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ORISSA HIGH COURT

1982

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		123	53 Out L T 444	199	...	271	...
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		129	...	204	(1982) 53 Out L T 590	275	...
		131	...	206	(1982) 53 Out L T 467	277	(1982) 54 Out L T 214
		137	54 Out L T 191			283	(1982) 54 Out L T 362
		139	...			285	...
		140	53 Out L T 584				
		144	...				

Other Journals - All India Reporter

ILR (1980) 1 Cut			(1981) 52 Cut L T			(1982) 53 Cut L T			(1982) 2 Civ L J			(1982) 1 Lab L J		
ILR	AIR		Out LT	AIR		Out LT	AIR		Civ LJ	AIR		Lab LJ	AIR	
368	1982 Ori	37	498	1982 Ori	19	577	1982 Ori	191	117	1982 Ori	88	381	1982 Ori	38
			523	" "	77	586	" "	186						
			535	" "	9	590	" "	204						
						600	" "	281						
						604	" "	239						
ILR (1980) 2 Cut			(1982) 53 Cut L T			(1982) 54 Cut L T			(1982) 18 Co-op L J			(1982) 1 Lab L N		
ILR	AIR		Out LT	AIR		Out LT	AIR		Co-op LJ	AIR		Lab LN	AIR	
371	1982 NOC	177	1	1982 Ori	83	18	1982 Ori	89	106	1982 Ori	38	528	1982 Ori	38
			23	" "	80	48	" "	218	114	" "	20			
			32	" "	8	57	" "	207	122	" "	1			
			47	" "	27	77	" "	120						
			57	" "	38	111	" "	236						
			78	" "	88	125	" "	212						
			87	" "	75	143	" "	48						
			214	" "	78	152	" "	117						
			223	" "	NOC 161	159	" "	183						
			244	" "	" 176	191	" "	187						
			323	" "	Ori 101	214	" "	277						
			335	" "	" 114	245	" "	234						
			348	" "	NOC 238	285	" "	221						
			358	" "	Ori 147	298	" "	272						
			375	" "	" 108	315	" "	178						
			383	" "	" 268	363	" "	283						
			395	" "	NOC 259									
			413	" "	Ori 126									
			428	" "	" 150									
			441	" "	" 341									
			444	" "	" 173									
			451	" "	" 167									
			454	" "	" 216									
			467	" "	" 208									
			478	" "	NOC 123									
			488	" "	Ori 194									
			497	" "	" 111									
			509	" "	" 166									
			529	" "	" 178									
			537	" "	" 264									
			541	" "	" 14									
			547	" "	" 145									
			552	" "	" 84									
			564	" "	" 140									
ILR (1981) 1 Cut			(1982) 53 Cut L T			(1982) 54 Cut L T			(1982) 1 DMC DMC			(1982) 2 Ren C R		
ILR	AIR		Out LT	AIR		Out LT	AIR		DMC	AIR		Ren CR	AIR	
52	1982 Ori	244	18	1982 Ori	89	48	" "	218	874	1982 Ori	37	284	1982 Ori	178
49	" NOC	88	43	" "	218	57	" "	207				288	" "	183
151	" Ori	113	57	" "	38	77	" "	120				362	" "	167
178	" "	242	78	" "	86	111	" "	236						
251	" "	168	87	" "	75	125	" "	212						
378	" "	12	214	" "	78	143	" "	48						
			223	" "	NOG 161	152	" "	117						
			244	" "	" 176	159	" "	183						
			323	" "	Ori 101	191	" "	187						
			335	" "	" 114	214	" "	277						
			348	" "	NOG 238	245	" "	234						
			358	" "	Ori 147	285	" "	221						
			375	" "	" 108	298	" "	272						
			383	" "	" 268	315	" "	178						
			395	" "	NOG 259	363	" "	283						
			413	" "	Ori 126									
			428	" "	" 150									
			441	" "	" 341									
			444	" "	" 173									
			451	" "	" 167									
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			529	" "	" 178									
			537	" "	" 264									
			541	" "	" 14									
			547	" "	" 145									
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			564	" "	" 140									
ILR (1981) 52 Cut L T			(1982) 53 Cut L T			(1982) 54 Cut L T			(1982) 18 Co-op L J			(1982) 1 Lab L N		
ILR	AIR		Out LT	AIR		Out LT	AIR		Co-op LJ	AIR		Lab LN	AIR	
1	1982 Ori	188	1	1982 Ori	83	18	1982 Ori	89	106	1982 Ori	38	528	1982 Ori	38
11	" NOC	102	23	" "	80	48	" "	218	114	" "	20			
386	" "	208	32	" "	8	57	" "	207	122	" "	1			
389	" "	87	47	" "	27	77	" "	120						
402	" Ori	20	57	" "	38	111	" "	236						
458	" "	18	78	" "	86	125	" "	212						
			87	" "	75	143	" "	48						
			214	" "	78	152	" "	117						
			223	" "	NOG 161	159	" "	183						
			244	" "	" 176	191	" "	187						
			323	" "	Ori 101	214	" "	277						
			335	" "	" 114	245	" "	234						
			348	" "	NOG 238	285	" "	221						
			358	" "	Ori 147	298	" "	272						
			375	" "	" 108	315	" "	178						
			383	" "	" 268	363	" "	283						
			395	" "	NOG 259									
			413	" "	Ori 126									
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ILR (1981) 52 Cut L T			(1982) 53 Cut L T			(1982) 54 Cut L T			(1982) 18 Co-op L J			(1982) 1 Lab L N		
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1	1982 Ori	188	1	1982 Ori	83	18	1982 Ori	89	106	1982 Ori	38	528	1982 Ori	38
11	" NOC	102	23	" "	80	48	" "	218	114	" "	20			
386	" "	208	32	" "	8	57	" "	207	122	" "	1			
389	" "	87	47	" "	27	77	" "	120						
402	" Ori	20	57	" "	38	111	" "	236						
458	" "	18	78	" "	86	125	" "	212						
			87	" "	75	143	" "	48						
			214	" "	78	152	" "	117						
			223	" "	NOG 161	159	" "	183						
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			348	" "	NOG 238	285	" "	221						
			358	" "	Ori 147	298	" "	272						
			375	" "	" 108	315	" "	178						
			383	" "	" 268	363	" "	283						
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THE
All India Reporter
1982

Orissa High Court

AIR 1982 ORISSA 1

R. N. MISRA, C. J.

Orissa State Co-operative Marketing Federation Ltd., Appellant v. Associated Marketing Co., Respondent.

Misc. Appeal No. 296 of 1980, D/- 5-9-1981.*

(A) Arbitration Act (10 of 1940), S. 2 (a) — Arbitration agreement — Who can enter into — Agreement stating that Orissa State Co-operative Marketing Federation was to be represented by its Secretary as required by bye-laws of Federation — Managing Director entering into agreement — Agreement ratified by Federation and was operative till annulled by it — Agreement held binding on Federation. (Para 5)

(B) Arbitration Act (10 of 1940), S. 20 — Existence of difference when application under Section 20 is filed — Agreement annulled by one party when difference mounted up — Application by other party under Section 20 — Held that it could not be said that there were no differences when application was filed. (Para 5)

(C) Orissa Co-operative Societies Act (2 of 1963), Section 127 — Arbitration Act (10 of 1940), Section 20 — "Suit" — Meaning of — Application under Section 20 is not "suit" though treated as suit under Orissa Rules of Procedure. — Notice under Section 127 is not, therefore, necessary. (Words and Phrases —

* From order of S. K. Satpathy, Sub J., Bhubaneswar, D/- 3-11-1980.

"Suit"). AIR 1962 Bom 162 (FB) and AIR 1964 SC 444, Rel. on. (Para 6)

(D) Orissa Co-operative Societies Act (2 of 1963), Ss. 68 (1) and 121 — "Agent" — Who is — Held that the terms of agreement showed relationship of principal and agent between the parties — Jurisdiction of Civil Court is ousted by Section 121 — Agreement between parties cannot confer jurisdiction.

In the instant case, F who was a manufacturer of certain goods entered into an agreement with A relating to the marketing of the goods. The agreement contained no provision for the passing of the title to the goods from F to A. Under the terms of the agreement A was to describe himself in all his dealings as the marketeer of F. A agreed to sell certain minimum quantity. A flat rate for commission was stipulated. A was allowed 90 days credit facility against a letter of credit or irrevocable bank guarantee. F was to allow to A certain distribution margin. On the tenth of each month both A and F were to furnish to each other details of previous month's sale. This sale was not by F to A but sale made by F at the instance of A to others. F undertook to replace by fresh supply of standard material at its own cost when the supply made was not up to quality. A was not to make any representation or given warranty other than those printed on the packings. A was to sell the goods in the same condition in which they were received.

Held that most of these terms indicated beyond dispute that the parties intended to establish the relationship of principal and agent and not seller and buyer. The terms of the agreement, unless there be any ambi-

guity, are the best material to be relied upon for ascertaining the intention of the parties, and if the terms are clear they must be accepted as offering the ultimate guideline for reaching the conclusion. AIR 1967 SC 181 and AIR 1978 Bom 273, Rel. on. (Para 10)

The fact that A was not a dealer under the Sales Tax Act was a material feature for discovering the true intention of parties. (1971) 28 STC 619 (Andh Pra) and AIR 1957 Andh Pra 474, Rel. on. (Para 10)

Once the relationship of principal and agent between F and A is established and A comes within the mischief of Section 68 (1) (a) the jurisdiction of the Civil Court is certainly ousted in view of the clear provision in Section 121. (Para 10)

When exclusive jurisdiction is created, it is not open to the parties by their consent to agree upon arbitration. The contract in question containing the arbitration clause is after all the outcome of an agreement between the parties. An agreement of this type cannot modify the statutory mandate, and parties could not, in derogation of the provision contained in Section 68, confer jurisdiction on the arbitrator. (Para 10)

The non obstante clause in Section 68 has an overriding application. AIR 1952 SC 369, Rel. on. (Para 10)

Cases Referred :	Chronological	Paras
AIR 1978 Bom 273		9
(1971) 28 STC 619 (Andh Pra)		10
AIR 1967 SC 181		9
AIR 1965 SC 1839		9
AIR 1964 SC 444		6
AIR 1962 Bom 162 (FB)		6
AIR 1957 Andh Pra 474		10
AIR 1952 SC 369		10
AIR 1929 PC 181		9
(1859) 141 ER 486 : 7 WR 464 : 28 LJ CP 242, The Wolverhampton New Water Works Company v. Hawkesford		11

L. Rath and B. S. Misra, for Appellant; G. Rath; R. K. Rath; N. C. Panigrahi; B. K. Nayak and R. C. Patnaik, for Respondent.

JUDGMENT:— This appeal under Section 39 (1) (iv) of the Arbitration Act, 1940, is against the order of the learned Subordinate Judge of Bhubaneswar directing the filing of the arbitration agreement.

2. The Orissa State Co-operative Marketing Federation Limited, appellant herein (hereafter referred to as the 'Federation'), is the manufacturer of the granulated mixed fertiliser by the trade name 'Shyamala'. The Federation entered into an agreement with the respondent as per Annexure I relating to the marketing of Shyamala. The terms re-

gulating the relationship between the parties are contained in the agreement. The Federation annulled the agreement with effect from 3rd of March, 1980. On 7th April, 1980, the respondent made an application purporting to be under S. 20 of the Arbitration Act before the learned subordinate Judge of Bhubaneswar and stated therein that the cause of action arose upon cancellation of the contract and subsequent service of notice demanding appointment of arbitrator. The Federation filed an objection and pleaded inter alia that—

(i) the application under Section 20 of the Arbitration Act was not maintainable;

(ii) there was no valid contract between the parties inasmuch as the contract had not been entered into by the Secretary on behalf of the Federation as required by the Bye-laws;

(iii) the Civil Court had no jurisdiction to entertain the dispute as it was covered by Section 68 of the Orissa Co-operative Societies Act, 1962, and the Court's jurisdiction is excluded under Section 121 of the Act; and

(iv) notice under Section 127 of the Co-operative Societies Act is a condition precedent to initiation of the action and the proceeding has to fail for want of notice.

The learned subordinate Judge registered the application as a suit as provided by the rules of procedure, framed four issues and by the impugned decision directed the defendant to file the agreement.

3. Clause 41 of the agreement ran thus:—

"Any dispute arising in the matter of execution, implementation or interpretation of this agreement or any provisions thereof shall be referred to arbitration under the provisions of the Arbitration Act of 1940."

The arbitration clause is in wide terms and but for the other aspects which arise, in terms of this clause a proceeding under the Arbitration Act would indisputably be entertainable.

4. Mr. Rath for the Federation in support of the appeal has pointedly raised five contentions; namely:—

(i) The respondent was an agent of the Federation. Therefore, Section 68 (F) (a) of the Orissa Co-operative Societies Act, 1962, is directly attracted and the Civil Court has no jurisdiction;

(ii) It follows from the submission raised above that the Civil Court has no jurisdiction to appoint an arbitrator and accordingly the application under Section 20 of the Arbitration Act was not maintainable;

(iii) In the agreement (Annexure 1), the Federation was to be represented by its Secretary as required by the Bye-laws. The

Managing Director having entered into the agreement on behalf of the Federation, the Federation is not bound by it;

(iv) Notice under Section 127 of the Orissa Co-operative Societies Act is a condition precedent to civil action and in the absence of such notice, the proceeding could not have been entertained by the learned subordinate Judge; and

(v) No dispute was in existence when the application under Section 20 of the Arbitration Act was made and, therefore, the Court had no jurisdiction to entertain the application.

5. The first two aspects which are connected raise the real point of dispute. I am inclined to think that the last three points may be dealt with first and the main question may be left for consideration at a later stage.

A copy of the Bye-laws of the Federation has been placed in course of argument. Clause 24 of the Bye-laws makes provision for officers of the Federation. Sub-clause (c) deals with the powers of the Managing Director while sub-clause (d) deals with powers of the Secretary. The general management of the Federation, subject to the control of the Managing Committee, the Executive Committee and the Chairman, vests in the Managing Director. He is also to conduct, negotiate and make arrangements for the purchase and sale of goods. The Managing Director is also the officer to sue and be sued on behalf of the Federation.

Under sub-clause (m) the Secretary is to enter into agreement or contract for purchase or sale of goods, for lease of land or building subject to previous approval of the Managing Director.

The Managing Director is the controlling authority of the Secretary. Full powers seem to have been vested subject to the general control of the Managing Committee, the Executive Committee and the Chairman in the Managing Director and he is the named officer of the Federation to sue and be sued on its behalf. The agreement in question was ratified by the Federation and was operative for some time. With the clear provisions in the Bye-laws and the fact that the contract had been put to operation, I do not think, there is any force in the submission of the appellant-Federation that as its Secretary had not entered into the contract, the same was not binding on the Federation. The conduct of the Federation in not repudiating the contract on that ground but in annulling it for alleged non-performance of the conditions thereof also clearly indicates that the conten-

tion advanced before me is without substance. Mr. Rath's contention that the contract was not a binding one fails.

One of the contentions of Mr. Rath for the Federation is that no dispute existed at the time when application under Section 20 of the Arbitration Act was filed and, therefore, the proceeding was not maintainable Section 20 as far as relevant provides:—

"(1) Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court."

Undoubtedly, differences must exist so as to give rise to an application under Section 20 of the Arbitration Act. The agreement was cancelled on 3rd of March, 1980. Thereafter, a notice purporting to be under Section 8 of the Act was given by the respondent and on 7th of April, 1980, the petition under Section 20 of the Act was filed. In this setting, it is difficult to appreciate the submission of the Federation that by the time the subordinate Judge was moved, there were no differences in existence. It is the common case of parties that the contract was cancelled when differences mounted up. There is, therefore, no force in the submission advanced on behalf of the Federation that differences were not in existence when the subordinate Judge was moved for a direction for filing of the arbitration agreement.

6. Want of notice as a condition precedent to the initiation of the proceeding was the next contention. Section 127 (1) of the Co-operative Societies Act provides:—

"No suit shall be instituted against a society or any of its officers in respect of any act touching the constitution, management or the business of the society until the expiration of two months after notice in writing has been delivered to the Registrar, or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims, and the plaintiff shall contain a statement that such notice has been so delivered or left."

An application under Section 20 of the Arbitration Act is really not a 'suit' though under the rules of procedure prescribed by this Court such applications are treated as suits. The word 'suit' has not been defined in the Code of Civil Procedure, but the word is a term of art and ordinarily means a proceed-

ing instituted in a Civil Court by the presentation of a plaint. The observations of the Full Bench of the Bombay High Court in the case of Farkhundali Nannhay v. V. B. Poldar, AIR 1962 Bom 162 (FB), are instructive. The Supreme Court in the case of Bhagwat Singh Bahadur of Udaipur v. State of Rajasthan, AIR 1964 SC 444, also pointed out that the suit is a proceeding which commences with a petition in the nature of a plaint. In the light of what has been stated in these cases, an application under Section 20 of the Arbitration Act for a direction from the Court for filing of the agreement does not amount to a suit though required to be registered as such, and I am prepared to accept the respondent's stand that such an application is not a 'suit' within the meaning of the word in Section 127 of the Co-operative Societies Act. Therefore, the Federation is not entitled to contend that the proceeding before the subordinate Judge was not sustainable for want of notice under Section 127 of the Co-operative Societies Act.

7. I shall now proceed to examine the main contention, namely whether the jurisdiction of the Civil Court is ousted, as the matter in dispute is covered by Section 68 of the Co-operative Societies Act. Section 68 (1) of that Act provides:—

"Notwithstanding anything contained in any law for the time being in force, any dispute touching the constitution, management or the business of a society, other than a dispute regarding disciplinary action taken by a society or its committee against a paid servant of the society, shall be referred to the Registrar if the parties thereto are among the following, namely:—

(a) the society, its committee, past committee, any past or present officer, any past or present agent, any past or present servant or the nominee, heir or legal representative of any deceased officer, deceased agent or deceased servant of the society or the liquidator of the society"

(Underlining is mine)

Section 121 of the Co-operative Societies Act provides:—

"(1) Save as provided in this Act no civil or Revenue Court shall have any jurisdiction in respect of—

(a) xx xx xx

(b) xx xx xx

(c) any dispute required under Section 68 to be referred to the Registrar; and

(d) xx xx xx."

If, therefore, the Federation's stand that the respondent is an agent is *prima facie* accept-

ed, then the matter would be really a dispute within the ambit of Section 68 of the Co-operative Societies Act and in view of the provisions therein, would be within the exclusive jurisdiction of the Registrar.

8. The terms of the agreement must first be looked into for finding out the nature of relationship established thereunder between the parties. In the preamble of the agreement it has been stated:—

"Whereas the first party (Federation) is at present the manufacturer of granulated mixed fertiliser 'Shyamala' at its Granular Fertiliser Plant at Bargarh in the district of Sambalpur and is the exclusive owner of the said fertiliser and is authorised to appoint a marketeer for the said fertiliser both inside and outside the State of Orissa and is desirous of appointing the said second party as its marketeer;"

Clause 32 of the agreement provides:—

"That the second party (respondent) shall in all his dealings and documents and on the name plate or letterhead describe himself as the marketeer of the first party for sale of the said granulated mixed fertiliser....."

Under the agreement, there is absolutely no provision for passing of the title from the Federation to the respondent.

Clause 6 of the agreement provides:—

"The first party agrees that after disposing of 2,000 tons as per separate agreement entered into, the subsequent production of the said granular fertiliser to be manufactured by the first party, the second party agrees to arrange for sale of the following minimum quantities"

Under Clause 7, a commission at a flat rate of Rs. 80/- per metric ton has been stipulated. That clause also refers to agency of sale. The Federation under Clause 8 undertook to deliver at its cost the stock of fertiliser F. O. R. destination nearest the rail head according to indent and despatch instructions issued from time to time by the respondent. In respect of sales to be effected outside the State, supplies were to be made on consignment basis to the marketeer and not to any other party under certain contingencies.

Clause 9 stipulated that in respect of all the sales effected, the respondent was to be allowed a period of 90 days credit facility against a letter of credit or irrevocable bank guarantee.

Under Clause 11, the Federation was to allow to the respondent a distribution margin at the rate of Rs. 100/- per metric ton. The respondent undertook to sell the fertiliser at a fixed price.

Clause 18 stipulated that by the 10th day of every calendar month, each party was to furnish to the other a statement in writing showing despatch chalan numbers, bill numbers with dates and quantity of the fertiliser sold during the previous calendar months. This sale was not by the Federation to the respondent but sale made by the Federation at the instance of the respondent to others.

Under Clause 23, the respondent undertook promotional activities in the modes indicated therein and Clause 24 entitled the Federation to supervise the activities of the respondent so as to ensure proper performance of the obligations of the respondent. Under Clause 25, the Federation undertook to replace by fresh supply of standard material at its cost when the supply made was not up to quality.

Clause 28 of the agreement made provision :—

"That the second party (respondent) shall not, while selling the goods of the first party, make any representation or give any warranty other than those printed either on the packing of the said granulated mixed fertiliser or on the current price list of the first party"

Under Clause 29, the respondent agreed to "sell the said granulated mixed fertiliser in the same condition as they receive from the first party and shall not alter, remove, or in any way tamper with any trade mark or numbers of symbols marked on the packing containing the said fertiliser."

9. Most of these terms indicate beyond dispute that the parties intended to establish the relationship of principal and agent and not seller and buyer. The terms of the agreement, unless there be any ambiguity, are the best material to be relied upon for ascertaining the intention of the parties, and if the terms are clear they must be accepted as offering the ultimate guideline for reaching the conclusion.

In the case of *Gordon Woodroffe and Co. (Madras) Ltd. v. Shaik M. A. Majid and Co.*, AIR 1967 SC 181, the question that arose was whether the defendants were acting as del credere agent of the plaintiff or they were outright purchasers of the goods. The Court pointed out (at p. 182) :—

"... In the approach to this question it is necessary to notice the distinction between a contract of sale and a contract of agency. The essence of sale is the transfer of the title to the goods for price paid or to be paid. The transferee in such case becomes liable to the transferor of the goods as a debtor for the price to be paid and not as agent for the proceeds of the sale. On the

other hand, the essence of agency to sell is the delivery of the goods to a person who is to sell them, not as his own property but as the property of the principal who continues to be the owner of the goods and who is therefore liable to account for the proceeds. The true legal relationship between the parties in the present case has, therefore, to be inferred from the nature of the contract, its terms and conditions and the nature of respective obligations undertaken by the parties."

In paragraph 5 of the judgment the Court further pointed out :—

"In the first place, it is important to notice that the contract in the opening portion specifically makes a mention of the fact that the defendants were buying the goods for resale, and in the paragraph containing the terms of the contract it is reiterated that the goods were intended for resale in the United Kingdom. On the face of it, therefore, the contract is clearly not one of agency for sale but it reads as an agreement of sale. If the defendants were intended to be constituted as the agents for sale, the terms of the contract would have been entirely different. Another important feature in this case is that there is a definite price fixed in the contract for the plaintiff's goods. According to the plaintiff, the rates fixed in the contract were the ones at which the goods were sold to London purchaser and not different rate and the defendants were agents who were obtaining for him only the price at which the goods were sold at London. xx xx xx

It was contended for the plaintiff that according to the contracts the prices fixed are c.i.f. less $2\frac{1}{2}$ per cent and discount of $2\frac{1}{2}$ per cent was the commission for the defendants as agents. There is no use of the word "commission" in the contracts and we see no reason to hold that $2\frac{1}{2}$ per cent should be taken as commission and not as a margin of profit. The important point is that if the contract was one of agency there was no need to mention the price at all as between the plaintiff and the defendants."

The guideline available from this decision of the Supreme Court when applied to the facts of the present case does indicate beyond doubt that the terms of the agreement in question which have been extracted above clearly point in favour of an agency being created under it. I may now refer to a Bench decision of the Bombay High Court in the case of *Lakhani Sahakari Shetki Kharedi Vikri Sanstha Ltd. v. Lakhani v. Moreshwar Bapu*, AIR 1978 Bom 273. The facts of that case were almost similar to

those here. The Court was called upon to find out with reference to the agreement whether it created an agency or created the relationship of seller and buyer. Section 91 of the Maharashtra Co-operative Societies Act corresponds to Section 68 of the Orissa Act. The court took note of the fact that the term "agent" had not been defined. After referring to the dictum in the case of Shaikh Gulfan v. Sanat Kumar, AIR 1965 SC 1839, the learned Judges of the Bombay High Court pointed out (at p. 277 of AIR 1978 Bom) :—

"As already observed, the special provision incorporated in Section 91 of the Act is made by the Legislature to shorten litigation, lessening its cost and to provide a summary procedure for the determination of the dispute relating to the internal management of the society as well as the dispute touching its business. Any of the parties to the dispute can refer the dispute under this provision, if it is covered by S. 91 (1) of the Act. The parties contemplated by sub-section (a) of Section 91 (1) of the Act include society, committee and past committee, past or present officer, past or present agent, past or present servant or nominee as well as their legal representatives. Practically, an effort is made by the Legislature to bring in the import of this section all the parties which stand in fiduciary relationship qua the Co-operative Society. An officer agent, servant or nominee of the society have obviously a fiduciary relationship with the society. To cover all possible disputes between such parties, the Legislature has used different words to make it all comprehensive. These words are used in a generic sense and, therefore, the meaning of the word 'agent' will have to be understood in the context of the object of the provision as well as its scope. As observed by the Privy Council in Laurence Arthur Adamson v. Melbourne and Metropolitan Board of Works (AIR 1929 PC 181) it is always unsatisfactory and generally unsafe to seek the meaning of words used in an Act in the definition clauses of another statute dealing with matters more or less cognate even when enacted by the same legislature and much more so when resort is had to the enactments of other legislatures. The word 'agent' is used in the present section in a comprehensive sense. Agency in itself is a comprehensive word which is used to describe the relationship that arises where one man is appointed to act as the representative of another. In our opinion, the word "agent" is used in Section 91 (1) (a) in this comprehensive sense."

The ratio of the Bombay decision directly supports.

10. The fact that the respondent is not a dealer under the Sales Tax Act is a material feature for discovering the true intention of parties.

In the case of Tata Oil Mills Ltd., Hyderabad v. State of Andhra Pradesh, (1971) 28 STC 619, the Andhra Pradesh High Court had examined on the facts indicated there as to whether construing the terms of an agreement the assessee was a mere commission agent and the transactions did not constitute sale by the manufacturer. The terms of the agreement are available at page 626 of the report. The Court held that the sale in that case was effected in favour of the customers by the manufacturers themselves through the agency of the assessee and, therefore, it was not a case of the assessee becoming owner of the property. The ratio of this decision supports the stand taken by the Federation.

In Satyanarayana v. State of Madras (now Andhra), AIR 1957 Andh Pra 474, the Court had to examine as to if the manufacturer of goods was selling the same through a commission agent or the manufacturer's goods had been purchased and were sold by the dealer in his turn. While analysing the facts available on record, the learned single Judge pointed out (at p. 476) :—

"It is difficult to construe the sale of goods by V. S. Narayana and Sons as that effected by the plaintiff, unless the handing over of the goods to the agents for sale constitutes a sale within the meaning of Section 2 (h). It looks to me that such a transaction is not susceptible of the meaning of a sale. It is no doubt true that the commission agent makes the sale on behalf of the principal, but he is authorised to transfer the property in goods so as to vest title thereto in the purchaser. This does not create the relationship of a vendor and vendee between the principal and the agent. Up to the point of sale the commission agent acts as the agent of the principal and subsequently the relationship between them is one of debtor and creditor."

In the instant case, the position also seems to be the same. When bills are raised by the Federation against the respondent, the relationship is of creditor and debtor and not a case where against the buyer the demand is for the sale price. I am inclined to agree that the stand taken by the Federation that the respondent was only an agent and not a buyer is correct. Once this conclusion is reached and the respondent comes within the mischief of Section 68 (1) (a) of the Co-operative Societies Act, the jurisdiction of the

Civil Court is certainly ousted in view of the clear provision in Section 121 of that Act. It is unnecessary to refer to certain authorities cited at the bar on this aspect of the matter.

Once exclusive jurisdiction is created, it is not open to the parties by their consent to agree upon arbitration. The contract in question containing the arbitration clause is after all the outcome of an agreement between the parties. An agreement of this type cannot modify the statutory mandate, and parties could not, in derogation of the provision contained in Section 68, confer jurisdiction on the arbitrator.

The opening words of Section 68 of the Co-operative Societies Act run thus:—

“Notwithstanding anything contained in any law for the time being in force

This non obstante clause makes it clear that the provision of Section 68 has overriding application. The Supreme Court in the case of Aswini Kumar Ghose v. Arabinda Bose, AIR 1952 SC 369, said (at p. 376):

“It should first be ascertained what the enacting part of the section provides on a fair construction of the words used according to their natural and ordinary meaning, and the non obstante clause is to be understood as operating to set aside as no longer valid anything contained in relevant existing laws which is inconsistent with the new enactment.”

The learned Chief Justice, speaking for a unanimous Court, further said (at p. 377):—

“The enacting part of a statute must, where it is clear, be taken to control the non obstante clause where both cannot be read harmoniously.”

The Orissa Co-operative Societies Act 2 of 1963, has received Presidential assent and, therefore, can supersede the Arbitration Act of 1940. That being the position, even if there could be provision for arbitration under the Arbitration Act of 1940, if the dispute came within the ambit of Section 68 of the Co-operative Societies Act, the Arbitration Act had no application and Section 68 would peremptorily apply. The position, therefore, is, once it is held that the respondent was an agent, the Registrar and not the Arbitrator, or for the matter of that no other authority including the Civil Court, would have jurisdiction to deal with the dispute.

11. In the premises indicated, it is unnecessary to examine the submission of counsel for the Federation that the tests indicated by Willes, J. in the case of *The Wolverhampton New Water Works Company v. Hawkesford*, (1859) 141 ER 486, applied to oust the jurisdiction of the Civil Court.

12. My conclusion, therefore, is that the respondent was an agent of the Federation under the agreement and Section 68 of the Co-operative Societies Act makes it clear that such a dispute as raised here is covered by Section 68 and the application under Section 20 of the Arbitration Act was, therefore, not maintainable.

13. The appeal is allowed, the impugned order of the subordinate Judge as also the arbitration proceeding are set aside and the application under Section 20 of the Arbitration Act is dismissed.

Since the point raised was contentious, parties are directed to bear their own costs.

Appeal allowed.

AIR 1982 ORISSA 7

R. N. MISRA, C. J. AND

R. C. PATNAIK, J.

Lord Sakhi-Gopinath Mohapatra and another, Petitioners v. State of Orissa and another, Opposite Parties.

O. J. C. No. 1260 of 1980, D/- 24-9-1981.

Orissa Hindu Religious Endowments Act (2 of 1952), S. 19 (5) (as amended in 1980) — Alienation of lands, belonging to deity — Sanction by Commissioner — No provision as to revision of order of Commissioner by State Government — However, State Government staying operation of order of Commissioner in suo motu revision — Pendency of revision — Subsequent amendment in Act empowering State Government to revise such orders — Orders passed by State Government in suo motu revision cannot be interfered with, even though initial action was without jurisdiction. (Constitution of India, Article 226). (Para 3)

S. Misra No. 2, B. Das and N. K. Acharya, for Petitioners; Addl. Govt. Advocate, for Opposite Parties.

R. N. MISRA, C. J.:— A Hindu religious endowment, represented by its trustee, seeks to challenge in this writ application under Article 226 of the Constitution the several orders passed by the State Government staying the operation of the order of the Commissioner of Endowments under Section 19 of the Orissa Hindu Religious Endowments Act II of 1952 (hereinafter referred to as the 'Act') in a purported suo motu revision.

2. The Commissioner of Endowments, in exercise of his powers vested under Sec. 19 of the Act, by order dated 7-1-1980 accorded sanction for alienation of certain lands belonging to the deity. The order indicated

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the rate of premium as also the other conditions under which the alienation had to be made. The State Government, opposite party No. 1, entertained a suo motu revision and directed that the alienation shall not operate and steps shall not be taken to execute any document in furtherance of the order of the Commissioner of Endowments until the State Government disposed of the revision.

Section 19 of the Act, prior to its amendment by Orissa Hindu Religious Endowments Amendment Act of 1980, clearly provided that the order of the Commissioner made under that section was final subject to an appeal under sub-section (4). In view of the provision in sub-section (5), short of an appeal and an appellate order which could be made by exercising power under sub-sec. (4), the State Government had no authority to interfere with the order of the Commissioner. There is no dispute that the State Government have taken power to themselves of looking into the validity and propriety of alienations sanctioned under Section 19 of the Act by amendment Act of 1980. Sub-section (5) of the amending Act provides:—

"If in any case where an appeal has not been made to the State Government it appears to the State Government that the consideration fixed in respect of the transfer by exchange, sale, mortgage or lease for a term exceeding five years of any immovable property is inadequate they may, within ninety days from the date of the receipt of the order communicated to them under sub-sec. (3) or the date of the publication of the order whichever date is later, call for the record of the case from the Commissioner and after giving an opportunity of hearing to the parties concerned, revise the order of the Commissioner.

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The impugned interference with the order of the Commissioner in the absence of a provision prior to incorporation of sub-sec. (5) with the aforesaid text into the Statute by the amending Act of 1980 ran counter to sub-section (5) of the unamended section. If the amendment had not been brought about, certainly the action of the State Government was bound to be struck down as contrary to sub-section (5) of Section 19.

3. It is one of the well settled principles of law that if during the pendency of a dispute power is vested in the authority whose orders are under challenge and the authority is capable of maintaining the action in exercise of such power following its vesting, the order impugned may not be struck down as one without jurisdiction. The learned Additional Government Advocate is right in his

submission that even if the initial action was without jurisdiction, now that a revision has been entertained, being suo motu Revision Case No. 6 of 1981, and power to entertain such a revision is available under the amended provision, we should not interfere in the entertaining of the revision. The proviso to sub-section (5) of the amended provision authorises the State Government to exercise jurisdiction even after expiry of 90 days from the date of the impugned order in appropriate cases.

In the circumstances, while declining to interfere with the order passed by the State Government with reference to the sanction of alienation, we direct that the revision which is pending before the State Government should be disposed of by end of November, 1981 and the order to be passed therein should be communicated to the petitioner within 10 days therefrom.

4. Undoubtedly, it would be for the State Government to fix up the appropriate rate at which the alienation has to be sanctioned. Since the Commissioner in exercise of his statutory powers has come to find as to what the appropriate rate would be, it is for the State Government, in case it is of the opinion that the rate determined is low, to fix up the appropriate rate on the basis of reasonable material available to it. Keeping the guideline in view, the revisional authority must dispose of the revision entertained by it within the time indicated by us.

5. No costs.

PATNAIK, J.:— I agree.

Order accordingly.

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R. N. MISRA, C. J.

Banchanidhi Panda, Petitioner v. Baishnab Charan Rout, Opposite Party.

Civil Revn. No. 645 of 1979. D/- 26-8-1981.*

(A) Civil P. C. (5 of 1908), S. 115 — Revisional jurisdiction — Concurrent finding of fact — High Court in revision cannot appreciate the evidence with a view to arrive at a different conclusion.

Where in a suit for recovery of money on the basis of promissory note, both the Courts below had come to the conclusion that a blank paper had been converted into the alleged promissory note, the High Court in

* From judgment and decree of B. Misra, Sub. J., Bhadrak, dated 3-8-1979 and 16-8-1979.

revision could not appreciate the evidence with a view to arriving at a different conclusion. (Para 3)

(B) Orissa Money-Lenders Act (3 of 1939). S. 18-B — Certificate under — Plaintiff, money-lender not producing certificate till the disposal of suit — No steps taken to produce the same in appeal, or even in revision — Request by plaintiff in revision to adjourn the case to enable him to obtain certificate — Cannot be granted. (Civil P. C. (1908), S. 115). (Para 4)

Mahadev Misra, for Petitioner; R. K. Mohapatra, A. N. Misra and S. C. Basa, for Opposite Party.

ORDER:— The plaintiff is in revision challenging an affirming appellate judgment against him in a suit for recovery of money on the basis of an alleged promissory note dated 29-9-1969.

2. The defence was that the document which has now been produced and marked as Ext. 1 had been given as a blank paper with the defendant's signature on the revenue stamp evidencing a loan of Rs. 200/- from a different person and at the instance of the lender of Rs. 200/-, the left hand thumb impression and signature had also been affixed on the back side of that blank paper. The plaintiff obtained the document from the lender, converted it into a regular promissory note and though no loan had actually been taken, the suit was filed on the basis of the converted document.

3. Both the Courts have found as a fact that a blank paper has been converted into the alleged promissory note. They have been impressed by the feature that while witnesses state that the entire document and the signature had been in one ink, to the naked eye it appears that the writing is in one ink while the signature of the defendant-borrower is in another ink. They have also taken the other oral evidence into consideration to find that the plaintiff has failed to establish that the defendant borrowed the amount claimed on the basis of the promissory note after its due execution. The entire oral evidence consisted of the plaintiff being examined as P. W. 1 and his usual scribe as P. W. 2. The plaintiff seems to be a money-lender in the regular course of business and if his business was extensive, the scribe who normally writes out his documents would be vitally interested in him. Keeping that aspect in view, the scribe's evidence was taken as not to come from an independent source. I do not think I am entitled in Civil Revision to appreciate the evidence with a view to reaching a different conclusion and accept the

submission advanced on behalf of the petitioner.

4. There is another feature which has led the Courts below to decide against the plaintiff. By the time the suit was filed, the Orissa Money-lenders Act with its amendment had come into force. Yet, the plaintiff did not comply with the requirements of Section 18-B of the said Act. By the time the suit was disposed of, the certificate had not come. The order sheet of the competent authority has been marked as Ext. 2. Counsel for the petitioner now relies upon it to show that the plaintiff had done his part in applying to the competent authority and had produced his accounts. It is contended that if the competent authority did not grant the appropriate certificate by disposing of the proceeding, he cannot be blamed. There is no force in this submission. Law requires that the appropriate certificate should be granted before a decree is obtained. It was open to the plaintiff to ask for quick disposal of the matter by the competent authority so that the certificate could be given to him. I also find that the appeal was disposed of about more than two years after the date which Ext. 2 bears. No steps were taken for two years to get the certificate issued so as to produce it at the appellate stage. More than two years have passed since disposal of the appeal by today. No steps have also been taken to produce the certificate and ask it to be received in evidence. In these circumstances, to entertain a request of the petitioner's counsel that the matter may be adjourned to enable the petitioner to obtain the certificate would not be at all acceptable.

5. The revision is without merit and is dismissed. No costs.

Revision dismissed.

AIR 1982 ORISSA 9

R. N. MISRA, C. J.

Mst. Sarabai Agarwalla and others, Petitioners v. Haradhan Mohapatra and another, Opposite Parties.

Civil Revn. No. 643 of 1979, D/- 31-8-1981.*

Civil P. C. (5 of 1908), S. 47 and S. 2 (2) (as amended by Act 104 of 1976) — Order passed under Section 47 on 2-11-1978 — Does not amount to 'decree' in view of amended Section 2 (2) — Appeal against — Not maintainable. AIR 1979 Pat 308 and

* From decision of V. V. R. Sarma, Addl. Dist. J., Sambalpur, D/- 11-10-1979.

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AIR 1980 Madh Pra 16, Dissented from. (Code of Civil Procedure (Amendment) Act (104 of 1976), S. 97 (2) (a)).

Where the executing Court passed order under Section 47 on 2-11-1978 against the judgment-debtor, the order did not amount to decree and the appeal filed against that order was not maintainable in law, as the order was passed long after amendment of the Code of 1908 and though it was within the ambit of Section 47 by the amending Act the definition of 'decree' in Section 2 (2) underwent an amendment and reference to Section 47 therein was omitted. (Para 4)

Prior to the amendment, an order under Section 47 of the Civil P. C. was open to appeal as a decree in view of the definition of 'decree'. After amendment, orders under Section 47 were no more taken as decrees. Legislative intention with reference to Section 97 (2) (a) of the amending Act is clear that notwithstanding such amendment, appeals pending on the date the amending Act came into force, were to continue without being affected by the amending Act. It necessarily follows that the Parliament intended that all matters which are not covered by Section 97 (2) (a) coming under S. 47 of the Civil P. C. would be governed by the amending Act. Therefore, the order, of the executing Court passed long after the amending Act came into force had to be dealt with in terms of the amending Act. It follows that on the date i.e. 2-11-1978 when the executing Court passed its order, an appeal did not lie against the impugned decision. AIR 1980 All 42 (FB), Foll; AIR 1979 Pat 308 and AIR 1980 Madh Pra 16, Dissented from. (Paras 3; 4)

Cases Referred :	Chronological	Paras
AIR 1981 Ker 18		4
AIR 1980 All 42 : 1979 All LJ 1335 (FB)		4
AIR 1980 Andh Pra 209		4
AIR 1980 Gau 3		4
AIR 1980 Madh Pra 16		4
AIR 1979 Pat 308		4
AIR 1978 Raj 127		4

S. S. Basu, for Petitioners; P. K. Misra and L. Mahapatra, for Opposite Parties.

ORDER :— This is an application of some of the heirs of the decree-holder auction-purchaser challenging the reversing appellate decision of the learned Additional District Judge of Sambalpur holding that their application for being put into possession was barred by limitation.

2. One Mathura Prasad Agarwalla, husband of the petitioner No. 1 and father of the remaining petitioners as also of opposite party No. 2 filed a money suit against op-

posite party No. 1. The said suit was decreed on compromise. Execution Case No. 98 of 1968 was levied by the decree-holder for realisation of the decretal dues as opposite party No. 1 failed to satisfy the decree in terms of the compromise. In the execution case attachment and sale of certain lands were prayed for and ultimately the attached lands were sold for satisfaction of the decree and the decree-holder purchased the lands at the auction. Sale was confirmed on 24-7-1971 and the sale certificate was signed and issued to the auction purchaser in due course. The decree-holder applied for delivery of possession and the executing Court directed possession to be delivered and the writ for delivery of possession was issued and the execution case was posted to 26-11-1971 for return. The writ was received back on 17-12-1971 after due execution on 21-11-1971, but Mathura Prasad was already dead on 5-11-1971. Judgment-debtor objected to such delivery of possession taken through the power-of-attorney holder as the principal was dead and the authority to act on behalf of the decree-holder had lapsed. The executing Court accepted the objection by order dated 21-2-1972 and ordered that the legal representatives of the decree-holder-auction-purchaser may come up with the prayer for fresh delivery of possession. Thereupon the heirs applied on 23-12-1975 for substitution and substitution being allowed they filed an application for issue of writ of delivery of possession. The move of the legal heirs was objected to by the judgment-debtor on the ground that the application had been barred by limitation. The executing Court upon hearing parties by order dated 2-11-1978 overruled the objection and directed issue of fresh writ of delivery of possession in favour of the legal heirs.

Against the said decision, an appeal was carried to the Additional District Judge at Sambalpur in Miscellaneous Appeal No. 43 of 1978 and the learned appellate Judge reversed the decision of the executing Court and held that the application was barred by time and accordingly no writ for delivery of possession could be issued. This reversing order of the appellate Court is assailed in the present revision application.

3. The main submission of counsel for the petitioners is that the order of the executing Court was not amenable to an appeal and the Additional District Judge had no jurisdiction to reverse the order of the executing Court. There is no dispute before me that the order made by the executing Court was one within the ambit of S. 47 of the Civil P. C. The order of the executing

Court was passed on 2-II-1978, long after the Civil P. C. of 1908 underwent amendment by Central Act 104 of 1976. By the amending Act, the definition of "decree" in Section 2 (2) underwent an amendment and reference to Section 47 therein was omitted. Section 97 of the amending Act making provision for repeal and saving provided, as far as relevant:—

"(2) Notwithstanding that the provisions of this Act have come into force or the repeal under sub-section (1) has taken effect, and without prejudice to the generality of the provisions of Section 6 of the General Clauses Act, 1897,—

(a) the amendment made to Clause (2) of Section 2 of the principal Act by Section 3 of this Act shall not affect any appeal against the determination of any such question as is referred to in Section 47 and every such appeal shall be dealt with as if the said Section 3 had not come into force."

Prior to the amendment, an order under Section 47 of the Civil P. C. was open to appeal as a decree in view of the definition of 'decree'. After amendment, orders under Section 47 were no more taken as decrees. Legislative intention with reference to Section 97 (2) (a) of the amending Act is clear that notwithstanding such amendment appeals pending on the date of the amending Act came into force, were to continue without being affected by the amending Act. It necessarily follows that the Parliament intended that all matters which are not covered by Section 97 (2) (a) coming under Section 47 of the Civil P. C. would be governed by the amending Act. Therefore, the order of the executing Court passed long after the amending Act came into force had to be dealt with in terms of the amending Act. It follows that on the date when the executing Court passed its order, an appeal did not lie against the impugned decision.

4. A Full Bench of the Allahabad High Court in the case of Pratap Narain Agarwal v. Ram Narain Agarwal, AIR 1980 All 42 (FB), considered this aspect of the matter. The learned Judges observed (at p. 47):—

"From the manner in which the amendment was made in Section 2 (2) of the Civil P. C., the irresistible conclusion is that the intention of the legislature was to affect the vested right retrospectively. This intention has been manifested by express words. Even otherwise, the necessary implication of the amendment appears to be that the same was made to be a retrospective operation. It could not be and was not argued that despite the amendment made in Sec-

tion 2 (2) an order passed on an objection filed under Section 47 after the amendment would amount to a decree. The question only was with respect to the pending applications on the date of enforcement of the amendment. The fact that after the amendment a decision on an objection under Section 47 would not amount to a decree, establishes that the decision given on objections can no longer be treated as decrees.

We have already noted the report of the Joint Committee which gave the reasons for bringing about the amendment in the definition of the term decree. The report of the Joint Committee is an aid to the construction and, as such, can be looked into for ascertaining or determining the intention of the legislature. The report leaves no room for doubt that the intentment behind the amendment was to deprive a party of his right to file an appeal which accrued against an order passed under Section 47. This amendment negatives any appeal which lay previously. For our view, we find support from a decision reported in Mohan Das v. Smt. Kamla Devi, AIR 1978 Raj 127."

The Full Bench also took note of S. 97 (2) (a) of the Amending Act and referring to it pointed out (at p. 48):—

"... The expression shall not affect any appeal, in our opinion, does not take within its sweep even the cases where execution applications were pending before the executing Court. This expression is capable of an interpretation that where the right to appeal had accrued because of passing of a decree on an objection under Section 47, the same would not be affected by the amendment, inasmuch as in such a case decree had already come into existence. As the decree had already come into existence, it should be left untouched by the amendment made in Section 2 (2). The amendment in sub-sec. (2) of Section 2 was that an order would not amount to a decree. As it did not amount to a decree, such an order was not appealable. But, where a decree had already come into existence, the amendment of Sec. 2 (2) did not apply. Consequently, the legislature intended to save the right to file an appeal in such a case, and for that purpose of saving Clause (a) in Section 97 (2) was enacted." To the same effect are a host of decisions of different High Courts. A learned single Judge in the case of Tapan Chandra Deb Barma v. Dulal Chandra Deb Barma, AIR 1980 Gau 3, took the view that an order determining question under Section 47 passed on or after 1-2-1977 when the amending Act came into force, no more amounted to a de-

cree and no appeal lay. It also held that Section 97 (2) (a) saved only pending appeals. To the same effect is a Bench decision of the Andhra Pradesh High Court in the case of Marriddi Janikamma v. Hanumantha Vajjula Paradesi Sarma, AIR 1980 Andh Pra 209. The Division Bench clearly held that the amended Code had retrospective effect and had applied to all pending proceedings except specifically provided otherwise, namely as in Section 97 (2) (a) of the amending Act. A learned single Judge of the Kerala High Court in the case of Kuriakose v. P. K. Narayanan Nair, AIR 1981 Ker 18, has followed the Full Bench decision of the Allahabad High Court (AIR 1980 All 42) (FB) as also the decisions of the Gauhati High Court and Rajasthan High Court, referred to above.

Contrary decisions are found in a case of the Madhya Pradesh High Court and in a case of the Patna High Court. In a Division Bench decision of the Madhya Pradesh High Court reported in AIR 1980 Madh Pra 16, (Chuluram v. Bhagatram), the view taken is that the amendment brought about in Section 2 (2) of the Civil P. C. by which determination of any question under Section 47 does not now amount to a decree may not be construed to take away a vested right of appeal in pending executions. This inference is further strengthened, according to the Madhya Pradesh High Court, by S. 97 (2) of the 1976 amendment Act which preserves the applicability of Section 6 of the General Clauses Act. Section 97 (2) (a) of the amending Act provides that the amendment made to Section 2 (2) of the Code shall not affect any appeal against the determination of such question as is referred to in Section 47 and every such appeal shall be dealt with as if Section 3 of the amending Act had not come into force. The Court further held that the amendment to Section 2 (2) is not intended to be retrospective so as to take away vested right of appeal. The main object behind the amendment was to reduce the number of appeals. I am not inclined to agree with the view taken by the M. P. High Court. Sec. 97 (2) (a) of the amending Act, as I have already pointed out, gives a clear indication of the legislative intention and what has been saved from the operation of the amendment is as specified in that provision. A Division Bench of the Patna High Court in the case of Parshava Properties Ltd. v. A. K. Bose, AIR 1979 Pat 308, put the matter somewhat differently thus (at p. 310):—

"The definition before the amendment was thus in three parts. The first part sets out the essential characteristics which, if satisfied, would amount to a decree. The second

part introduced a legal fiction. It said, inter alia, that determination of any question within Section 47 of the Code shall be deemed to be a decree. The third part states what shall not be a decree. By the amendment, the second part has been deleted, in so far as any question under Section 47 is concerned. The effect thereof obviously is that the aforesaid statutory fiction disappears. It cannot now be said that the determination of any question within Section 47 is a decree. Nevertheless, if an order passed by a Court satisfies the essential characteristics of decree, as now defined, the mere fact that the order was passed in exercise of powers under S. 47 of the Code would not be of consequence."

Orders under Section 47 would never have been treated as "decree" except on account of the definition in Section 2 (2) of the Civil P. C. Once the definition has undergone an amendment, and the legislative intention is what I have indicated above, I do not think, the observations of the Patna High Court in paragraph 8 of the reported judgment at page 310 of the Reporter would indeed be applicable.

On the analysis presented above, I must hold that the impugned order of the executing Court did not amount to a decree and the appeal filed against that order was not maintainable in law.

5. The net result, therefore, is that the appellate order of the Additional District Judge must be vacated as having been rendered in an incompetent appeal. The civil revision is allowed. The order of the appellate Court is vacated and that of the executing Court is restored. Parties shall bear their own costs here.

Revision allowed.

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N. K. DAS, J.

Mst. Amruta Dei and others, Appellants v. State of Orissa and another, Respondents.

Misc. Appeals Nos. 51 and 52 of 1979, D/- 16-4-1981.*

(A) Motor Vehicles Act (4. of 1939), Section 110-B — Compensation — Vicarious liability — Govt. vehicle driven by person other than driver — Officer in charge of vehicle not objecting — Accident due to rash and negligent driving proved — Govt. is

* From a common order passed by N. P. Mohapatra, 2nd Motor Accidents Claims Tribunal, Cuttack, D/- 30-11-1978.

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vicariously liable to pay compensation to legal representatives of deceased — Plea of sovereign function not maintainable: (i) Torts — Negligence; vicarious liability; (ii) Constitution of India, Part III (General)).

The R. T. O. took a Govt. jeep and went to check the vehicles in the morning accompanied by junior vehicle Inspector and Enforcement Inspector, two clerks of the office of the R. T. O. and two constables. The authorised official driver of the jeep was also there. While coming back at about midnight the Enforcement Officer drove the jeep and asked the driver to sit in the rear seat. The R. T. O. did not object. The Enforcement Officer had a licence and on many occasions driven the jeep previously. While he was driving the jeep an accident took place as the jeep dashed against a tree. The Enforcement Inspector and the two clerks died on the spot. Front tyres of the jeep were almost brand new and the driver had checked all the tyres before taking out the jeep. The road was a good one with black top excepting a little portion which was morum which was also in good condition. The accident took place while the jeep was negotiating a 'U' turn and was on a down gradient. The jeep was in 50 to 60 K. Ms. speed. A wheel of the jeep had gone out of it.

Held, that the Enforcement Officer driving the jeep at midnight while taking a complete turn on the road in a down gradient motion in 50 to 60 K. Ms. speed was rash and negligent in driving. The bursting of the tyre was the result of the impact of the jeep with the tyre and the accident was not as a result of bursting of the tyres. Held further, as the accident did not take place in course of checking the vehicle and could not be said to be in the discharge of sovereign function. The State was vicariously liable to pay compensation to the clerks and it could not take shelter under the plea of discharge of sovereign function. Case law discussed.

(Paras 3, 8 and 10)

(B) Motor Vehicles Act (4 of 1939), Section 110-B — Compensation — Determination of — Award of lump sum — 1/3rd of the amount can be slashed. (Para 11)

Cases Referred: Chronological Paras
AIR 1980 SC 1354 9
AIR 1977 SC 1735 3, 8, 10
AIR 1976 Andh Pra 122 7
AIR 1972 Bom 93 : 1973 ACJ 403 5
AIR 1967 SC 997 : 1967 Cri LJ 950 6
AIR 1966 SC 1697 8
AIR 1965 SC 1039 : (1965) 2 Cri LJ 144 5, 10

AIR 1962 SC 933 5, 10

In Misc. Appeal No. 51 of 1979: Mrs. A. K. Padhi, for Appellants; Indrajit Roy and Standing Counsel, for Respondents; In Misc. Appeal No. 52 of 1979: J. K. Tripathy and S. Kar, for Appellants; Mr. Indrajit Roy and Standing Counsel, for Respondents.

JUDGMENT:— Both the appeals relate to two cases for compensation arising out of the same accident, in which two clerks of the office of R. T. O. Sundargarh died. The accident is of a Govt. Jeep which took place on 9-1-1977 at about 1 A. M. The age of the deceased Lingaraj Behera in Miscellaneous Appeal No. 51 of 1979 was 26 years and he was having income of Rs. 270.00 per month (as appears from the written statement) as a Lower Division Clerk. In Misc. Appeal No. 52 of 1979 the deceased was Bipin Bihari Pradhan aged about 25 years. The legal heirs of late Lingaraj Behera claimed Rs. 10,800.00 and the claimants of deceased Bipin Bihari Pradhan laid a claim of Rs. 49,680.00.

2. In the morning of 9-1-1979 at about 7 A. M. the R. T. O. Sundargarh went to Purunapani via Biramitrapur for checking of vehicles. The Junior Motor Vehicle Inspector (O. P. W. 2) and one Sri G. C. Patnaik, the Enforcement Inspector also accompanied him. P. W. 3 was the official driver of the jeep. The two deceased persons, namely, Bipin Bihari Pradhan and Lingaraj Behera and two constables were in that jeep. After 11.30 P. M. in the night, the occupants of the jeep had their dinner at Rajgangapur. Thereafter the jeep was driven by the Enforcement Inspector, G. C. Patnaik. While Sri Patnaik was driving the jeep the accident took place at 2/3 K. Ms. before reaching Paramdih. The jeep dashed against a tree. The Enforcement Inspector who was driving the jeep died at the spot and the two Lower Division Clerks, namely Lingaraj Behera and Bipin Bihari Pradhan, also died at the spot.

State of Orissa, the defendant, in the written statement has admitted the accident but has contended that the accident took place due to bursting of the rear tyre of the jeep and that the State is not liable as the accident took place while discharging sovereign functions.

The Claims Tribunal has disallowed the claims in both the cases on two grounds:

(1) The State is protected as the sovereign function was being discharged by its employees; and,

(2) That the accident was due to bursting of tyre.

3. There is no dispute about the fact that the R. T. O. (O. P. W. 1) and the Junior Motor Vehicle Inspector (O. P. W. 2) and Sri Patnaik, the Enforcement Inspector as well as two Lower Division Clerks had gone in the Government jeep. It is also not disputed that P. W. 3 was the official driver of the jeep. All of them had their meals at about 11.30 P. M. at Rajgangapur. Thereafter admittedly the jeep was driven by Sri G. C. Patnaik, the Enforcement Inspector. While Sri Patnaik was driving the jeep and these two L. D. Clerks as well as O. P. W. 1, O. P. W. 2 and P. W. 3 were inside the jeep, the accident took place. It is also not disputed that the jeep dashed against a tree.

It is contended by Mrs. Padhi, the learned counsel for appellants that the findings of the Tribunal that the officers were discharging sovereign function is wrong and that it was not a case of bursting of tyres. The learned standing counsel vehemently opposed the contentions raised by the learned counsel for the appellants contending that on the principle of *res ipsa loquitur* it cannot be said that the State is, in any way, liable and that it was a clear case of sudden bursting of tyres resulting in the accident.

Normally it is for the plaintiff to prove negligence, but as in some cases considerable hardship is caused to the plaintiff as the true cause of the accident is not known to him but is solely within the knowledge of the defendant who caused it, the plaintiff can prove the accident but cannot prove how it happened to establish negligence on the part of the defendant. This hardship is sought to be avoided by applying the principle *res ipsa loquitur*. The general purport of the words *res ipsa loquitur* is that the accident "speaks for itself" or tells its own story. There are cases in which the accident speaks for itself so that it is sufficient for the plaintiff to prove the accident and nothing more. It will then be for the defendant to establish that the accident happened due to some other cause than his negligence. When the maxim is applied the burden is on the defendant to show either that in fact he was not negligent or that the accident might more probably have happened in a manner which did not connote negligence on his part. For the application of the principle it must be shown that the vehicle was under the management of the defendant and that the accident is such as in ordinary course of things does not happen if those who had the management used proper care (See *Pushpabai Parshotam*

Videshi v. M/s. Ranjit Ginning & Pressing Co. (P.) Ltd., AIR 1977 SC 1735).

It appears from the evidence of O. P. W. 3, the A. S. I. of Police who went to investigate, found that the right front wheel of the jeep was completely detached from the vehicle and was lying at some distance. Further, he noticed that the rim of the wheel was bent. It would thus appear that the accident was a serious one. Undoubtedly, Sri Patnaik who was driving the jeep also died at the spot as well as the two Lower Division Clerks. From the evidence of the driver P. W. 3, it appears that at Rajgangapur after they took their meals, Sri Patnaik asked him to bring some cigarettes. By the time he brought the cigarettes, Sri Patnaik was holding the steering sitting on the driver's seat. P. W. 3 gave the cigarettes to Sri Patnaik and when he wanted to drive the jeep, Sri Patnaik told him that the front seat was not enough to accommodate four persons and asked him to go to the rear seat and drove the vehicle. He further states that he was aware of the administrative instructions that the jeep was not to be handled by any one excepting himself unless the authority permits to drive the vehicle. In that night he allowed Sri Patnaik to drive the jeep as his higher authority, the R. T. O. did not object to the driving of the jeep by Sri Patnaik. He has further stated that the front tyres of the jeep were almost brand new and he had checked all these tyres before taking out the jeep and he did not find any damage or any crack mark on any of the tyres. From the evidence of the driver as well as from the evidence of other witnesses, it appears that the road was a good road with black top excepting a little portion, which was morum and the said morum portion was also in good condition. From the written statement filed by the State, it appears that when the jeep went with an 'U' turn, there was down gradient towards Paramdih and while negotiating that portion there was bursting of the tyre. It is evident from the written statement that the accident took place while the jeep was negotiating one 'U' turn and was on a down gradient road. The witnesses have stated that the jeep was in 50 to 60 K. Ms. speed. It would thus appear that the person who was driving the jeep in the midnight would have been careful in driving the jeep while it was taking a complete turn on the road and was in a down gradient motion. Undoubtedly, it amounts to rash and negligent driving.

The next question is whether there was bursting of tyres prior to the accident and the accident was due to bursting of tyres. The R. T. O. and the Junior M. V. I. have stated that they heard a sound of bursting of tyre but the driver who was in the jeep has clearly stated that he did not hear any sound of bursting of tyre prior to the accident. The position of the jeep and the condition of the wheel as stated by O. P. W. 3, the Investigating Officer clearly show that the wheel had gone out of the jeep. It, therefore, appears that the impact was so heavy and bursting of tyres can be the result of the impact. This fact is reinforced by the statement of the driver that the tyre which is said to have burst was a new tyre and was in good condition and it had been checked before the vehicle started. The evidence of O. P. Ws. 1 and 2 is not very clear about the bursting of tyre. Only they heard a sound like bursting of tyre and Sri Patnaik could not control the steering of the jeep. Curiously enough none of them said anything at that time. The cumulative effect of the evidence available on record is that at midnight while the jeep was taking in 'U' turn and was on a down gradient motion running at 50 to 60 K. Ms. speed having brand new tyre and there being no clear evidence about bursting of tyre, the reasonable inference is that the bursting of tyre was the result of the impact of the jeep with the tyre and the wheel had gone out of the jeep.

4. It is next contended that the State Government is not liable because the accident took place while the sovereign function was being discharged which, in other words, can be said to be the act of State. The Tribunal has come to the conclusion that they were discharging the sovereign function and, as such, the State is immune from liability. The admitted facts in this case clearly show that the Regional Transport Officer had gone to check the vehicles. After checking they were returning. He had taken with him these two L. D. Clerks as well as the Enforcement Inspector. The authorised driver was in the jeep. While coming back at Rajgangapur they had their meals and thereafter Sri Patnaik started driving the jeep and the R. T. O. did not object. When the driver wanted to drive the jeep, Sri Patnaik said that he himself would drive the jeep and the driver was directed to go the rear seat. The R. T. O. also did not object. The driver said that as his boss, the R. T. O., did not object, he believed that Sri Patnaik was permitted to

drive the jeep. This is also admitted by the R. T. O. (O. P. W. 1) that Sri Patnaik had on many occasions previously driven the jeep. Therefore, the R. T. O. who had taken the jeep had allowed Sri Patnaik to drive the jeep. In the written statement, it is also stated that Sri Patnaik was holding a licence. Nowhere in the written statement or in the additional written statement, the State has taken the plea that Sri Patnaik was authorised to drive the jeep the State is not liable. The admitted fact, therefore, is that Sri Patnaik was allowed to drive the jeep.

The function of the Regional Transport Officer was to check the vehicles. He had taken the jeep along with other persons, of whom two unfortunate L. D. Clerks expired due to the accident. It cannot be said that it was during the course of the discharge of sovereign function, the accident took place.

5. In *State of Rajasthan v. Mst. Vidyawati*, AIR 1962 SC 933, the question for consideration was whether the State Government would be liable for the accident while the vehicle was in official use. In that case it has been held that where the driver of a jeep, owned and maintained by the State of Rajasthan for the official use of the Collector of a district, drove it rashly and negligently, while bringing it back from the workshop after repairs and knocked down a pedestrian and fatally injured him, the State can be made vicariously liable for the tortious act, like any other employer. It has been held that in so far as the State activities have such wide ramifications involving not only the use of sovereign powers but also its powers as employers in so many public sectors, it is too much to claim that the State should be immune from the consequences of tortious acts of its employees committed in the course of their employment as such. The maxim "The King can do no wrong", to sue the Crown for the tortious act of its servant had become outmoded in the context of modern developments in statecraft and, as such, in England, the Parliament intervened by enacting the Crown Proceedings Act, 1947, which came into force in 1948.

In *M/s. Kasturi Lal v. State of Uttar Pradesh*, AIR 1965 SC 1039, a Bench of five Judges held that there is a material distinction between the acts committed by the servants employed by the State where such acts are referable to the exercise of sovereign powers delegated to public servants, and acts committed by public servants which are not referable to the delegation of any

sovereign powers. If a tortious act is committed by a public servant and it gives rise to a claim for damages, the question to ask is; was the tortious act committed by the public servant in discharge of statutory functions which are referable to, and ultimately based on, the delegation of the sovereign powers of the State to such public servant? If the answer is in the affirmative, the action for damages for loss caused by such tortious act will not lie. On the other hand, if the tortious act has been committed by a public servant in discharge of duties assigned to him not by virtue of the delegation of any sovereign power, an action for damages would lie. The act of the public servant committed by him during the course of his employment is, in this category of cases, an act of a servant who might have been employed by a private individual for the same purpose.

The principles laid down in *Mst. Vidhyawati's* case was taken into consideration by the Bombay High Court in *State of Mysore v. Ram Chandra Gunda Kulkarni*, 1973 ACJ 403 (AIR 1972 Bom 93). In that case the accident took place while the Government jeep had gone in connection with a construction of a reservoir. Following the principles of *Vidhyawati's* case, it was held that this construction of the reservoir was at best can be an act of welfare State for the betterment of the people of a part of the State.

6. There is another question for consideration arising out of the facts of the case. It has been held by the Supreme Court in *State of West Bengal v. Corporation of Calcutta*, AIR 1967 SC 997, that the substantive rule of law is that the prerogative of the Crown can only be taken away by law. The rule of construction evolved by the Courts to ascertain the legislative intention is, that it is presumed that a statute has not taken away the prescriptive right unless it has expressly or by necessary implication done so.

7. After the amendment of S. 110 of the Motor Vehicles Act by the Amending Act, 100 of 1956, which came into force on 16th Feb., 1957, the Parliament has, in categorical terms by introduction of these sections, stated that if, while driving a motor vehicle (which includes a vehicle owned by the State Government or by the Government of India) the owner of the vehicle is liable to pay compensation to the persons who are entitled to claim damages. In other words, Section 110 and the Rules made thereunder, including the Government liable for the tor-

tious acts of its servants while driving the vehicle. Therefore, after the Amending Act 100 of 1956, by which S. 110-A of the Motor Vehicles Act has been inserted, the distinction of sovereign and non-sovereign acts, of the State no longer exists as all owners of vehicles are brought within the scope of this section. Whether the State is bound by the provisions of the Act is no longer *res integra* (See *Government of Andhra Pradesh v. Mrs. K. Padma Rani*, AIR 1976 Andh Pra 122).

8. Reliance has been placed by the respondents on *Sitaram Motilal v. Santanuprasad Jaishanker*, AIR 1966 SC 1697. In that case, the owner of a vehicle entrusted it to a person for plying it as a taxi. Another person who used to clean the taxi had given the vehicle to other persons for obtaining the licence for driving and while taking the taxi, that person caused bodily injury to a person while the person entrusted with the vehicle was not present. It was held that the person entrusted was not liable. This case was distinguished in *Puspabai's* case (AIR 1977 SC 1735) (supra) by the Supreme Court and it was held that while the driver was acting under employment of the owner had taken one passenger into the jeep and the passenger died out of the accident committed by the driver, the owner was held liable. Applying the tests laid down by the Supreme Court in *Puspabai's* case to the facts and circumstances of the present case, it would appear that the R. T. O. allowed Sri Patnaik to drive the jeep in question. Even the driver had allowed Sri Patnaik to drive the jeep. The R. T. O. and the driver both were present in the jeep while the accident took place and as such, the owner is liable.

9. The Supreme Court in *N. K. V. Bros. v. Karumai Ammal*, AIR 1980 SC 1354, has observed that Accidents Tribunals must take special care to see that innocent victims do not suffer and drivers and owners do not escape liability merely because of some doubt here or some obscurity there, save in plain cases, culpability must be inferred from the circumstances where it is fairly reasonable. The Court should not succumb to niceties, technicalities and mystic may-bes.

10. On the aforesaid analysis, I hold that the accident did not take place in course of checking the vehicle. The R. T. O. was coming back and after midnight had allowed Sri Patnaik to drive the vehicle. It was not the first occasion but previously Sri Patnaik had been allowed to drive the jeep. This cannot be said to be a discharge of sovereign function. In view of princi-

ples of Puspabati's case (AIR 1977 SC 1735) and the case of Vidyawati (AIR 1962 SC 933) and Kasturi Lal (AIR 1965 SC 1039) laid down by the Supreme Court and applying to the facts and circumstances of the case, the owner can be held vicariously liable.

I, therefore, hold that the State is vicariously liable to pay the compensation and cannot take shelter under the plea of discharge of sovereign function.

11. The next question relates to the quantum of compensation. In Misc. Appeal No. 52 of 1979 the deceased Bipin Bihari Pradhan was aged 25 years and he was having the income of Rs. 306.00 per month. The total claim is Rs. 49,680.00. This amount does not appear to be high and excessive which is much less than the amount which in ordinary course should have been allowed. Therefore, the claimants in Misc. Appeal No. 52 of 1979 are entitled to the entire amount claimed by them.

The deceased in Misc. Appeal No. 51 of 1979 was aged 26 years and the defendant has admitted in the written statement that his monthly pay was Rs. 270.00. Taking the normal course of life to be 65 years, he would live for 39 years more and he would have contributed to the family. He was living in the joint family along with his wife and children. P. W. 4 has stated that the deceased used to pay her Rs. 300.00 every month to run the house including his maintenance. Considering the pay to be Rupees 270.00 per month a deduction of Rs. 100/- for maintenance of the deceased can be made and the balance of Rs. 170/- can be taken to be the contribution to the family which he would have made for 39 years. Calculating according to the above rate the amount comes to Rs. 89,760.00. For a lump sum payment 1/6th of the amount can be slashed. After slashing 1/6th the balance comes to Rs. 74,834.00. I, therefore, hold that the claimants in Misc. Appeal No. 51 of 1979 are entitled to Rs. 74,834.00.

12. In the result, both the appeals are allowed with costs. The claimants in Misc. Appeal No. 51 of 1979 are entitled to Rs. 74,834.00 along with interest at six per cent per annum from the date of the claim till the date of final payment along with costs. Hearing fee is assessed at Rs. 100.00 only.

In Misc. Appeal No. 52 of 1979 the claimants are entitled to Rs. 49,680.00 together with interest at the rate of six per cent per annum from the date of application

till the date of payment along with costs. Hearing fee is assessed at Rs. 100.00 only. Appeals allowed.

AIR 1982 ORISSA 17

R. N. MISRA, C. J.

Narasingh Bariha, Petitioner v. Abhimanyu Behera, Opposite Party.

Civil Revn. No. 30 of 1981, D/- 3-9-1981.

Civil P. C. (5 of 1908), S. 115 — Revision petition challenging order as to maintainability of suit — Total delay of 295 days in presentation of petition — Special circumstances — Delay if could be condoned. (Limitation Act (1963), Art. 131, S. 5).

In the instant case there was a total delay of 295 days in presentation of revision petition challenging the order as to maintainability of suit. The suit in which impugned order was passed, was dismissed for plaintiff's default. The whole suit having been dismissed, it was of no use to the defendant-petitioner to assail the finding on the issue as to maintainability, during the period the suit stood dismissed. The restoration of the suit was allowed after about 11 months from its dismissal. Thus, excluding the period during which the suit stood dismissed, the petitioner was within the statutory period of 90 days. The delay was, therefore, condoned.

(Para 1)

Cases Referred: Chronological Paras
AIR 1978 Andh Pra 30 2

D. P. Sahu, for Petitioner; S. C. Mohapatra, for Opposite Party.

ORDER:— Heard Mr. Sahu for the petitioner and Mr. Mohapatra for the O. P. on the question of condonation of delay. There is a total delay of 295 days in the presentation of this revision application on behalf of the defendant challenging the finding rendered on 22-11-1979 by the learned subordinate Judge that the suit is maintainable. Ordinarily I would have refused to entertain the application for condonation of the long delay, but for these special circumstances. The suit in which the impugned order was passed was dismissed for the opposite party's default on 10-1-1980. An application for restoration of the suit was allowed on 12-12-1980. On 14-1-1981 this revision application challenging the order dated 22-11-1979 has been filed. Petitioner's stand is that the suit having been dismissed on 10-1-1980 and the dismissal having remained effective till 12-12-1980, petitioner had no scope to challenge

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the impugned order during the period the suit stood dismissed. The whole suit having been dismissed, it was of no use to the defendant-petitioner to assail the finding on the issue as to maintainability. Before the dismissal, 48 days had elapsed. After the restoration, petitioner has been in this Court within 33 days. The total period taken excluding the period when the suit stood dismissed thus works out to about 80 days. If the period during which the suit had been dismissed is excluded, petitioner is within the statutory period of 90 days.

2. Mr. Mohapatra appearing for the other side relying upon a Bench decision of Andhra Pradesh High Court in the case of N. Rami Reddi v. N. Padma Reddy, AIR 1978 Andh Pra 30 says that with the restoration of the suit interlocutory orders are restored and it was open to the defendant at the time of restoration to contend that the restoration should have been made conditional so as to make the finding regarding the issue of maintainability stand dissolved and a fresh finding should have been called for or the Court while ordering restoration should have given direction as to the question of limitation.

3. I am not at all impressed by the argument of Mr. Mohapatra. It is the plaintiff who by his negligence had brought about the dismissal of the suit and he cannot again be heard to contend that the defendant should have suffered the prejudice on account of his negligence. The delay is condoned.

Application allowed.

AIR 1982 ORISSA 18

R. N. MISRA, C. J.

Executive Engineer, Rural Engineering Division, Puri, Appellant v. M/s. Construction India, Respondent.

Misc. Appeal No. 95 of 1981, D/- 28-8-1981*.

Arbitration Act (10 of 1940), Section 30 — Filing of objection under — Limitation for — Period of limitation can be extended by the Court. (Limitation Act (1963), S. 29).

In view of the change brought about in Section 29 of the Limitation Act, the Court has jurisdiction to extend the time by condoning the delay in filing an objection beyond 30 days. Case law discussed. (Para 3)

*From order of S. K. Satpathy, Sub. J., Bhubaneswar, D/- 22-1-1981.

Cases Referred :	Chronological	Paras
AIR 1981 Orissa 188		3
(1972) 1 Cut WR 821		3
(1972) 1 Cut WR 951		3
AIR 1969 Cal 381		3

Addl. Govt. Advocate, for Appellant; K. N. Jena, for Respondent.

ORDER :— This is an appeal under the Arbitration Act (hereinafter referred to as the 'Act') against the decision of the learned Subordinate Judge, Bhubaneswar, to make the award a rule of the Court.

2. The award was received by the Court on 21st Mar., 1980. Notice was directed on 27th Mar., 1980. From the endorsement in the Remarks Column against order No. 2, it appears that the Government Pleader was given notice in the matter that day. On 21st April, 1980, an application was made by the State for time to file objection and time was extended till 6th May, 1980. On 3rd May, 1980, the objection had been filed. The Subordinate Judge proceeded on the footing that for filing of an objection under Section 30 of the Act the period of limitation was 30 days and since the objection filed on 3rd May, 1980 was beyond the 30 day period from the date when notice was given, the said objection was not maintainable.

3. The learned Additional Government Advocate in appeal contended that under the new Limitation Act, 1963, the Court has jurisdiction to extend the time for filing of objection. Otherwise put, if there be delay in presentation of an objection being beyond 30 days, the Court has also jurisdiction to excuse the delay and entertain the objection. Reliance has been placed on the observations of this Court in the case of State of Orissa v. Govinda Choudhury & Sons, (1972) 1 Cut WR 821 as also another decision in the same volume at page 951 (State of Orissa v. Bhagabat Prasad Bal). Reference has also been made to a decision of the Calcutta High Court in the case of Soorajmull Nagarmal v. Golden Fibre & Products, AIR 1969 Cal 381. In an unreported decision dated 29-7-1981 in Misc. Appeal No. 36 of 1981 : (since reported in AIR 1981 Orissa 188) a learned single Judge of this Court has also taken the same view. In the circumstances indicated and in view of the change brought about in Section 29 of the new Limitation Act, it must follow that a Court has jurisdiction to extend the time by condoning the delay in filing an objection beyond 30 days. In the facts of the case as already narrated, it must follow that the Court did extend the time for filing of the objection and, there-

fore, the objection filed on 3rd May, 1980, which was a combined one both under Sections 30 and 33 of the Arbitration Act, was not out of time even in so far as it related to objections tenable under Section 30 of the Arbitration Act. The learned subordinate Judge omitted to entertain the objections raised under Section 30 of the Arbitration Act on the ground that the objection was beyond time. Therefore, there has been no adjudication on merit in relation to the objection raised under Section 30 of the Act.

4. The impugned decision of the learned subordinate Judge is accordingly set aside and the matter is remitted to the learned subordinate Judge for a fresh disposal by accepting the objection under Section 30 of the Arbitration Act as tenable in law on the ground of limitation.

Costs shall abide the event.

Order accordingly.

AIR 1982 ORISSA 19

R. N. MISRA, C. J. AND R. C. PATNAIK, J.

Basudev Bissoi, Petitioner v. Revenue Officer, Berhampur and others Opposite Parties.

Original Jurn, Case No. 590 of 1977, D/-21-9-1981.

Orissa Land Reforms Act (16 of 1960), Ss. 2, Cl. (13) and 37-A — Irrigated Land — Determination of surplus land — Classification of lands must precede — Petitioner's lands held to be Class I land though in that area no lands were of that category — Revenue Officer basing his conclusion on Inspector's report which did not indicate any classification — Order determining surplus land held was illegal. (Para 3)

R. C. Misra, for Petitioner; Addl. Govt. Advocate, for Opposite Parties.

R. N. MISRA, C. J.:— The petitioner is a land-holder. The Revenue Officer, opposite party No. 1, initiated a suo motu proceeding under S. 42 of the Orissa Land Reforms Act (hereinafter referred to as the 'Act') and published a draft statement fixing the ceiling surplus lands in the hands of the petitioner and called upon him to show cause why the said draft statement may not be confirmed. The petitioner filed objection before the Revenue Officer saying that there was no assured source of irrigation and the lands were mainly rainfed. He accordingly wanted the Revenue Officer to drop the proceeding. The Revenue Officer

asked for a report from the Revenue Inspector. From the record, we find that the Revenue Inspector in his report only gave the particulars of the lands and their extent but did not classify the same. Overruling the objection of the petitioner, the Revenue Officer ultimately published a confirmed statement and found that the petitioner was possessed of surplus lands beyond the ceiling. An appeal was carried by the petitioner under the Act, and from the very commencement of the appeal the petitioner as appellant contended that there should be a spot verification to determine whether the classification made by the Revenue Officer was justified. No steps were taken for a spot verification though by two separate orders the prayer was noticed, and even on one occasion the appellate authority indicated that a date for spot inspection would be communicated to the petitioner. The appeal was dismissed. A revision carried against the appellate order did not bring in any benefit.

2. In Section 2 of the Act "irrigated land" has been defined in Cl. (13) to mean —

"Land which is assured of irrigation from an irrigation project constructed or maintained or improved or controlled by the Central Government or the State Government or by a body corporate established under any law for the time being in force and includes land which is assured of irrigation from any private source by means of lift irrigation from any perennial water source operated by diesel or electric power

3. Reliance has been placed by counsel for the petitioner on the stand of the State Government which has been noticed in a reported decision of this Court that instructions have been issued by the State Government not to rely upon private sources referred to in the notification.

The Revenue Officer's order shows that there were two tanks located in the village. The petitioner has contended throughout that though there are two tanks in the village they are used for purposes other than irrigation. Reliance is also placed by the petitioner on an order of the Revenue Officer in Annexure 5 which is an order on a similar proceeding in another case with reference to lands located in the same village as that of the petitioner. Therein it has been found by the Revenue Officer that the very two tanks which have been taken as water source for the petitioner's lands were not available for irrigation purposes.

The report of the Revenue Inspector, as already noted, never indicated any classification. There is no material on the record of the Revenue Officer, which we had called for to see, as to what was the information which he had received regarding classification. The marking of classification put on the objection filed by the petitioner seems to have been an act of the Revenue Officer. There is therefore, admission by the petitioner as to classification. One of the items of property held by the petitioner has been classified as Class I though it is conceded before us that in Ganjam district where the petitioner's lands are located, in the absence of any irrigation sources of the type which would make lands Class I, no Class I lands exist. The fact that the Revenue Officer classified one of the items of property as Class I goes to support the stand of the petitioner that there was no appropriate application of mind and no adequate enquiry for classifying the lands.

Very much inter-connected with the classification of land is the extent of the ceiling unit. If lands were classified as Class I, i.e. every acre to be a standard acre, the petitioner would have been entitled to 10 acres in his ceiling area. If all the lands were Class IV, the area would have been four times of it. In such circumstances, unless appropriate care is taken to classify the lands, the size of the ceiling area in terms of normal acreage (not being standard acres) would be different. As there has been no appropriate enquiry in this case, the petitioner's claim has been negatived without investigation and he has been prejudiced.

4. We would accordingly set aside the appellate decision as also the order of the Revisional Authority and direct that the appeal be re-disposed of from the stage where local inspection had been decided to be undertaken and the date was to be notified to the petitioner.

5. No costs.

R. C. PATNAIK, J.:— I agree.

Order accordingly.

AIR 1982 ORISSA 20

P. K. MOHANTI AND B. N. MISRA, JJ.

Durga Shankar Kar, Petitioner v. State of Orissa and others, Opposite Parties.

Original Jurin. Case No. 730 of 1981, D/- 21-8-1981.

(A) Orissa Co-operative Societies Act (2 of 1963), S. 32 (1), (4) — Supersession

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of Managing Committee of Society — Notice to financing bank after consultation — Written consent of financing bank obtained prior to order of supersession — Order of supersession not vitiated on account of any defect in notice. AIR 1979 Orissa 143 and AIR 1981 Orissa 154, Rel. on.

(Para 4)

(B) Orissa Co-operative Societies Act (2 of 1963), S. 32 (1) — Supersession of Managing Committee of Society — Petitioner filing objections to the notice of supersession — Opportunity of personal hearing to him in supersession proceedings — Not necessary. (Constitution of India, Art. 226).

Where the petitioner was given an opportunity of stating his objections to the charges mentioned in the notice of supersession and he has availed of that opportunity by filing his objections, a mere denial of opportunity of personal hearing to him during supersession proceedings could not vitiate the proceedings. The opportunity given to the petitioner to state his objections is sufficient compliance with the rules of natural justice. Case law discussed.

(Para 5)

(C) Constitution of India, Art. 226 — Natural justice — Supersession of Managing Committee of Society — Order passed by Assistant Registrar who was also member of the Committee — Doctrine of a person judging his own case not attracted as he was not personally interested in supersession — Order of supersession cannot be challenged merely because he was member of Committee. (Nemo debet esse iudex in propria cause).

(Para 11)

(D) Orissa Co-operative Societies Act (2 of 1963), S. 32 (1) — Supersession of Managing Committee of Society — Order passed by Assistant Registrar by virtue of powers of Deputy Registrar delegated to him — Not without jurisdiction.

(Para 12)

Cases Referred: Chronological Paras

AIR 1981 Orissa 154 4

AIR 1979 Orissa 143 4

AIR 1978 SC 597 9

AIR 1971 SC 1093 6

AIR 1971 Ker 34 10

AIR 1963 SC 375 7

AIR 1958 SC 398 8

AIR 1957 SC 232 8

1915 AC 120: 111 LT 905: 84 LJ KB 72.

Local Govt. Board v. Arlidge 6.

R. Mohanty, for Petitioner; Govt. Advocate, for Opposite Parties.

P. K. MOHANTI, J.:— The petitioner challenges the order dated 30-3-1981 (Annex

ure-1) passed by opposite party No. 2 under S. 32 (1) of the Orissa Co-operative Societies Act, 1962 (hereinafter called 'the Act') superseding the Committee of Management of Kalahandi Wholesale Consumers Stores (hereinafter referred to as 'the Society' and appointing the Sub-Divisional Officer (Civil), Bhawanipatna as Administrator of the Society under S. 32 (1) (b) of the Act.

2. The Society is a 'Central Society' within the meaning of S. 2 (h-2) of the Act. Petitioner is the President and opposite parties 2, 4, 5, 6 and 7 are the Directors of the Committee of Management of the Society. It is alleged that the opposite party No. 2 N. Madhav Rao, who is Assistant Registrar and not Dy. Registrar of Co-op Societies, Bhawanipatna, issued a notice under S. 32 (1) of the Act on 23-1-1981 calling upon the members of the Committee to show cause as to why the Committee should not be superseded on the ground of mismanagement. On service of notice the petitioner submitted his show cause contending, inter alia, that the charges of mismanagement were grossly mala fide and outcome of political vendetta and had been issued at the behest of the Minister in charge of Co-operation in the Government of Orissa. The petitioner prayed for being given an opportunity of personal hearing. It is contended that without giving an opportunity of personal hearing the opposite party No. 2 passed the impugned order on 30-3-1981. The impugned order is attacked mainly on the following grounds:

(1) that the financing bank (O. P. No. 5) was not consulted by O. P. No. 2 before initiating action under S. 32 (1) of the Act.

(2) that no opportunity of personal hearing was given, though specifically asked for.

(3) that opposite party No. 2 N. Madhav Rao had no jurisdiction to issue the show cause notice (Annexure-2) and to pass the impugned order (Annexure-1), because firstly, he is a Director of the Committee of Management and the alleged laches are attributable to him also and in any event, he is incompetent to remove himself which he has purported to do under Annexure-1, and secondly, he is Assistant Registrar of Co-operative Societies, Bhawanipatna, and, as such, cannot act under S. 32 on behalf of the Registrar as delegation of power under S. 32 has been made to the Deputy Registrars only.

3. In the counter-affidavit filed by opposite parties 1 to 4 it is maintained that the show cause notice was served on the petitioner on 24-1-1981 and the impugned order

was passed on 30-3-1981 and the financing bank had been consulted on 14-1-1981, that is, before the issue of show cause notice, and the financing bank had given its written consent on 13-2-1981, that is, before the impugned order was passed. It is also maintained that opposite party No. 2 has been given the power of the Deputy Registrar by the Government of Orissa and the said opposite party No. 2 acting as the Deputy Registrar of Co-operative Societies, Bhawanipatna, has passed the impugned order. It is further maintained that the show cause filed by the petitioner was duly considered along with the relevant records of the Society and the impugned order was passed giving detailed reasons for supersession and it was not felt necessary to give a personal hearing to the petitioner.

4. The first contention is that initiation of action under Section 32 of the Act without complying with the requirements of subsection (4) thereof is bad in law and consequently the order of supersession is vitiated. Reliance is placed on a decision of this Court reported in AIR 1979 Orissa 143 (Sarat Chandra Panda v. State of Orissa).

Sub-section (4) of Section 32 of the Co-operative Societies Act runs as follows:

"Before taking any action under subsection (1) in respect of society, the Registrar shall consult the financing Bank to which it is indebted and consider the opinion, if any, received from such Bank."

In the case cited above, it was the notice to show cause against supersession which was challenged on the ground of absence of consultation. It was held that consultation with the financing bank of a Co-operative Society is a condition precedent not only when the final step of supersession of the Society is contemplated but even for issue of notice to the Society to show cause against its supersession. In the present case, challenge has been laid after the order of supersession was made. The financing Bank (O. P. No. 5) was consulted on 14-1-1981 which is evident from the minutes of discussion held on that date between the Deputy Registrar of Co-operative Societies and the financing bank (O. P. No. 5) vide Annexure A. The written consent of the financing bank for supersession of the Society was obtained on 13-2-1981 vide Annexure B. The order of supersession was made on 30-3-1981 vide Annexure 1. It is contended on behalf of the petitioner that Annexure A has been manufactured for the purpose of this case. It is pointed out that the copy of the notice (Annexure 2) was forwarded to O. P. No. 5 on 23-1-1981 and

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the opp. party No. 5 was requested to state its objections on or before 5-2-1981. It is accordingly urged that there was no consultation with opp. party No. 5 on 14-1-1981 as alleged. It appears, however, that there was a discussion between O. Ps. 3 and 5 with reference to a copy of the visit note on the working of the Co-operative Stores and in the minutes of discussion (Annexure A) it is mentioned that in the opinion of the financing bank the management of the Kalahandi Wholesale Consumers' Co-operative Stores ought to be superseded in the best interest of the said Stores. It is also mentioned therein that the financing bank would be issuing the written consent in due course. Thus, it appears that though the copy of the notice under Section 32 (1) of the Act was forwarded to O. P. No. 5 on 23-1-1981, yet there was consultation with the O. P. No. 5 during the discussion held on 14-1-1981. Even assuming that there was no consultation with the financing bank before issue of notice, yet the written consent of O. P. No. 5 having been obtained on 13-2-1981, the order of supersession made on 30-3-1981 is not open to attack. Sarat Chandra's case was considered in a recent decision of this Court in the case of Parameswar Bagh v. State of Orissa, O. J. C. No. 1473 of 1980 decided on 22-4-1981 : (reported in AIR 1981 Orissa 154 at p. 156) and it was held as follows :

".....In Sarat Chandra's case (AIR 1979 Orissa 143) (supra) challenge had been laid before this Court against a notice and the validity of the notice in the absence of consultation came for consideration. It was in that background that the Division Bench of this Court held that consultation was a condition precedent and when there was no consultation, the notice was invalid. In the present case, challenge has been laid after the order of supersession has been made and there is sufficient material to show that by the time supersession was ordered, the Bank had been consulted and its consent had also been obtained. While we agree that consultation is a condition precedent as held by this Court, we are not prepared to accept Mr. Rath's submission that the order of supersession must fall as the notice was defective at the preliminary stage"

We accordingly hold that the order of supersession was duly made after consultation with the financing bank and it is not vitiated on account of any defect in the notice.

5. The next contention is that the order of supersession is vitiated as no opportunity of personal hearing was given to the peti-

tioner. Section 32 (1) of the Act provides as follows :

"32. Supersession of committee and power to disqualify officers of the society :—

(1) If, in the opinion of the Registrar, the Committee of any Society persistently makes default or is negligent in the performance of the duties imposed on it by this Act or the Rules or the bye-laws or commits any act which is prejudicial to the interests of the society or its members, or is otherwise not functioning properly, the Registrar may, after giving the committee an opportunity to state its objections, if any, by order in writing, stating reasons therefor, remove the committee; and

The statute provides for giving an opportunity to the committee to state its objections, if any. It does not require the Registrar or any other officer exercising the powers of the Registrar under Section 32 (1) to hear the members of the committee of management in person before passing final orders under Section 32 (1) of the Act. In sub-sec. (2) of Section 67 of the Act which deals with surcharge, provision has been made for giving the person concerned an opportunity of being heard. But Section 32 (1) provides for giving the committee an opportunity to state its objections. Thus, it appears that where the Legislature intended to confer a right of being heard it has said so as in sub-sec. (2) of S. 67. The expression used in S. 32 (1) is opportunity to state its objections and not "opportunity of personal hearing." The Court cannot supplant a particular rule of natural justice so as to nullify the legislative provision. In the present case, the petitioner was given an opportunity of stating his objections to the charges mentioned in the notice and he has availed of that opportunity by filing his objections. A mere denial of opportunity of personal hearing will not vitiate the proceedings. The opportunity given to the petitioner to state his objections is, in our opinion, sufficient compliance with the rules of natural justice. We are fortified in this view by high authorities.

6. In the case of Local Govt. Board v. Arlidge, 1915 AC 120 decided by the House of Lords it was held that personal or oral hearing is not a sine qua non of the principles of natural justice.

In the case of Union of India v. Jyoti Prakash Mitter, AIR 1971 SC 1093, Art. 217 (3) of the Constitution of India came up for consideration before their Lordships and it was held as follows (at p. 1103) :

"Article 217 (3) does not guarantee a right of personal hearing. In a proceeding of a

judicial nature, the basic rules of natural justice must be followed. The respondent was on that account entitled to make a representation. But it is not necessarily an incident of the rules of natural justice that personal hearing must be given to a party likely to be affected by the order. Except in proceedings in Courts, a mere denial of opportunity of making an oral representation will not, without more, vitiate the proceeding. A party likely to be affected by a decision is entitled to know the evidence against him and to have an opportunity of making a representation. He, however, cannot claim that an order made without affording him an opportunity of a personal hearing is invalid."

(The underlining is ours)

In that case the respondent repeatedly requested for being given an opportunity of oral hearing before the President of India and an opportunity to adduce evidence and to make submissions in support of his case. In reply, he was informed that the President would decide after considering the evidence whether any personal hearing was necessary. He was also informed that should the President decide that he should be heard in person, he will be informed in due course. It was contended before their Lordships that the respondent's request was granted and he remained under an impression that he would be given an oral hearing and the order made without granting him an opportunity of oral representation was contrary to the rules of natural justice. Their Lordships held (at p. 1103):

"... .. The President is performing a judicial function when he determines a dispute as to the age of a Judge, but he is not constituted by the Constitution a Court. Whether in a given case the President should give a personal hearing is for him to decide. The question is left to the discretion of the President to decide whether an oral hearing should be given to the Judge concerned...."

In the present case, the opposite parties have taken the stand that the order of supersession was made after considering the objections filed by the petitioner along with relevant documents and it was not felt necessary to give a personal hearing. The materials on record amply support the contention that personal hearing was not necessary. The order of supersession was made after considering the visit note of the Deputy Registrar on the working of the society which revealed a lot of defects in the day to day management and serious irregularities committed by the members of the committee in

contravention of the rules and bye-laws. The explanation submitted by the petitioner was duly considered along with other relevant documents and the order of supersession was passed giving detailed reasons for the same.

7. In the case of *State of Mysore v. Shivabasappa Shivappa*, AIR 1963 SC 375 it was laid down that domestic Tribunals are not Courts and that they are therefore not bound to follow the procedure prescribed for trial of actions in Courts. Nor are they bound by rules of evidence. Further unlike Courts they can obtain information from all sources and that all that is expected is that they should give fair opportunity to the party against whom such material is to be used, to explain it. It was added that what is fair opportunity will depend on facts and circumstances of each case.

8. In *New Prakash Transport Co. Ltd. v. New Suwarna Transport Co. Ltd.*, AIR 1957 SC 232 their Lordships observed that the rules of natural justice vary with varying constitutions of statutory bodies, and the rules prescribed by the legislature under which they have to act, and the question whether in a particular case they have been contravened must be judged not by any preconceived notion on what they may be but in the light of the provisions of the relevant Act. This principle was reaffirmed in AIR 1958 SC 398, (*Nagendra Nath Bora v. Commr. of Hills Division*).

9. Mr. R. Mohanty, the learned counsel for the petitioner relied on a decision in the case of *Smt. Maneka Gandhi v. Union of India*, AIR 1978 SC 597 in support of his contention that the impugned order is vitiated as no opportunity of personal hearing was afforded to the petitioner. In that case the passport of Smt. Maneka Gandhi was impounded by an order under Section 10 (3) (c) of the Passport Act, 1967. The Passport Act does not provide for giving an opportunity to the holder of the passport of showing that the ground for impounding the passport does not exist. Smt. Gandhi filed the writ application challenging the order on the grounds, inter alia, that Section 10 (3) (c) is void as conferring an arbitrary power since it does not provide for a hearing of the holder of the passport before the passport is impounded and that the provision is violative of Art. 21 of the Constitution since it does not prescribe procedure within the meaning of that Article. It was found that the Central Government not only did not give an opportunity of stating her objections or of hearing to the petitioner after impounding her passport but even declined to furnish

to the petitioner the reasons for impounding her passport despite request made by her. Their Lordships held that the Central Government was wholly unjustified in withholding the reasons for impounding the passport from the petitioner and this was not only in breach of the statutory provision, but it also amounted to denial of opportunity of hearing to the petitioner. Their Lordships observed that the power to impound a passport seriously interferes with the constitutional right of the holder of the passport to go abroad and entails adverse civil consequences. The fact that Smt. Gandhi was not given an opportunity of making a representation before or after the impounding of her passport introduced a serious infirmity in the order. It was held that the order impounding the passport of the petitioner was clearly violative of the rules of natural justice embodied in the maxim *audi alteram partem* and it was not in conformity with the procedure prescribed by the Passport Act, 1967.

It was further held :

"It is well established that even where there is no specific provision in a statute or rules made thereunder for showing cause against action proposed to be taken against an individual which affects the rights of that individual, the duty to give reasonable opportunity to be heard will be implied from the nature of the function to be performed by the authority which has the power to take punitive or damaging action."

(Paragraph 32).

10. Mr. R. Mohanty, the learned counsel for the petitioner also relied on a decision in the case of the President, the Commonwealth Co-operative Society Ltd., Ernakulam v. The Joint Registrar (General) of Co-operative Societies, Trivandrum, AIR 1971 Ker 34. In that case an order for winding up the Co-operative Society was passed under S. 51(1) of the Travancore-Cochin Co-operative Societies Act, 1951 without giving notice to the society. Their Lordships held that an adjudication of the facts without notice and an opportunity of being heard, when the adjudication will have serious civil consequences to the society is against the principles of natural justice and that even if the statute does not expressly provide for notice, the justice of the common law will supply the omission and would require notice and an opportunity of being heard.

We fail to appreciate how that case is of any service to the petitioner in the present case.

11. It is urged that the doctrine of natural justice also consists of the rule *nemo debet*

esse judex in propria causa (no one shall be a judge in his own cause) and Shri Rao, who was undisputedly one of the Directors of the Co-operative Society and the alleged laches were also attributable to him, was incompetent to remove himself by superseding the entire committee of management including himself. We are unable to accede to this contention. Shri Rao was acting as the Deputy Registrar of the Society to whom the power has been delegated and he made the order of supersession in that capacity. There is nothing to show that he had any personal interest in the matter of supersession or that he was biased against the other members of the committee. His decision cannot be called in question merely because he was a member of the committee in his capacity as the Director of the Co-operative Society. There is absolutely no evidence to show that the members of the committee did not have a fair and impartial consideration of their objections at his hands. This contention is, therefore, without any force.

12. The last contention of the petitioner is that the O. P. No. 2 N. Madhav Rao is an Assistant Registrar of Co-operative Societies and as such cannot exercise the powers under Section 32 delegated by the Registrar to the Deputy Registrars. It is argued that O. P. No. 2 had no jurisdiction to pass the order of supersession as he was not a Deputy Registrar and there was no statutory delegation in his favour. It is not disputed that by a general order of the Registrar all Deputy Registrars have been authorised to exercise the power of supersession under Section 32 of the Act (vide Annexure D). It appears from Government notification dated 13th Nov., 1980 (Annexure C) that Shri B. P. Guru, the Deputy Registrar of Co-operative Society, Kalahandi proceeded on leave and O. P. No. 2 N. Madhav Rao, who was the Assistant Registrar, was allowed to remain in additional charge of the post of Deputy Registrar. Shri Rao was also allowed to act as drawing and disbursing officer in respect of the office of the Deputy Registrar of Co-operative Societies, Kalahandi. Officiating appointments and in-charge arrangements are well understood terms in civil service. When an officer is appointed to Officiate in a higher post he is invested with the powers of the higher post. But when he is placed in charge of the current duties of a vacant post in a higher appointment he cannot exercise any of the statutory powers of the office. He can merely perform the day to day routine duty. The Government notification in Annexure C does not show that Shri Rao was placed in charge of the current duties of the

Deputy Registrar. The notification clearly shows that he remained in additional charge of the post of the Deputy Registrar and was allowed to function as drawing and disbursing officer in respect of the office of the Deputy Registrar. Thus, it appears that he was in full charge of the duties and functions of the Deputy Registrar and was, therefore, entitled to exercise the statutory powers of the Deputy Registrar. By virtue of the powers delegated to the Deputy Registrars, Shri Rao acting as the Deputy Registrar of the Co-operative Society for the time being issued the notice under Section 32 (1) and passed the order of supersession. The petitioner filed his objection before Shri Rao in pursuance of the notice under Section 32 (1) of the Act. He did not take the objection that Shri Rao (O. P. No. 2) had no jurisdiction to initiate the proceeding or to pass the order of supersession. We find no merit in the contention that the C. P. No. 2 had no jurisdiction to make the order of supersession.

13. In view of our foregoing findings, the writ application is devoid of any merit and it is accordingly dismissed, but in the circumstances without any order as to costs.

MISRA, J.:— I agree.

Petition dismissed.

AIR 1982 ORISSA 25

R. C. PATNAIK, J.

Simadri Panda, Petitioner v. Durgasi China Appanna and others, Opposite Parties.

Civil Revn. No. 111 of 1979, D/- 30-9-1981.*

Civil P. C. (5 of 1908), O. 6, R. 17 — Amendment taking suit out of jurisdiction, if can be allowed.

Where an amendment of the plaint oust the pecuniary jurisdiction of the court, which it originally had, the court should allow, the amendment and return the amended plaint for presentation in the proper Court. (Case law discussed). (Paras 4, 5)

Cases Referred: Chronological Paras

AIR 1978 Cal 133:82 Cal WN 51. 3

AIR 1973 Guj 283:14 Guj LR 487. 4

AIR 1970 Mad 247: (1969) 2 Mad LJ 239. 4

*From Order of K. P. Tripathi, Suo, J., Parlakhemundi, D/- 4-12-1978.

LY/LY/G46/81/LGC

AIR 1969 Ker 75:1968 Ker LT 479. 4
AIR 1968 Orissa 181:34 Cut LT 1195. 4
AIR 1931 Mad 67:61 Mad LJ 43. 3

L. Rath and B. S. Misra, for Petitioner.

ORDER:— The plaintiff filed an application for amendment of the plaint seeking inter alia to raise the valuation of the suit. His application having been allowed and the valuation of the suit after amendment being beyond the pecuniary jurisdiction of the trial court, the plaint was directed to be returned for presentation in the proper Court. In the appeal of defendant numbers 2 and 3, the order of the trial court was set aside. The plaintiff is in revision before this Court.

2. The petitioner instituted a suit seeking a declaration that the defendants have no manner of right, title or interest in the suit land nor were they in possession and he also sought the relief of permanent injunction. The suit was, however, valued at Rs. 100/- for the purpose of jurisdiction. After defendants 2, 3 and 4, filed their written statements claiming title through purchase under certain registered sale deeds, the petitioner (plaintiff) filed an application seeking amendment of the plaint. He impugned the title of the vendors of the defendants and sought the relief of confirmation of possession alternatively of recovery of possession. In view of the altered nature of the reliefs the plaintiff sought to value the suit at Rs. 2800/-. The amendment having been allowed, the valuation of the suit got raised to Rs. 2800/- and the learned Munsif holding that the suit after amendment was beyond his pecuniary jurisdiction, directed the plaint to be returned for presentation in the proper court.

3. The defendants 2 and 3 challenged the order in appeal. Their contention before the learned Subordinate Judge was that a court should not permit amendment of the plaint which would entail the loss of pecuniary jurisdiction by itself. In support of the aforesaid contention reliance was placed upon the case of Satti Ramana v. Padala Amireddi (AIR 1931 Mad 67) and the case of Mst. Zohra Khatoon v. Janab Moham-mad Jane Alam (AIR 1978 Cal 133). In the case reported in AIR 1931 Mad 67, (supra) the suit was for a declaration

that certain lease deeds executed by the plaintiff and some other defendants in favour of defendant No. 1 were fraudulent and invalid and for dissolution of partnership and for other consequential reliefs. The suit was valued at Rs. 100/-. An objection to the valuation having been raised, it was held that the valuation should be Rupees 56,919/2/3 ps. in addition to another sum of Rs. 2318/6/0. The court then directed that the plaintiff should pay court fee on the aforesaid amounts before the plaint was returned for presentation to the proper court. The plaintiff having failed to pay the court fee, the court rejected the plaint. In such circumstances, their Lordships of the Madras High Court held:—

"When the Court finds that on the correct valuation, the plaint is not cognizable by it the proper thing to be done is to return the plaint so that it may be presented to the Court having jurisdiction. It will be for the Court having jurisdiction to entertain the plaint, to consider whether proper court fee has been paid and if not paid, to proceed in accordance with the power conferred upon it by law for that purpose. If a Court finds that it has no jurisdiction, then to say that it has jurisdiction to ask the plaintiff to amend his valuation with a view to direct him to pay additional court fee and then return the plaint, would seem to suggest that a Court not having jurisdiction has got jurisdiction to do something which is prima facie the duty and function of the proper Court.

It is difficult to understand how this decision of the Madras High Court was an appropriate one for reference in the present case. The trial court had called upon the plaintiff to pay court fee on the valuation determined when it itself had not the jurisdiction to entertain the suit on the correct valuation. Against that background the aforesaid observation was made by their Lordships. In that case on the correct valuation the Court had no jurisdiction to entertain the suit. It was, therefore, improper for the trial court to call upon the plaintiff to pay the additional court fee before the plaint was returned for presentation in the proper court.

In the case reported in AIR 1978 Cal 133 (supra), the Wakf Commissioner had

appointed defendants 1 to 6 therein as Co-Mutwalis along with the plaintiff in respect of the wakf property. The plaintiff prayed for a declaration that the order of the Commissioner was bad and invalid and the defendants had no right, title or interest in the wakf property and for mandatory injunction. It was contended on behalf of the defendants that the Court had no territorial jurisdiction. The question was decided preliminarily and the trial court held against the plaintiff and directed return of the plaint. In appeal it was contended that if it was held that the court had no jurisdiction, the property being situate beyond the court's territorial jurisdiction, the plaintiff might be given an opportunity to amend the plaint by confining the relief to a challenge of the order only and deleting the rest. In such circumstances, the court held:—

".....where the court inherently lacks jurisdiction to entertain the suit it cannot make any order for amendment to bring the suit within its jurisdiction....."

This case is distinguishable on facts and is not an authority for the present case.

4. I regret to observe that the learned Subordinate Judge was not properly advised at the Bar. There is a direct authority of our High Court in the case of Kurupa Naik v. Bhagaban Naik ((1968) 34 Cut. LT 1195): (AIR 1968 Ori 181). The principle as summarised in the placitum is "Amendment adopting valuation of relief for injunction the same as value for jurisdiction according to Section 8 of the Suits Valuation Act, can be allowed even if such amendment oust the jurisdiction Court which must return the plaint to be filed in court having jurisdiction."

Reference may also be made to the case Patel Construction & Co. at Bombay v. Shah Raichand Maulak (AIR 1973 Guj 283). In the well reasoned judgment Justice Mehta after analysis of the various relevant provisions of the Code of Civil Procedure said:

"Where the effect of the amendment would be to oust the jurisdiction of the Court, which it originally had, the proper course is to allow the amendment and then return the amended plaint for presentation to the proper Court. To reject the application for amendment on the ground that the amendment would

take the suit out of the pecuniary jurisdiction of the Court is not in consonance with the spirit of Order 6, R. 17 nor is it open to the court to return the plaint along with the application for amendment to be filed in the proper court."

His Lordship after discussing the various alternatives open when an amendment is sought in such a manner that allowing the same would oust the jurisdiction of the Court in which the suit was initially filed made observations quoted above. The same view is also taken in the case of T. K. Sreedharan v. P. S. Job (AIR 1969 Ker 75) and in the case of M. Allaudin v. P. S. Lakshminarayanan (AIR 1970 Mad 247):—

I am sure if the aforesaid decision had been cited before him, the learned Subordinate Judge would not have held.

"The learned Munsif had no jurisdiction to allow the amendment. The amendment thus allowed is neither proper nor correct because the learned Munsif had no pecuniary jurisdiction to entertain the suit of that valuation."

5. I would, therefore, set aside the judgment passed by the learned Subordinate Judge and restore that of the learned Munsif. The plaint be returned for presentation in the proper court. As opposite parties did not enter appearance, there would be no order as to costs.

Petition allowed.

AIR 1982 ORISSA 27

N. K. DAS AND R. C. PATNAIK, JJ.

Smt. Hiramani Kundu and others, Petitioners v. Additional District Magistrate (Land Reforms), Balasore and others, Opposite Parties.

Original Jurisdiction Case No. 749 of 1977, D/- 17-11-1981.

Orissa Land Reforms Act (16 of 1960), Ss. 36-A and 67 — Suit for declaration of title and eviction of defendant — Civil Court holding defendant a trespasser — subsequent application by defendant under S. 36-A of O. L. R. Act in revenue court for claiming tenancy rights in respect of suit property — Not maintainable — (Civil P.C. (5 of 1908) S. 9).

Where in a civil suit for declaration of title and for eviction of defendant on

the ground that the defendant had trespassed upon the suit land, the defendant was held a trespasser by the Civil Court having jurisdiction to entertain the suit a subsequent application by defendant under S. 36-A of O. L. R. Act claiming tenancy rights in respect of suit property was not maintainable, because the right to make an application under S. 36-A of the O. L. R. Act has been given by the statute to a tenant, and not to a trespasser, (1975) 41 Cut LT 1320, Foll. AIR 1976 Ori 103, Disting.

(Paras 3, 5)

In the instant case, when the suit for declaration of title and for eviction of defendant was filed in the Civil Court, the Civil Court had jurisdiction to try the case. After being defeated in the litigation in the Civil Court, the defendant came up with an application under S. 36-A of the O. L. R. Act, while the decree of the civil court was pending for execution. Since there had already been a decision of the civil court that the defendant was a trespasser, the defendant therefore, could not thereafter be allowed to turn round and say that he was a tenant and thereby to nullify the decree of the civil court. AIR 1968 SC 466, Foll.

(Para 4)

Cases Referred : Chronological Paras
AIR 1976 Ori 103 : ILR (1975) Cut 1526

3

(1975) 41 Cut LT 1320 : (1975) 2 Cut WR 1050

3

AIR 1968 SC 466 : 1968 All LJ 313 : (1968) 2 SCJ 225

4

B. Pal, N. Prusty and A. Mohanty, for Petitioners; R. Mohanty, for Opposite Parties.

DAS, J.:— Petitioners are successors-in-interest of Bhagabat Kundu. Bhagabat Kundu had filed a civil suit (O.W. No. 217 of 1966) in the court of the Munsif, Balasore against opposite party No. 4 for declaration of title and for eviction of opposite party No. 4 on the ground that opposite party No. 4 had trespassed upon the suit land. The defence of opposite party No. 4 was that the vendor of Bhagabat Kundu had contracted to sell the suit land to him and had delivered possession thereof. He claimed that he was entitled to protection under S. 53-A of the Transfer of Property Act. The learned Munsif held that Bhagabat had title to the suit property and opposite party No. 4 was a trespasser and hence decreed the

suit. Opposite Party No. 4 preferred an appeal against the decree of the learned Munsif, but the same was dismissed. He thereafter preferred Second Appeal No. 272 of 1979 which was decided on 12-2-1974 and the decree of the trial court was upheld. After disposal of the Second Appeal, the petitioners who are the legal representatives of Bhagabat Kundu levied execution of the decree for delivery of possession, but opposite party No. 4 filed O. L. R. Case No. 51 of 1974 under S. 36-A of the Orissa Land Reforms Act claiming tenancy right in respect of the suit property. The Tahasildar held that possession had been taken in the execution case levied by the petitioners after the disposal of Second Appeal and that opposite party No. 4 was not a tenant. As against the said order of the Tahsildar, opposite party No. 4 preferred O.L.R. Appeal No. 86 of 1975. The appellate authority set aside the decision of the Tahsildar holding that the revenue court is the proper court to hold whether there was relationship of landlord and tenant and remanded the case to the Tahsildar. As against the said order, the petitioners preferred O. L. R. Revision Case No. 20 of 1976 before the Additional District Magistrate who was the authority under the Land Reforms Act. The revisional authority confirmed the findings of the appellate authority and dismissed the revision. It further held that the revenue officer can suo motu make a case to confer the tenancy right under Ss. 3, 61 and 67 read with Section 36-A of the O.L.R. Act and the Civil Court has no jurisdiction to give a finding about the relationship of landlord and tenant. Ultimately, the revisional authority held that opposite party No. 4 is the tenant and directed to fix the fair rent. This writ petition is directed against the decision of the revisional authority.

In the return, it is asserted that the proper authority under the O. L. R. Act is the revenue court and the Civil Court has no jurisdiction to record the finding as to relationship of landlord and tenant and, as such, the decision of the civil court culminating in the Second Appeal is not binding against opposite party No. 4.

2. Admittedly, application under Section 36-A of the O.L.R. Act was filed

after disposal of the Second Appeal and during the pendency of the execution case. In the Second Appeal, it was held that opposite party No. 4 failed to establish his claim as Bhagchasi and he was not in possession of the property, but was a trespasser. The claim for specific performance of contract made by opposite party No. 4 in the civil suit was barred by limitation. Opposite party No. 4 had taken a stand in the civil suit that he came into possession of the disputed property by virtue of an agreement for sale by the vendor of the predecessor of the petitioners and he was in possession. As such, he also claimed protection under Sec. 53-A of the T. P. Act. The stand taken by opposite party No. 4 was negatived by the civil court. He never took the stand in the civil suit that he was a tenant under the O. L. R. Act even though the Second Appeal was finally disposed of in 1974. Being defeated in the litigation in the civil court, while the petitioners levied execution for taking possession of the suit property and to evict opposite party No. 4 as he was held to be a trespasser, opposite party No. 4 came with a petition under S. 36-A of the O. L. R. Act claiming tenancy over the suit property.

3. The question for consideration is when there has already been a finding that opposite party No. 4 is not a tenant within a definition of the Act, whether any right subsists to opposite party No. 4 to make an application under Section 36-A of the O. L. R. Act for holding that he is a tenant, but not a trespasser. Such a question was raised in this Court in Dandapani Sahu v. Konchada Panduranga Subudhi, (1975) 41 Cut LT 1320. In that case, there had already been a decree that defendant No. 1 in that case was not a tenant within the definition of the Act and when that defendant No. 1 filed a petition claiming tenancy right under Section 36-A of the O. L. R. Act, it was held that the decrees already passed cannot be superseded or vacated on account of introduction of S. 36-A of the Act to the extent that a binding decree declaring defendant No. 1 to be trespasser would stand ignored. In view of the adjudication that he is a trespasser, the application under S. 36-A of the Act was not maintainable. The decree of the civil court should not stand vacated or wiped out and the dispute

should not be left to be adjudicated by the revenue officer.

The learned counsel for opposite party No. 4 relied on a decision of this Court in Sankar Kumar Bhattar v. Tahsildar-cum-Revenue Officer, Basta, ILR (1975) Cut 1526 : (AIR 1976 Orissa 103). That was a case where the civil suit was pending in the trial court when the amendment came into force and the defendant in that case took the stand under the O. L. R. Act. The suit was only for interim injunction and after the amendment of the O. L. R. Act, the defendant took the stand that he was protected under the provisions of the said Act and he filed a petition under S 36-A of the O. L. R. Act. The position was that while the civil suit for an injunction was pending in the civil court for trial, the defendant filed a petition under S. 36-A of the O. L. R. Act and this Court held that the revenue authority was the proper authority in such circumstances to decide the dispute. It was further held in that case that the meaning of the expression 'to entertain any suit' in S. 67 of the O. L. R. Act would be to receive and to deal with it or to admit it to consideration, and the process of entertaining would continue until the suit is finally determined. The net result would be that the civil court would lose the further jurisdiction to decide the question of existence of relationship of landlord and tenant between the petitioners and opposite parties after coming into force of the President's Act 17 of 1973. The case of Sankar Kumar Bhattar was taken into consideration by this Court in Dandapani case. It was held that there had already been a finding that the defendant in that case was not a tenant within the meaning of the definition of the Act and the right to make an application under S. 36-A of the Act has been given by the statute to a tenant, and not to a trespasser. The facts and circumstances of the present case are almost equal to the case of Dandapani Sahu. The difference between Dandapani Sahu case and the case of Sankar Bhattar is that in the latter case there had not been any conclusive decision as to whether the defendant was a trespasser or not but in Dandapani Sahu case there had already been a decision that the defendant was a trespasser. Therefore, the principles laid down in Sankar Bhattar

case are not applicable to the facts and circumstances of the present case.

4. It has also been held by the Supreme Court in Smt. Sonawati v. Sri Ram, AIR 1968 SC 466, that a party who is defeated on merits of dispute may not by securing order from another court, during the pendency of suit be permitted to displace jurisdiction of civil court to try the suit which was within the competence when the suit was filed. Admittedly, in the instant case when the suit was filed in the civil court, the civil court had jurisdiction to try the case. It is also apparent from the records that after being defeated in the litigation in the civil court, opposite party No. 4 came up with a petition under S. 36-A of the O. L. R. Act while the decree of the civil court was pending for execution. There had already been a decision of the proper court that opposite party No. 4 was a trespasser. Opposite party No. 4 cannot be allowed to turn round and say that he is a tenant and thereby to nullify the decree of the civil court.

5. The learned counsel for opposite party No. 4 relying on Ss. 3 and 67 of the O. L. R. Act contends that it is the revenue court which is the proper authority to decide the dispute between the parties and the civil court has no jurisdiction. We have already held that when there has already been an adjudication by the civil court, the application under S. 36-A of opposite party No. 4 in the revenue court is not maintainable. The questions raised by the learned counsel for opposite party No. 4 under Ss. 3 and 67 of the O. L. R. Act were also taken into consideration by this Court in Dandapani Sahu case. After considering the legal positions raised under the aforesaid two Sections, this Court has come to the ultimate conclusion that an application under these circumstances under Sec. 36-A of the O. L. R. Act is not maintainable. Accordingly, we hold that the decision of the Additional Tahsildar vide Annexure-1 is the correct decision and the decisions of the appellate and revisional authorities as in Annexures 3 and 4 are wrong.

6. In the result, the writ petition is allowed. Annexures 3 and 4 are hereby quashed and Annexure 1, the decision of the Additional Tahsildar, is sustained.

In the circumstances of the case, there will be no order as to costs.

R. C. PATNAIK, J.:— I agree,
Petition allowed.

AIR 1982 ORISSA 30

**R. N. MISRA, C. J.
AND B. K. BEHERA, J.**

Surendranath Das Adhikari (dead) and after him Harendra Kumar Das and others, Appellants v. Sudhir Kumar Behera and others, Respondents.

First Appeal No. 246 of 1970, D/- 2-11-1981.*

**Hindu Law — Joint family property
— Alienation — Sale for legal necessity
or for benefit to the estate.**

Where the entire homestead land was sold for the purchase of another piece of land for construction of a residential house, the sale could not be said to be an act of prudent management for the benefit to the estate of family or for any legal necessity, when there was no evidence that the house standing on the homestead land of the family was in a dilapidated condition and the land was sold for a higher price for the purpose of purchasing another piece of homestead land at a lower price. AIR 1971 SC 1028; AIR 1974 Orissa 218 and AIR 1981 Orissa 23, Referred. (Para 11)

Cases Referred : Chronological Paras

AIR 1981 Orissa 23 : 50 Cut LT 507 5

AIR 1974 Orissa 218 : (1974) 1 Cut WR 350 5

AIR 1971 SC 1028 : (1971) 2 SCJ 550 5

R. Mohanty and N. Patra, for Appellants; N. Mukherjee, D. Mukherjee, Jayadev Sahu and Miss Rama Natia, for Respondents.

BEHERA, J.:— The defendant No. 2 and upon his death, his legal representatives and defendant No. 21 are in appeal against the judgment and decree passed by the learned Subordinate Judge, Balasore, holding that the sales effected by the defendant No. 22 (respondent No. 23) in their favour were not binding on the plaintiffs Nos. 1 and 2, the sons of the defendant No. 22, who are the respondents Nos. 1 and 2 in this appeal.

*From decision of K. C. Kar, Sub. J., Balasore, D/- 3-9-1970.

LY/LY/G50/81/AAJ

2. The respondents Nos. 1 and 2 and the wife of the respondent No. 23 Trailokyanath Behera (defendant No. 22) had instituted the suit for a declaration that the transfers made by the respondent No. 23 in respect of the ancestral properties described in schedule 'Ka' of the plaint including the sales on 25-11-1957 in favour of the appellant No. 1 (defendant No. 2) under Ext. A for Rupees 100/- and in favour of the appellant No. 2 (defendant No. 21) on 16-10-1963 under Ext. D for Rs. 2,500/-, were not binding on them on the ground that the respondent No. 23, who had taken to squandering of money in horse race in Calcutta and in gambling, had executed the sale deeds which were not for any legal necessity nor for the benefit of the estate. The defendants nos. 9 to 12 and 14 to 18 were minors and were represented by pleader guardian. The original defendant No. 16 died during the pendency of the suit and was substituted by her legal representatives (defendants Nos. 16, 16 (ka) and 16 (kha)) The minor defendants through their pleader guardian, the defendants Nos. 16, 16(ka) and 16(kha) and the present appellants contested the suit. The other defendants including the defendant No. 22 (respondent No. 23) had been set ex parte. The appellants had resisted the suit by asserting that the income was inadequate for maintenance and meeting pressing expenses of the family and the respondent No. 23 had, therefore, sold the properties to meet the marriage expenses of his daughters, for repair of the house and for other household expenses. The sales, according to them, were all for legal necessity and for the benefit of the estate and they had purchased the lands after due enquiry about the existence of legal necessity. They had asserted that the respondent No. 23 had not taken to gambling nor had he been spending money in horse race or for other illegal purposes.

3. The learned Subordinate Judge framed six issues. No specific issue as to existence of legal necessity was framed, but both the contesting parties led evidence, oral and documentary, in their regard and were well aware of the relevancy of the question. The learned Subordinate Judge, after an elaborate consideration of the evidence with regard to issue No. 5 as to whether the plaintiffs had any right, title and

interest in the suit lands and as to whether they could challenge the validity of the alienations made by the respondent No. 23, came to find that the properties sold by the respondent No. 23 were the ancestral properties of the family and the evidence did not warrant a conclusion that the respondent No. 23 was a gambler or that he had been spending money in horse race. It was, however, found that besides lands, the respondents 1 and 2 and their father had income from trees and betel leaf garden and it was not possible to categorically say that they were always in want or were under financial stress. The learned Subordinate Judge, therefore, concluded that the sales in favour of the appellants had not been for legal necessity nor for the benefit of the estate. Accordingly, the suit was decreed.

4. Mr. Patra has submitted that the oral and documentary evidence would lead one to a reasonable conclusion that the sales as per Exts. A and D were for legal necessity as also for the benefit of the estate and were, therefore, binding on the plaintiffs. Mr. Mukherjee on the other hand submitted that on the evidence on record, the findings of the learned Subordinate Judge could not be assailed.

5. As to the proof of legal necessity and the nature of evidence to be adduced in proof thereof, we would quote some observations made by the Supreme Court in the case of *Smt. Rani v. Smt. Santa Bala Debnath* reported in AIR 1971 SC 1028. Their Lordships observed (at p. 1031):—

"Legal necessity to support the sale must, however, be established by the alienees. Sarala owned the land in dispute as a limited owner. She was competent to dispose of the whole estate in the property for legal necessity or benefit to the estate. In adjudging whether the sale conveys the whole estate, the actual pressure on the estate, the danger to be averted, and the benefit to be conferred upon the estate in the particular insistence must be considered. Legal necessity does not mean actual compulsion: it means pressure upon the estate which in law may be regarded as serious and sufficient. The onus of proving legal necessity may be discharged by the alienee by proof of actual necessity or by proof that he made proper and

bona fide enquiries about the existence of the necessity and that he did all that was reasonable to satisfy himself as to the existence of the necessity.

Recitals in a deed of legal necessity do not by themselves prove legal necessity. The recitals are, however, admissible in evidence, their value varying according to the circumstances in which the transaction was entered into. The recitals may be used to corroborate other evidence of the existence of legal necessity. The weight to be attached to the recitals varies according to the circumstances. Where the evidence which could be brought before the Court and is within the special knowledge of the person who seeks to set aside the sale is withheld, such evidence being normally not available to the alienee, the recitals go to his aid with greater force and the Court may be justified in appropriate cases in raising an inference against the party seeking to set aside the sale on the ground of absence of legal necessity wholly or partially, when he withholds evidence in his possession."

Referring to and relying on the afore-said principles laid down by the Supreme Court, this Court in the case of *Dhana Das v. Pandav Das* reported in AIR 1974 Orissa 218 held (at p. 219) :

"Even where the manager of a joint Hindu family alienates joint family property, the alienee is bound to inquire into the necessity for the alienation, and the burden lies on the alienee to prove either that there was legal necessity in fact, or that he made proper and bona fide enquiries as to the existence of such necessity and did all that was reasonable to satisfy himself as to the existence of such necessity."

The same principles have been enunciated in the case of *Karunakar Panda v. Durgabati Bewa* reported in AIR 1981 Orissa 23.

6. Judged in the light of the afore-said principles, we find, for the reasons to follow, that the evidence relied on by the appellants as to the existence of legal necessity justifying the two sales in question was far short of the mark.

7. As has rightly been held by the learned Subordinate Judge, on the basis of the evidence adduced from both the sides, there was paucity of evidence to support the stand that for meeting

household necessities of the family ancestral properties had to be sold. The evidence of the respondent No. 2 as PW 1 in this regard and in particular with regard to the income of the family from mango, coconut and bamboo clumps, besides the betel leaf garden gets some support from the evidence of DW 1, who has stated in his cross-examination that the respondent No. 23 owned and possessed a betel leaf garden 15 to 16 years back and its extent was 7 to 8 decimals. It would also appear from his evidence that the respondent No. 23 had 7 to 8 cocoanut trees and had also mango and cashew-nut trees, although according to him, at the time of cyclone, most of the trees were destroyed. The respondent No. 23, according to DW 1, used to get 2 to 2½ maunds of cashew-nut every year. Besides, he had 3 to 4 bamboo clumps. In Ext. D, a reference had been made to the transfer of trees. DW 4, the son of the original appellant No. 1, had testified about the destruction of the trees on the land of the respondent No. 23 by cyclone, but on his own admission, he had no personal knowledge about the same. There was no specific evidence from the side of the contesting defendants as to the actual yield from the land in question and their evidence with regard to the necessities of the family of the respondent No. 23 was vague and unsatisfactory. It cannot, therefore, be said that the trial court went wrong in coming to the conclusion that there was no legal necessity for the alienations.

8. Coming to the sales under Exts. A and D in favour of the original appellant No. 1 and the appellant No. 2 respectively, the learned Subordinate Judge had given due consideration to the evidence from both the sides in reaching the conclusion that the sales were not for legal necessity or for the benefit to the estate of the family.

9. As regards the sale in favour of original appellant No. 1 as per Ext. A for Rs. 100/- on 25-11-1957, reliance was placed on the evidence of DW 4, the son of the appellant to the effect that at the instance of his father, he got the sale deed executed and registered. The original appellant No. 1 had in his written statement stated that the respondent No. 23 had necessity to sell the land for household expenses and for mainten-

ance of the family. A recital had been made in Ext. A that the sale was for household expenses. No clear evidence had been led as to the nature of the household expenses. At the time of the execution of Ext. A, DW 4 was reading in class IX and was about 18 years of age. It was, therefore, highly unlikely, as found by the trial court in paragraph 26 of the judgment, that this witness would have been entrusted with the execution of the sale deed by the respondent No. 23. The repayment of the loan of Rs. 50/- to Khetramohan Sahu by DW 4 out of the consideration money after which the handnote was destroyed, as deposed to by DW 4, was not mentioned in the sale deed and has not been supported by any other witness. DW 4 has, no doubt, deposed that his father was old and ailing at the time of the trial of the suit and was not in a position to move about, but there was nothing to show that he was not in a position to depose or that he could not have been examined on commission. This was not done. DW 4 has admitted in his cross-examination that he had not been keeping any information regarding the family of the respondent No. 23. Thus, apart from the intrinsic weaknesses in the evidence of DW 4, there was no independent evidence to support the case of the original appellant No. 1 that the sale in his favour was for legal necessity. There was also no clear evidence that the original appellant No. 1 or his family members had made due and proper enquiries as to the existence of legal necessity for the sale of the land as per Ext. A. The learned Subordinate Judge has rightly concluded that legal necessity for this sale has not been established.

10. As for the sale in favour of the appellant No. 2 of the entire homestead land of the family of the respondent No. 23 vide Ext. D for Rs. 2,500/- on 16-10-1963, the evidence with regard to the legal necessity justifying the sale or to show that the sale was for the benefit to the estate was unsatisfactory. It had been pleaded by the appellant No. 2 in his written statement that the respondent No. 23 was in urgent need of money for the marriage expenses of his daughter, household expenses and for getting a piece of land from his brother-in-law for the purpose of mov-

ing away to the latter's village. In Ext. D, it had been stated that the sale was for repayment of some debts and for purchasing a piece of land at another place for the purpose of residence. There was no averment therein with regard to the expenses for the marriage of his daughter. It is admitted on all hands that under Ext. D, the entire homestead land of the family was disposed of. The evidence of the appellant No. 2 as DW 2 was that the respondent No. 23 had necessity to sell the land as he was to purchase a homestead land at Handipada from his brother-in-law at a low price and besides, he was in need of money for household expenses and he (DW 2) made enquiries as to the existence of the necessity. There was no evidence to show that the ancestral house of the respondent No. 23 and his sons was in a dilapidated condition or that there was pressing necessity to dispose of that piece of homestead land with the house thereon. There was evidence to show that the family of the respondent No. 23 after the sale of this land had been residing in a house standing on the land of the uncle of the respondents Nos. 1 and 2, but as the evidence would show, after the purchase of the entire homestead land, the appellant No. 2 had driven away the respondents Nos. 1 and 2 and their father and, therefore, they had shifted to Handipada where they had been staying. No satisfactory evidence had been led to show that out of the consideration money, the respondent No. 23 had purchased any house site. No sale deed showing any such purchase has been brought into evidence. In the absence of other evidence, the mere fact that the respondent No. 23 had been staying elsewhere would not lead one to the conclusion that the site on which they had been staying had been purchased by them or transferred in their favour on the basis of consideration being paid out of the sale price. DW 2 (appellant No. 2) has stated in his cross-examination that after finishing the marriage of his daughter, the respondent No. 23 sold the land and left the house. The appellant No. 2 has not testified as regards the amount required or spent by the respondent No. 23 for household expenses. He has not deposed with regard to the necessity for repayment of loan

about which a statement had been made in the sale deed (Ext. D). There was, therefore, no satisfactory evidence from the side of the appellant No. 2 as regards the legal necessity for the sale of the entire homestead land of the family vide Ext. D nor was there any clear and convincing evidence to show that this appellant had made due and bona fide enquiries as to the existence of such legal necessity.

11. The sale of the entire homestead land by the respondent No. 23 in favour of the appellant No. 2 only for the purpose of shifting to another place could not be said to be for the benefit to the estate of the family. If the sale in the instant case had been for the purchase of another piece of land for construction of a residential house on the ground that the house standing on the homestead land was a dilapidated one and could be of no use to the family unless renovated involving needless outlay of money or that for some cogent and relevant reason the family residential house was not suitable for occupation and a shift to a new locality was expedient, it could not be said that it was for the benefit to the family. As already indicated, there was no evidence that the house standing on the homestead land of the family was in a dilapidated condition. There was no satisfactory evidence to indicate that the homestead land sold as per Ext. D had been sold for a higher price for the purpose of purchasing another piece of homestead land at a lower price. The sale of the entire homestead land of the family in favour of the appellant No. 2, in the circumstances of the case, could not be said to be an act of prudent management by the respondent No. 23 and it could not thus be said to be for the benefit to the estate of the family.

12. For the aforesaid reasons, the findings recorded by the learned Subordinate Judge that the sales in favour of the appellants as per Exts. A and D were not for legal necessity and the sale in favour of the appellant No. 2 was not for the benefit to the estate of the family are well-founded on facts and sustainable in law.

13. In course of the hearing, we suggested to counsel for the plaintiffs-respondents that in regard to the sale

of homestead under Ext. D, where the alienation is found not to have been a prudent act of the father, the alienee should be compensated in the matter of refund of at least a part of the consideration. On the basis of agreement of parties, we direct that as a condition to Ext. D being set aside, the plaintiffs would pay to the alienee thereunder half the consideration money, i.e., a sum of Rs. 1,250/- and failing payment, the alienee would be entitled to recover that amount through execution by virtue of the decree in this appeal.

14. Subject to this modification only, the judgment and decree of the trial court are affirmed and the appeal is dismissed with costs.

R. N. MISRA, C. J.:— I agree.

Appeal dismissed.

AIR 1982 ORISSA 34

R. C. PATNAIK, J.

State Bank of India, Petitioner v. M/s. Ashok Stores and others, Opposite Parties.

Civil Revn. No. 662 of 1979, D/- 26-10-1981.*

Civil P. C. (5 of 1908), O. 41, R. 27
(1) (b) — Additional evidence — Provisions of sub-clause (b) — Could be resorted to even if requirements of cl. (a) or (aa) are not satisfied.

The provisions of cl. (b) can be resorted to notwithstanding the fact that the facts of the particular case do not satisfy the requirements of cl. (a) or (aa) of R. 27 (1) of O. 41. If the requirements of either cl. (a) or cl. (aa) are satisfied, there would be no need to resort to the provisions contained in cl. (b). In the instant case, as the hearing of appeal had not commenced before the appellate court nor did the appellate court examine the evidence to adjudge the requirements of the provisions of cl. (b), it was inappropriate to deal with the application for additional evidence. (Paras 4, 6)

Cases Referred : Chronological Paras

AIR 1972 All 515	5
(1971) 2 Cut WR 357	3, 5
AIR 1963 SC 1526 : 1963 All LJ 903 :	
(1964) 1 SCA 35	3

*From decision of S. K. Patel, Sub. J., Bhubaneswar, D/- 24-10-1979.

LY/LY/F644/81/JDD/LGC—HN

AIR 1962 Orissa 9 : 27 Cut LT 141 3

AIR 1961 Orissa 169 : ILR (1961) Cut 226 3

AIR 1951 SC 193 : 1951 All LJ 78 : 1951 SCJ 274 3

AIR 1931 PC 143 : 1931 All LJ 513 : 61 Mad LJ 489 3

ILR (1907) 31 Bom 381 : 34 Ind App 115 (PC) 3

S. N. Sinha, for Petitioner; A. Mukherjee, A. K. Misra and S. C. Das, for Opposite Parties.

ORDER:— An order of the Subordinate Judge, Bhubaneswar, rejecting the prayer of the petitioner for adducing additional evidence has given rise to this revision.

2. The opposite parties having obtained a cash credit accommodation to the extent of Rs. 5,000/- secured a loan from the petitioner-Bank. When they failed to clear up the dues, the petitioner filed the suit for realisation of the amount outstanding against the opposite parties. The trial court decreed the suit in part holding the balance to have been barred by limitation. The petitioner filed an appeal and therein filed an application under O. 41, R. 27 of the Civil P. C. for acceptance of certain documents, namely, statement of accounts with certificate under the Bankers' Books of Evidence Act and certain cash credit pay-in-slips of different dates as additional evidence. Petitioner's case was that on 18-9-76 while the case was taken up for hearing, it was not ready and filed an application for time. Its prayer for adjournment having been rejected, the case was taken up and in such circumstances, it could not file the documents though the documents were in its possession. The petitioner also contended that under confusion of law, appropriate steps for proving the documents were not taken earlier. Its prayer before the trial court made belatedly for re-examination of its witnesses to prove the documents was refused. According to the petitioner, the documents would prove acknowledgment of liability by the opposite parties and so, no part of its claim would be barred by limitation. Against the aforesaid background, the petitioner filed its application for reception of additional evidence. The appellate court rejected the petition holding as follows: "I find that the present petition does not come under any of these three cate-

gories. It was not a case where the lower court refused to admit the evidence. Since the documents now sought to be produced were in possession and knowledge of the petitioner it has no excuse not to produce it before the lower court. For pronouncing the judgment in appeal, this appellate court does not require the documents. Thus I find the plaintiff's petition does not come within the ambit of O. 41, R. 27, C.P.C....."

No exception can be taken that in the facts and circumstances of the case, cls. (a) and (aa) of sub-r. (1) of E. 27 of O. 41, C. P. C. were not attracted. Mr. Sinha, learned counsel for the petitioner, however, joins issue on the observation of the appellate judge that the appellate court did not require the documents. He submits that the case came within the ambit of cl. (b) of sub-rule (1) which could still apply despite non-applicability of cls. (a) and (aa). He further submits that the stage, when the appellate court should decide whether the document is required by it, is reached after the commencement of the hearing of the appeal when the court apprises itself of the facts and circumstances of the case. At that stage only the appellate court would be in a position to adjudge the requirement. The record of the appeal does not disclose that the appellate court had by the time of disposal of the application filed by the petitioner for adding additional evidence apprised itself of the facts of the case. He submits that the order of the appellate court rejecting the petition of the petitioner for additional evidence is unsustainable.

3. The provisions contained in O. 41, R. 27 of the Civil P. C. are clearly not intended to allow the litigant who has been unsuccessful in the lower court to patch up the weak parts of his case and fill up the omissions in the court of appeal. Under cl. (1) (b) it is only where the appellate court requires it that additional evidence can be admitted. It may be required 'to enable the court to pronounce the judgment or for any other substantial cause' but in either case it must be the court that requires it. The legitimate occasion for the exercise of his discretion is not wherever before the appeal is heard a party applies to adduce fresh evidence, but

"when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent". Such was the view of their Lordships of the Privy Council in Parsotim's case (AIR 1931 PC 143) expressing themselves strongly while approving the observations made by Lord Robertson in Kessowji's case (ILR (1907) 31 Bom 381). Their Lordships further observed:—

"It may well be that the defect may be pointed out by a party, or that a party may move the Court to supply the defect, but the requirement must be the requirement of the Court upon its appreciation of the evidence as it stands." (underlining supplied)

(AIR 1931 PC 143 : Parsotim Thakur v. Lal Mohar Thakur).

The Supreme Court in Arjan Singh's case (AIR 1951 SC 193) approved the rule laid down in Kessowji's case as reiterated in Parsotim's case and held:—

"The true test, therefore, is whether the appellate court is able to pronounce the judgment on the materials before it without taking into consideration the additional evidence sought to be adduced." (underlining supplied)

The necessity can be adjudged upon examining the evidence which is ordinarily done after the commencement of the hearing.

In the case of K. Venkataramiah v. Seetharama Reddy (AIR 1963 SC 1526) it was held (at p. 1530):

"Under R. 27 (1), the appellate court has the power to allow additional evidence not only if it requires such evidence 'to enable it to pronounce judgment', but also for 'any other substantial cause'. There may well be cases where even though the court finds that it is able to pronounce judgment on the state of record as it is, and so it cannot strictly say that it requires additional evidence 'to enable it to pronounce the judgment, it still considers that in the interest of justice something which remains obscure should be filled up so that it can pronounce its judgment in a more satisfactory manner. Such a case will be one for allowing additional evidence for any other substantial cause under R. 27 (1) (b) of the Code."

This view modified and extended the rule laid down in Arjan Singh's case (AIR 1951 SC 193), namely, that even

if the court is able to pronounce the judgment, still in the interest of justice it can receive additional evidence. From the aforesaid, it is obvious that the provisions contained in cl. (b) can be applied despite inapplicability of cls. (a) and (aa).

In the case of Chunilal Ojha v. Mul Shankar Ojha (AIR 1961 Orissa 169), a Division Bench of this Court found want of due diligence on the part of the plaintiff who sought reception of additional evidence, but held (at p. 171):—

"they came within the scope of 'any other substantial cause' referred to in cl. (c) of R. 27 (1) of O. 41" (Orissa Amendment).

In AIR 1962 Orissa 9 (Banchhanidhi Behera v. Ananta Upadhaya), it was held (at p. 10):—

"Where the case of the appellant for adducing additional evidence, could not be covered either by cls. (a) or (b) of sub-r. (1) of O. 41, R. 27 (Patna Amendment), under cl. (c) it is competent for the court, after going through the whole case, to say that the document in question was necessary to enable the court to pronounce the judgment. But before hearing the case on merits, the court cannot be in a position to decide whether such document is necessary or not." (underlining supplied)

In Mahammad Baboo's case ((1971) 2 Cut WR 357), the trial court had not refused to admit the documents or notwithstanding exercise of due diligence, the document was not within the knowledge of the party or could not be produced at the time the judgment was passed. Even then this Court considered whether the conditions mentioned in cl. (c) (Orissa Amendment) could be applied and held:—

".....It is essential that the court should require such additional evidence to enable it to pronounce judgment or for other substantial cause which occasion will arise only during the course of hearing of the appeal or on examination of the evidence. Before that stage, it is not possible for the court to come to a finding that without this additional evidence it will be unable to pronounce judgment or other substantial cause exists.....Without going through the evidence and finding out if there is any lacuna or otherwise, the court could not

have arrived at the conclusion that 'it will help for a just adjudication.' (underlining supplied).

4. The observations, contained in the various decisions, referred to above, indicate that the provisions of cl. (b) can be resorted to notwithstanding the fact that the facts of the particular case do not satisfy the requirements of cl. (a) or (aa) of R. 27 (1). I find it difficult to accept the contention of Mr. Mukherjee that the provisions contained in cl. (b) cannot be applied where the provisions contained in cls. (a) and (aa) are not satisfied. The answer to this contention lies in the contention itself, namely, that if the requirements of either cl. (a) or cl. (aa) are satisfied, there would be no need to resort to the provisions contained in cl. (b). That apart, as authoritatively stated by the Privy Council and the Supreme Court, the cause of ends of justice is paramount and that is the justification for enacting the provisions contained in cl. (b).

5. Mr. Mukherjee, learned counsel for the opposite parties, relied upon a decision in the case of Deputy Registrar Co-operative Societies, U. P., Lucknow v. Choudhuri Sarfaraz-un-Zaman (AIR 1972 All 515) and contended that a decision to admit additional evidence under R. 27 (1) (b) can as well be taken before hearing of the appeal and consideration of such question need not be contemporaneous with or subsequent to the hearing of the appeal itself. There is no conflict between the Allahabad case and the cases decided by this Court. In Mohammad Baboo's case ((1971) 2 Cut WR 357) this Court said:

"The occasion for admitting additional evidence under cl. (c) will arise only during the course of hearing of the appeal or on examination of the evidence."

6. Inasmuch as the hearing of the appeal in the present case had not commenced before the appellate court nor did the appellate court examine the evidence to adjudge the requirements of the provisions of cl. (b), it was inappropriate to deal with the application for additional evidence. The order of rejection is, therefore, not sustainable and is set aside. The appellate court is directed to re-hear the application for reception of additional evidence filed by the petitioner at the appropriate stage

and deal with the same according to law.

In the result, the revision is allowed but without costs.

Revision allowed.

AIR 1982 ORISSA 37

SPECIAL BENCH

R. N. MISRA, K. B. PANDA AND P. K. MOHANTI, JJ.

Ranjuk Ranjan Das, Petitioner v. Smt. Pranati Kumari Behera, Respondent.

Matrimonial Ref. No. 2 of 1977, D/- 27-6-1980.*

Divorce Act (4 of 1869), S. 19 — Decree of nullity of marriage on ground of fraud — Application as to, to District Judge — Not maintainable — It is exclusive jurisdiction of High Court.

In so far as dissolution of marriage and nullity of marriage on the specific grounds stated in S. 19 are concerned both the District Court and the High Court have concurrent jurisdiction and when the case is one for declaration of nullity of marriage on the ground of force or fraud the exclusive jurisdiction of the High Court is saved. AIR 1966 Andh Pra 178, Rel. on. (Para 4)

Cases Referred: Chronological Paras
AIR 1966 Andh Pra 178 : (1965) 2 Andh WR 467 4

S. K. Dey, for Petitioner; Mahadev Misra and B. Das, for Respondent.

R. N. MISRA, J.:— This is a reference made under S. 20 of the Divorce Act, 4 of 1869 (hereinafter referred to as the 'Act') by the learned District Judge of Cuttack for confirmation of the decree of nullity of marriage between the spouses.

2. The husband made an application to the learned District Judge purporting to be under S. 18 of the Act and alleged that the father of the wife suppressed the fact that she had become pregnant through some other source by the time of marriage between the spouses which took place on 10th of April, 1976, and lured the husband to marry on the representation that provision would be made for him for earning livelihood. Soon after the marriage, the husband discovered the fact that his wife was already pregnant before marriage and claimed that the marriage was a nullity on the ground that the

husband's consent had been obtained by fraud.

3. The wife remained ex parte and on the basis of the evidence given by the husband and another, the learned District Judge accepted the allegations of the husband and declared the marriage to be a nullity on account of fraud subject to confirmation of the said decree by this Court.

4. Section 18 of the Act provides that any husband or wife may present a petition to the District Court or to the High Court, praying that his or her marriage may be declared null and void. The grounds of decree are contained in S. 19 which provides :—

“Such decree may be made on any of the following grounds :

1. that the respondent was impotent at the time of the marriage and at the time of the institution of the suit;

2. that the parties are within the prohibited degree of consanguinity (whether natural or legal) or affinity;

3. that either party was a lunatic or idiot at the time of the marriage;

4. that the former husband or wife of either party was living at the time of the marriage, and the marriage with such former husband or wife was then in force.

Nothing in this section shall affect the jurisdiction of the High Court to make decrees of nullity of marriage on the ground that the consent of either party was obtained by force or fraud.”

The ground on which the petition was laid before the District Court is that consent of the husband had been obtained by fraud. The jurisdiction to entertain a petition on such ground is exclusively of the High Court. It has been pointed out in the case of T. Saroja David v. Christie Francis, AIR 1966 Andh Pra 178 (at p. 179) :—

“It may be observed that in so far as dissolution of marriage and nullity of marriage on the specific grounds stated in S. 19 are concerned both the District Court and the High Court have concurrent jurisdiction and when the case is one for declaration of nullity of marriage on the ground of force or fraud, the exclusive jurisdiction of the High Court is saved. In order to understand what this jurisdiction is, it is necessary to refer to the history of that jurisdiction. Originally, the Ecclesiastical Courts in England were empowered to deal with matrimonial matters. The Supreme Courts in India which were administering the English Law as it was on a particular day, had inherited this jurisdiction from the Ecclesiastical Courts. Ultimately, by statute the High Courts have inherited their

*Reference made by S. N. Misra, Dist. J., Cuttack, D/- 30-7-1977.

jurisdiction direct from the Supreme Courts. Thus the power to make decrees of nullity of marriage on the ground of duress or fraud was inherited by the Supreme Courts, from the Ecclesiastical Courts and the High Courts inherited that power from the Supreme Courts"

This, in our view, seems to be the correct position in law. The District Court, therefore, had no jurisdiction to entertain the application and the reference thus is incompetent. We cannot in the circumstances confirm the decree. The reference is discharged. It is open to the husband if he is so advised to move this Court in an appropriate proceeding. There will be no order for costs.

PANDA, J.:—I agree.

P. K. MOHANTI, J.:— I agree.

Order accordingly.

AIR 1982 ORISSA 38

R. N. MISRA, C. J. AND
R. C. PATNAIK, J.

Chakradhar Patel, Petitioner v. Samasingha Service Co-operative Society Ltd. and others, Opposite Parties.

Original Jurn. Case No. 608 of 1979, D/-28-11-1981.

(A) Constitution of India, Arts. 226 and 12 — Co-operative Society which is a Society within meaning of S. 2 (k) of Orissa Co-operative Societies Act is not 'State' within meaning of Art. 12 — Writ petition by employee of society challenging his termination, not maintainable. (Orissa Co-operative Societies Act (2 of 1963), S. 2 (k)). Case law discussed.

(Para 5)

(B) Constitution of India, Arts. 226, 245 — Assistant Registrar directing society in terms of resolution of the Board of Society to terminate services of Secretary — Resolution passed on basis of material available — It could not be said that Board had abdicated its powers to Assistant Registrar — Writ petition challenging order of termination, not maintainable.

Where the Board of the Co-operative Society had decided to remove the Secretary as he had failed to show cause against the charges levelled against him and the Board felt that the charges in the circumstances were on good grounds and latter the Assistant Registrar directed the Society in terms of the Board's resolution to terminate the service of the Secretary it could not be said that the Board, the employer, had abdicated its powers to the Assistant Registrar. Hence,

LY/LY/G36/81/SMA/SSG—HN

the writ petition by the Secretary challenging the order of termination would not be maintainable even assuming that the Society is a 'state' within the meaning of Art. 12.

(Para 6)

Cases Referred : Chronological Paras

AIR 1981 SC 122 : 1980 All LJ 1070 : (1979)

4 SCC 160 5

AIR 1981 SC 212 : (1981) 1 SCJ 458 5

AIR 1981 SC 487 : (1981) 1 SCC 722 5

AIR 1981 SC 1395 : (1981) 3 SCC 431 : 1981

Cri LJ 871 4

AIR 1981 Orissa 143 : (1981) 51 Cut LT 437 5

AIR 1979 SC 1628 : (1979) 3 SCC 489 5, 7

AIR 1977 SC 112 : 1977 SCC (Lab) 532 4

AIR 1976 SC 888 : 1976 Lab IC 576 : 1976

SCC (Lab) 176 4

AIR 1975 SC 1329 : 1975 Lab IC 819 : (1975) 1 SCC 485 4

AIR 1975 SC 1331 : 1975 Lab IC 881 : (1975)

1 SCC 421 4, 5

AIR 1973 SC 855 : 1973 Lab IC 453 : 1973

SCD 525 4

AIR 1971 SC 1828 : 1971 Lab IC 1129 : (1971) 2 SCA 176 4

(1970) 2 Lab LJ 54 : 1970 SCD 434 (SC) 4

A. Das and S. N. Satapathy, for Petitioner;

G. Rath, R. K. Rath, N. C. Panigrahi and

Addl. Govt. Advocate, for Opposite Parties.

R. N. MISRA, C. J.:— The Samasingha

Service Co-operative Society Limited (opposite

party No. 1) — hereafter referred to as the

'Society' — is a society within the meaning

of S. 2 (k) of the Orissa Co-operative Soci-

eties Act, 1962 (hereafter referred to as the

'Act') having its registered office at Sama-

singha within the district of Sambalpur.

Petitioner was appointed as Secretary of the

said society and was an officer within the

meaning of S. 2 (g) of the Act. On 19-11-

1978 the President of the society (opposite

party No. 2) suspended the petitioner from

service and directed him to hand over charge

of his office to the Co-operative Extension

Officer of the Kolabira Block. Later that

day, the Board of Management of the society

approved the action of the President and also

accepted the resignation of the President.

The Co-operative Extension Officer was ap-

pointed as the Enquiring Officer to investi-

gate into the charges against the petitioner.

He called upon him to offer his explanations

against the charges. Though there is some

amount of confusion as to whether the order

under Annexure 1 was one of suspension or

discharge, the succeeding President of the

society wrote the following letter to the En-

quiring Officer:—

"... .. That the discharge order of

19-11-1978 is illegal as before issuing the dis-

...

charge order, no charge sheet has been issued to the Secretary. He was not even asked to show cause and there was no domestic enquiry made by our Board. So, the whole proceeding started against the Secretary (now suspended) is illegal, without jurisdiction and without justification. So, I request that before starting any proceeding against the Secretary, the status quo be maintained, and the suspension resolution be declared as null and void, as, if the Secretary seeks any redress in legal Court we will be bound to lose and our society would unnecessarily face irreparable loss in defending the case."

On 30-12-1978, the same President informed the petitioner that with effect from the date of issue of the order petitioner was removed from service. Challenge in this application is to the order of termination and petitioner has claimed consequential service benefits.

2. Opposite parties 1 and 2 have filed a common counter affidavit. Therein, it has been pointed out that specific charges had been framed against the petitioner by the President and such action was subsequently ratified by the Board. Petitioner did not show cause against the charges though a direction to the effect was given. The Extension Officer was entrusted by the Board with the work of enquiry. Allegation has been made in the counter affidavit that the letter dated 14-12-1978 said to have been written by the interim President was a concoction. No such letter was actually issued to the Co-operative Extension Officer. The Assistant Registrar of Co-operative Societies, Kachinda, by his letter dated 30th of Dec., 1978, advised the President to give effect to the decision of the Board dated 16-12-1978 in which it had been decided that petitioner's services should be put an end to. The final decision, therefore, was not of anybody else except the Board of the society which was competent to make the order. A specific plea was taken that the society was not 'State' within the meaning of Art. 12 and, therefore, the matter did not come within the ambit of Art. 226 of the Constitution and petitioner was not entitled to claim relief of restoration to service by invoking the extraordinary jurisdiction of this Court.

A separate counter affidavit was filed by opposite parties 3 and 4 who were the Enquiring Officer and the Assistant Registrar respectively. The factual stand taken in the other counter affidavit was adopted and further details of delinquency which led to the order of termination of service were indicated. These public officers also took the stand that the matter was not cognisable in

the extraordinary jurisdiction as the society was not 'State'.

Petitioner filed a rejoinder disputing the several questions of fact pleaded in the counter affidavit of the public officers.

3. Two questions arise, namely:—

(i) Whether opposite party No. 1 — society is 'State' within the meaning of Art. 12 of the Constitution; and

(ii) Whether on the facts of the case, petitioner is entitled to relief.

4. The first aspect had been argued by counsel for both sides at considerable length. In the case of *Indian Airlines Corporation v. Sukhdeo Rai*, AIR 1971 SC 1828, it was observed (at p. 1829):—

"It is a well settled principle that when there is a purported termination of a contract of service, a declaration, that the contract of service still subsisted, would not be made in the absence of special circumstances because of the principle that Courts do not ordinarily grant specific performance of service. This is so, even in cases where the authority appointing an employee was acting in exercise of statutory authority. The relationship between the person appointed and the employer would in such cases be contractual, i.e., as between a master and servant, and the termination of that relationship would not entitle the servant to a declaration that his employment had not been validly determined... .."

The position was reiterated in the case of *Bank of Baroda Ltd. v. Jivan Lal Mehrotra*, (1970) 2 Lab LJ 54 (SC), where it was said:—

"... .. The law as settled by this Court is that no declaration to enforce a contract of personal service will be normally granted. The well recognised exceptions to this rule are: (1) where a public servant has been dismissed from service in contravention of Article 311; (2) where reinstatement is sought of a dismissed worker under the industrial law by labour or industrial tribunals; (3) where a statutory body has acted in breach of a mandatory obligation imposed by statute"

The position was further clarified in the case of *Sirsi Municipality v. Cecelia Kom Francis Tellis*, AIR 1973 SC 855, where on a review of the several authorities, the Court by majority concluded saying (at p. 857):—

"The cases of dismissal of a servant fall under three broad heads. The first head relates to relationship of master and servant governed purely by contract of employment. Any breach of contract in such a case is enforced by a suit for wrongful dismissal and

damages. Just as a contract of employment is not capable of specific performance similarly breach of contract of employment is not capable of finding a declaratory judgment of subsistence of employment. A declaration of unlawful termination and restoration to service in such a case of contract of employment would be indirectly an instance of specific performance of contract for personal services. Such a declaration is not permissible under the law of Specific Relief Act.

The second type of cases of master and servant arises under Industrial Law. Under that branch of law a servant who is wrongfully dismissed may be reinstated. This is a special provision under Industrial Law. This relief is a departure from the reliefs available under the Indian Contract Act and the Specific Relief Act which do not provide for reinstatement of a servant.

The third category of cases of master and servant arises in regard to the servant in the employment of the State or of other public or local authorities or bodies created under statute.

Termination or dismissal of what is described as a pure contract of master and servant is not declared to be a nullity however wrongful or illegal it may be. The reason is that dismissal in breach of contract is remedied by damages. In the case of servant of the State or of local authorities or statutory bodies, Courts have declared in appropriate cases the dismissal to be invalid if the dismissal is contrary to rules of natural justice or if the dismissal is in violation of the provisions of the statutes. Apart from the intervention of statute there would not be a declaration of nullity in the case of termination or dismissal of a servant of the State or of other local authorities or statutory bodies.

The Courts keep the State and the public authorities within the limits of their statutory powers. Where a State or a public authority dismisses an employee in violation of the mandatory procedural requirements or on grounds which are not sanctioned or supported by statute the Courts may exercise jurisdiction to declare the act of dismissal to be a nullity. Such implication of public employment is thus distinguished from private employment in pure cases of master and servant."

In the backdrop of the law declared by the Supreme Court, petitioner can succeed in his submission only if he can bring his case within the category indicated in the last paragraph extracted above. The co-operative society or its officers cannot be taken to be public authority and employment thereunder cannot be

taken to be public employment in view of the recent pronouncement of the Supreme Court in the case of *S. S. Dhanoa v. Municipal Corporation, Delhi*, (1981) 3 SCC 431 : (AIR 1981 SC 1395). In para 7 of the judgment, it was categorically pointed out that a co-operative society registered under the Bombay Co-operative Societies Act of 1925 was not a 'corporation' established by or under an Act of the Central or State legislature. The Court again pointed out :—

"... .. Corporation established by or under an Act of Legislature can only mean a body corporate which owes its existence, and not merely its corporate status, to the Act. For example, a Municipality, a Zilla Parishad or a Gram Panchayat owes its existence and status to an Act of Legislature. On the other hand, an association of persons constituting themselves into a company under the Companies Act or a society under the Societies Registration Act owes its existence not to the Act of Legislature but to acts of parties though, it may owe its status as a body corporate to an Act of Legislature."

The Court approved the ratio in the case of *Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi*, AIR 1975 SC 1331, where it was observed (at p. 1396) :—

"... .. A company incorporated under the Companies Act is not created by the Companies Act but comes into existence in accordance with the provisions of the Act"

and also the observations in the case of *Sabhajit Tewary v. Union of India*, AIR 1975 SC 1329, where Chief Justice Ray pointed (at p. 1330) :—

"... .. The Society does not have a statutory character like the Oil and Natural Gas Commission, or the Life Insurance Corporation or Industrial Finance Corporation. It is a society incorporated in accordance with the provisions of the Societies Registration Act. The fact that the Prime Minister is the President or that the Government appoints nominees to the Governing Body or that the Government may terminate the membership will not establish anything more than the fact that the Government takes special care that the promotion, guidance and co-operation of scientific and industrial research, the institution and financing of specific researches, establishment or development and assistance to special institutions or departments of the existing institutions for scientific study of problem affecting particular industry in a trade, the utilisation of the result of the researches conducted under the auspices of the Council towards the develop-

ment of industries in the country are carried out in a responsible manner.”

In the case of Executive Committee of Vaish Degree College, Shamli v. Lakshmi Narain, AIR 1976 SC 888, a three-Judge Bench was considering a claim to protection of service in a College which was a society registered under the relevant Co-operative Societies Act. The question arose as to whether the Executive Committee of the College which later got affiliated to a University became a statutory body and, therefore, work under such College amounted to public employment and the majority decision was in the negative. In para 9, the majority opinion was expressed thus :—

“It is, therefore, clear that there is a well marked distinction between a body which is created by the statute and a body which after having come into existence is governed in accordance with the provisions of the statute. In other words the position seems to be that the institution concerned must owe its very existence to a statute which would be the fountainhead of its powers. The question in such cases to be asked is, if there is no statute would the institution have any legal existence. If the answer is in the negative, then undoubtedly it is a statutory body, but if the institution has a separate existence of its own without any reference to the statute concerned but is merely governed by the statutory provisions it cannot be said to be a statutory body... ..”

The Supreme Court in another case which went in appeal from this Court relating to a co-operative society in the case of Nayagarh Co-operative Central Bank Ltd. v. Narayan Rath, AIR 1977 SC 112, observed (at p. 113) :—

“The High Court has dealt with the question whether a writ petition can be maintained against a co-operative society, but we are inclined to the view that the observations made by the High Court and its decision that such a writ petition is maintainable are not strictly in accordance with the decisions of this Court... ..

and further observed by saying :—

“We would like to observe that the judgment of the High Court should not be treated as an authority for the proposition that a writ petition is maintainable against a co-operative society. That question shall have to be decided by the High Court as and when it arises in the light of the decisions of this Court.”

There are thus three categorical authorities of the Supreme Court where co-operative societies have not been considered to be ‘State’

nor employment under a co-operative society has been considered to constitute ‘public employment’. These societies have also not been accepted to be statutory in character.

5. Mr. Das for the petitioner, however, relied upon three later decisions of the Supreme Court being the cases of Ramana Dayaram Shetty v. International Airport Authority of India, AIR 1979 SC 1628; Som Prakash Rekhi v. Union of India, AIR 1981 SC 212 and Ajay Hasia v. Khalid Mujib Sehravardi, AIR 1981 SC 487. The cases of the International Airport Authority (AIR 1979 SC 1628) and Som Prakash Rekhi (AIR 1981 SC 212) were decided by three-Judge Benches of the Supreme Court. A Bench of this Court had recently occasion to deal with all these decisions of the Supreme Court in the case of B. Rajkumar Patra v. Union of India, AIR 1981 Orissa 143, where the question came up whether the Indian Rare Earths Limited — a Government Company wholly owned by the Union of India was ‘State’. This Court highlighted the aspects which led the learned Judges in the Airport Authority case to hold that it was an instrumentality of Government and found that a Company registered under the Companies Act like the Rare Earths Limited did not constitute an instrumentality of the State. Referring to the majority judgment in Som Prakash Rekhi’s case (AIR 1981 SC 212), the Court extracted a part of the judgment to the following effect :—

“A study of Sukhdev’s case (1975) 3 SCR 619 : (AIR 1975 SC 1331) (a Constitution Bench decision of this Court) yields the clear result that the preponderant considerations for pronouncing an entity as State agency or instrumentality are :

(1) financial resources of the State being the chief finding source.

(2) functional character being governmental in essence,

(3) plenary control residing in Government,

(4) prior history of the same activity having been carried on by Government and made over to the new body, and

(5) some element of authority or command.”

These obviously would not exist in the case of a co-operative society as here.

Then came Ajay Hasia’s case (AIR 1981 SC 487). Referring to this decision, the Division Bench of this Court observed (at p. 146 of AIR 1981 Ori 143) :—

“... .. This decision is of the Constitution Bench and the question that fell for determination was whether one of the Regional Engineering Colleges located at Srinagar being

one of the fifteen such Colleges in the country sponsored by the Government of India, was an instrumentality of the State. The College was being managed by a Society registered under the Jammu & Kashmir Registration of Societies Act, 1898. The Court pointed out that where a Corporation is an instrumentality or agency of the Government, it must be held to be an 'authority' within the meaning of Art. 12 of the Constitution and hence subject to the same basic obligation to obey the Fundamental Rights as the Government. Then came the question as to whether this was an instrumentality of the State. Sumptuous reference was made to the ratio of the International Airport Authority's case (AIR 1979 SC 1628). In para 9 of the judgment, the tests for determining when a Corporation can be said to be an instrumentality or agency of Government were gathered thus:—

"(1) One thing is clear that if the entire share capital of the corporation is held by Government would go a long way towards indicating that the corporation is an instrumentality or agency of Government.

(2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the Corporation, it would afford some indication of the corporation being impregnated with governmental character.

(3) It may also be a relevant factor whether the corporation enjoys monopoly status which is the State conferred or State protected.

(4) Existence or 'deep and pervasive State control' may afford an indication that the Corporation is a State agency or instrumentality.

(5) If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government.

(6) Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference of the corporation being an instrumentality or agency of Government."

The Court then proceeded to observe:—

"If on a consideration of these relevant factors it is found that the corporation is an instrumentality or agency of Government, it would, as pointed out in the International Airport Authority's case, be an authority and, therefore, State within the meaning of the expression in Art. 12."

In para 11 of the judgment, the Court pointed out that it was immaterial whether the corporation is created by a statute or under

a statute. The test was whether it was an instrumentality or agency of the Government and not as to how it was created."

The Division Bench further pointed out:—

"We are inclined to think that no particular test has a predominant role to play. The cumulative effect has to be looked into. Where the functions are closely related to governmental functions and where a department of Government is transferred to a corporation or where rule-making or regulation-making power has been given which when made would regulate the conduct of the people at large are clear features in support of treating the institution as an instrumentality or agency of Government. Where, however, Government while embarking upon a commercial activity putting the entire money, exercise direct or indirect control and receive the profits — these by themselves may not be adequate to hold the institution to be an agency or instrumentality of Government....."

We may at this stage refer to another three-Judge decision of the Supreme Court in the case of Smt. J. Tiwari v. Smt. Jwala Devi Vidya Mandir, AIR 1981 SC 122, where an educational institution registered under the Societies Registration Act was held not to be an authority within the meaning of Art. 12. The judgment was delivered in January, 1978 and it is an instance of belated reporting.

As pointed out by one of the learned Judges in Som Prakash Rekhi's case (AIR 1981 SC 212), the decision in the International Airport Authority case (AIR 1979 SC 1628) has given the matter a new turn and the older decisions may require review. Notwithstanding this position, even applying the tests in the three cases which we have referred to above and on which strong reliance was placed by petitioner's counsel, we are of the view that a co-operative society of the type we are concerned with cannot be treated as 'State' within the meaning of Art. 12 of the Constitution.

6. In view of what we have found on the first point, the second point does not arise for consideration. Yet, since it has been argued at the Bar and can be disposed of briefly, we shall deal with it. Admittedly, petitioner by Annexure 1 was served with a set of charges. The action of the President was ratified by the Board and the Board directed the Extension Officer to enquire into the matter. Annexure 3 produced by the petitioner in clear terms calls for the explanation or show cause. It is not the case of the petitioner that he did not have knowledge of the resolution of the Board or the direction in Annexure 3 for showing cause. It is the specific case of the opposite parties that no cause was shown by

the petitioner and in the absence of refutation to the charges, the Enquiring Officer was of the view that the charges were admitted. There is no foundation for the contention that the Board — the employer — had abdicated its power to the Co-operative Extension Officer or to the Assistant Registrar. The Board had decided on 16-12-1978 to remove the Secretary as he had failed to show cause against the charges and the Board felt that the charges in the circumstances were on good foundation. The Assistant Registrar directed the society in terms of the Board's resolution dated 16-12-1978 to terminate the service of the petitioner. In the facts of the case, there is hardly scope to interfere on merit even if this Court is found to have jurisdiction on the footing that the society is 'State' within the meaning of Art. 12 of the Constitution.

7. It follows, therefore, that in regard to grievances relating to employment under such a co-operative society, jurisdiction under Art. 226 of the Constitution cannot be invoked and restoration of service cannot be ordered in terms of the ratio in the series of authorities of the Supreme Court some of which we have referred to above. The writ application is thus devoid of merit on either score and is dismissed. The writ application was filed even before the judgment in the International Airport Authority's case was pronounced and the argument which has been advanced at the hearing was obviously on the basis of the law as indicated in the later cases. Yet, we think it is a fit case where parties should be directed to bear their own costs.

PATNAIK, J.:— I agree.

Petition dismissed.

AIR 1982 ORISSA 43

P. K. MOHANTY AND
J. K. MOHANTY, JJ.

Amiya Kumar Swain, Petitioner v. Principal, Regional Engineering College, Rourkela and others, Opposite Parties.

Original Jurn. Case No. 499 of 1977, D/- 18-11-1981.

Constitution of India, Art. 226 — Natural justice — Admission in Engineering College — Cancellation of, on ground of production of false mark-sheets — Opportunity to defend case, not given to petitioner — Principles of natural justice violated.

Where the admission of the petitioner in the Engineering College was cancelled by the

Principal and the University on ground of production of false marksheet and the petitioner was only asked to produce the certificates and mark-lists of Matriculation, P. U. S. C. and Pre-professional examinations, it could not amount to show cause notice before cancelling his admission and against the allegation of production of false mark-sheet, even if the petitioner failed to produce the same, it could not be said that the opportunity to defend his case was given to the petitioner. Case law discussed. (Para 12)

Cases Referred: Chronological Paras
AIR 1981 Orissa 91 : (1981) 51 Cut LT 455 10
(1980) 49 Cut LT 134 : ILR (1980) 1 Cut 97 8

AIR 1977 Orissa 107 : ILR (1977) 1 Cutt 33 :
(1976) 2 Cut WR 919 10

ILR (1971) Cut 433 8

AIR 1970 SC 1039 : 1970 SCD 222 9, 12

S. C. Das, for Petitioner; Devananda Misra, Deepak Misra, A. Pasayat, N. C. Patnaik, L. Rath, B. S. Misra and A. K. Misra, for Opposite Parties.

J. K. MOHANTY, J.:— The petitioner was admitted as a student of Regional Engineering College, Rourkela (hereinafter mentioned as 'R. E. College') in Aug., 1973. He passed the Preliminary Science (Engineering) Examination and I.Sc. (Engineering) Examination of Sambalpur University and joined the 1st Semester of the B.Sc. Engineering course. While he was studying in the 7th Semester in 1976-77, he received the order dated 18-8-1976 (Annexure 2) of the Principal, R. E. College wherein it was mentioned:

"The admission of Sri Amiya Kumar Swain (Present Roll No. 35-7th Semester) to this College with Roll No. 158 in the Academic Session 1973-74 is hereby cancelled as he has managed to take admission into the 1st Semester of the B.Sc. Course by producing false mark-sheet.

It may be mentioned that the Orissa University of Agriculture and Technology, Bhubaneswar vide their notification No. 13983/UAP dated 7th Aug., 1976 have also cancelled his pre-professional trimester results of 1972-73 examination as he had managed to get himself admitted in the Pre-professional course of 1972-73 by producing false mark-sheet."

Annexure 3 to the petition is the notification No. 13893/OUAT dated 7-8-1976 of the Academic Council of the Orissa University of Agriculture and Technology (O. U. A. T.) which is as follows:—

"In pursuance of the Resolution No. 2084 dated 31-7-1976 of the Academic council the

Pre-Professional Trimester results of 1972-73 in respect of Sri Amiya Kumar Swain, Adm. No. 2042 are cancelled as he had managed to get himself admitted in the Pre-Professional course of 1972-73 by producing a false mark-list."

The petitioner has now come up with this writ petition with prayers to issue a writ of certiorari quashing the orders in Annexures 2 and 3 and to issue a writ of mandamus directing the O. P. No. 1 to allow the petitioner to continue as a student in the 7th Semester. According to the petitioner he passed the Pre-University Examination from Utkal University in 1971 and obtained the mark-sheet from S. V. M. College, Jagatsinghpur on the basis of which he was admitted to the Orissa University of Agriculture and Technology, Bhubaneswar. The mark-sheet is Annexure 4 to this petition. This shows that the petitioner has secured 427 marks out of 700 marks with Mathematics as a subject. He got himself admitted into the Pre-Professional Class of O. U. A. T. and passed the same in first division in June, 1973 which is evident from Annexure 5 (mark-sheet issued by the O. U. A. T.) to this petition. On the basis of the mark-sheet of Pre-Professional Examination, 1973, the petitioner got himself admitted to the R. E. College, Rourkela. The grievance of the petitioner is that the Registrar, O. U. A. T. and the Principal, R. E. College, Rourkela did not consider it necessary to follow the principle of natural justice by calling upon him to submit his explanation to the charges brought against him on the basis of which his admission to the R. E. College and P. P. results were cancelled. According to the petitioner, had that been done, he could have put up his defence. The petitioner further submitted that he was awarded a Scholarship of Rs. 75/- per month on the basis of his merit in the qualifying examination for admission plus the college first terminal examination. The petitioner passed the Pre-Professional Examination of O. U. A. T. in 1973 in first division and thereafter he passed the Preliminary Science (Engineering) Examination in 1974 also in first division. He passed the I. Sc. (Engineering) Examination in 1976 with credit. It is strange that O. Ps. 1 and 2 have cancelled his admission and result about after four years on the allegation that he had submitted a false mark-sheet. The petitioner further averred that he had requisite qualification for admission to the Pre-Professional Class of O. U. A. T. and also to the Preliminary Science (Engineering) course of Sambalpur University. The petitioner being aggrieved by the orders contained in Annexure 2 and 3

has come up with this writ petition on the grounds that O. Ps. 1 and 2 have contravened the Sambalpur University Act and Statutes and the O. U. A. T. Act and Statutes; that they have acted without jurisdiction that they have violated the principles of natural justice; that there being no definite material before them in support of their decisions; these are based on no evidence and there are errors apparent on the face of the record; and that Annexures 2 and 3 are otherwise wrong, illegal and contrary to law, justice and equity.

2. In the counter-affidavit and additional counter-affidavit, O. P. No. 1, the Principal of R. E. College, Rourkela, has taken the stand that the petitioner has got admission into the college on the basis of the mark sheets which were manipulated. Even the mark-list that the petitioner secured from the Utkal University in his P. U. (Sc.) Examination of the year 1970-71 has been manipulated and there had been deliberate suppression of certain material facts when the application was made before the Rourkela Engineering College. By the time of admission of the petitioner, O. P. No. 1 had no material before him to doubt the veracity of the petitioner's documents which were filed along with the application and it was found out later that the marks in both the application form and the original mark-list had been tampered with and manipulated to suit the needs of the moment of the petitioner for the sake of admission. In reply to the allegation that he did not follow the principle of natural justice, O. P. No. 1 averred that the petitioner was called upon by letter No. Aca/8868, D/- 6-8-76 (Annex-F) to produce Matriculation pass certificate, P. U. Sc. pass certificate and mark-sheet, and P. P. pass certificate and mark-sheet in original before the Deputy Registrar on 7-8-76 in order to conduct an enquiry and hear the petitioner's explanation to the charges made against him. In response to the above letter the petitioner produced the provisional certificates of P. P. and Matriculation Examinations and prayed for one week's time (vide Annexure-A) to produce the rest on the ground that those were at his home at a distance of 595 Kms. from Rourkela. Time was allowed to him till 14-8-76, but as he did not turn up, after due consideration of the merits of the case it was found out that he had obtained admission into the college illegally and fraudulently and as such his admission was cancelled. According to O. P. No. 1 though the admission has been cancelled almost four years after his admis-

sion into the college, this was not due to inefficiency or negligence of any of the officers connected with the rigors of admission of the college. By a confidential letter dated 14-7-76 (Annexure-B) from a person who had signed under the designation of an Intelligence Officer, when the petitioner was in the 7th Semester of Civil Engineering, the peculiar nature of the case was brought out. It was intimated that the petitioner had been admitted into the 1st year class on the basis of a mark-list produced by him which was a forged or tampered one. It was mentioned therein that the petitioner bearing roll No. 2733 in the Annual P. U. Sc. Examination, 1971 had passed in 3rd division with marks aggregating to 291 without Mathematics from the S. V. M. College, Jagatsinghpur and has passed the P. P. Sc. Examination from the O. U. A. T. Bhubaneswar with 'B' grade marks. The letter contained a request for verification of documents with proper reference to Mark Registers of the Utkal University. After receiving the letter information was called for from the Registrar, Utkal University by a letter dated 21-7-76 (Annexure-C) seeking to know the marks actually secured by the petitioner in his P. U. Sc. Examination with the proper check up from the original marks register in the University Office. The Assistant Controller of Examinations of Utkal University by a letter dated 20-8-76 (Annexure-D) informed the Registrar of the Rourkela Engineering College that the petitioner had secured 291 marks out of a maximum of 700 and Mathematics was his fourth optional and not a subject of his regular study. From Ext. D it was evident that he had failed in Mathematics by securing only 16 marks. It was also ascertained from the Registrar, O. U. A. T., Bhubaneswar (vide Annexure-E) where the petitioner was admitted to the P. P. Class during the session 1972-73, that his P. P. results had been cancelled as he was admitted to the College by producing a false mark-sheet. O. P. No. 1 further averred that in view of the above documents the petitioner was not eligible for admission into the Engineering College. He further stated that there would be severe breach of discipline in the college curriculum if such things are allowed to escape unnoticed or negligently and overlooked. It is the duty of the authorities when such a case comes to their notice to deal with it in as strict and legal manner as the circumstances would justify. In this particular case the action taken against the petitioner was absolutely justified under the circumstances after giving due consideration to his case and it was in

keeping with the principle of natural justice, equity and fair play. The petitioner was given every opportunity to explain his point of view as would be evident from Annexure F, but he applied for time and failed to show cause or explain his conduct. So the authorities had no other alternative than to issue Annexure 2 cancelling the admission of the petitioner. It has been further submitted that there has been no contravention of the Act and Statute of Sambalpur University.

3. O. P. No. 2, the Registrar of the O. U. A. T., has filed his counter-affidavit and has taken the ground that the writ application is liable to be dismissed in the absence of the Utkal University as a party since the decision taken against the petitioner is based upon his forging the mark-sheet issued by the Utkal University as has been reported by them to this University. It is also mentioned in the counter that there was an enquiry made by the Central Intelligence Bureau into the matter, as has already been stated in the counter of O. P. No. 1. After receipt of the confidential letter reference was made to the Utkal University (vide Annex. A/2). The Registrar of Utkal University, in reply to the above reference, stated (vide Annexure B/2) that the petitioner has submitted a false mark-sheet regarding his Pre-University Examination results. In the attested copy of the mark-sheet submitted to O. P. No. 2, the marks were highly inflated so as to show him to have passed in the first division though actually he had passed in the third division. A reference was also made to the Principal, S. V. M. College, Jagatsinghpur and his reply in Annexure C/2. From Annexures A/2, B/2 and C/2 it would be seen that the petitioner had deliberately made a false statement in the application for admission to the college. The copy of the application is Annexure D/2. The mark-sheet annexed by the petitioner to this writ petition is a forged mark-sheet and not the correct one. Since the petitioner had submitted a false mark-sheet of the P. U. Examination, his admission to the P. P. Class would not have been possible in accordance with the Pre-Professional Regulations framed by Regulation No. 77 of Chapter VII which is as follows:—

"Both Mathematics and Biology shall be allowed only to those who have passed those two subjects at the Pre-University Science stage."

As the petitioner had made a false statement in the application for admission, his admission and results were liable to be cancelled and the petitioner is responsible for his misconduct and laches. On these averments he

prayed that the writ petition should be dismissed.

4. O. P. No. 3, the Principal of S. V. M. College, Jagatsinghpur has filed counter-affidavit wherein it has been stated that the records indicate that the petitioner had secured 291 marks out of 700 in the P. U. Sc. Examination. Annexure 4 is not the true copy of the mark-sheet supplied to the petitioner and he has not secured the marks mentioned therein. It is a clear case of interpolation and fabrication of documents.

5. O. P. No. 4, the Registrar of Sambalpur University, has not filed any counter.

6. The petitioner has filed rejoinders to the above counter-affidavit filed by O. P. Nos. 1, 2 and 3 refuting the contentions made therein.

7. The main grounds on which the petitioner wants to quash Annexures 2 and 3 are:

That the principle of natural justice has been violated and the petitioner has not been given any opportunity to place his case before the Principal, R. E. College, Rourkela and the O. U. A. T. before the orders in Annexures 2 and 3 were passed cancelling the admission of the petitioner in the R. E. College and the results of P. P. Examination respectively; and that the opposite parties are estopped from doing so after a lapse of four years.

8. Dr. Das, learned counsel appearing for the petitioner, submitted that even assuming that the petitioner has secured 291 marks in the aggregate in the P. U. Sc. Examination, there was no bar for his admission to the P. P. class of O. U. A. T. This has not been disputed by the learned counsel for the O. U. A. T., but he submitted that having failed in Mathematics in P. U. Sc. the petitioner could not have been admitted to the P. P. Class with Mathematics as a subject. According to Dr. Das the petitioner after passing P. P. Examination sought admission into the Engineering College. Therefore, he had higher qualification than the required minimum qualification (which was P. U. Sc.) for admission to the Engineering College. So his admission to the R. E. College should not have been cancelled as has been done as per Annexure 2. He further submitted that Annexure 2 is based on the notification No. 13893/OUAT dated 7-8-1976 cancelling the P. P. Examination. It is evident that this notification (Annexure 3) has been issued in pursuance of the resolution dated 31-7-1976 of the Academic council cancelling the P. P. results of 1972-73 of the petitioner. It is on this basis that the petitioner managed to get

himself admitted to the P. P. Class by producing a false mark-sheet. But there is no mention therein as to which false mark-sheet was produced by the petitioner. The petitioner has not been given any chance to defend his case before the order in Annexure 3 was passed. Dr. Das relied on a decision reported in ILR (1971) Cut 433 (Deba Prasanna Misra v. Principal, S. C. B. Medical College, Cuttack) wherein it has been observed:—

“The substantial question that arises for consideration is whether in awarding disciplinary punishments, principles of natural justice were relevant and, if so, to what extent has there been a non-fulfilment of these requirements.

xx xx xx

Though there was sufficient justification for the College authorities to feel the necessity for prompt action, there was no justification to assume that there could be any antithesis between the interest of the institution in the matter of maintenance of discipline and the interest of the boys sought to be charged with criminal misconduct in the context of their having a proper chance to defend themselves.”

In the above case the order taking disciplinary action against the petitioners was quashed. Dr. Das also cited a decision reported in (1980) 49 Cut LT 134 (Badrinarayan Ray v. Principal, Narsingh Choudhury College, Jaipur). In that case the petitioners were debarred from appearing in the Annual Examination of the college. After considering the report of the Invigilator, the explanation received from the petitioners and the statement of the members of the staff who were engaged in conducting the examination, the Principal and the Chairman came to the conclusion that the petitioners no more deserved to be the students of the institution. It was held by the Court that the information gathered against the petitioners had not been brought to the notice of the petitioners; that the petitioners never had a chance to defend themselves; and that there was failure of observance of natural justice. Dr. Das also cited another decision reported in AIR 1970 SC 1039; (The Board of High School and Intermediate Education, U. P. v. Kumari Chitra Srivastava) wherein it has been held (at p. 1040):—

“Whether a duty arises in a particular case to issue a show cause notice before inflicting a penalty does not depend on the authority's satisfaction that the person to be penalised has no defence but on the nature of the order proposed to be passed.

Where the Board of High School and Intermediate examination had cancelled the ex-

amination of a candidate who had been allowed to appear at the examination and had actually answered all the question papers, on the ground that he had been admitted to the examination in spite of shortage of attendance at lectures, without giving any show cause notice to the candidate, the action of Board is vitiated by violation of rules of natural justice. The Board in cancelling the examination was exercising quasi-judicial functions and it was incumbent upon it to issue a show cause notice to the candidate before inflicting the penalty of cancellation."

9. In reply the main contention of the learned counsel appearing for O. P. No. 1 is that the petitioner was served with a notice (Annexure E) dated 6-8-1976 to furnish the original certificates and mark-sheets from Matriculation till P. P. Examinations but the petitioner by an application dated 7-8-1976 prayed for seven days' time. As no communication was received till 18-8-1976 and the petitioner did not avail of the opportunity afforded to him, the order in Annexure 2 was passed. Learned counsel submitted that as the Utkal University has not been made a party, this writ petition should be dismissed. He further argued that the petitioner cannot take advantage of his own fraud. It has been clearly established from the enquiry made from the Utkal University that the mark-sheets of the P. U. Sc. submitted by the petitioner while taking admission in the P. P. Class of O. U. A. T. and also in the R. E. College were forged and fabricated. On behalf of the O. U. A. T. learned counsel made a similar contention and submitted that at the time of admission the petitioner had given an undertaking that the information furnished in the application form was correct to the best of his knowledge and he would abide by the rules and regulations of the University and the College and would withdraw from the University and the College at any time should the Vice-Chancellor so desire in the interest of the institution. But this undertaking is of no avail because when the P. P. results were cancelled as per Annexure 3, the petitioner had already left the college since more than three years. Learned counsel further submitted that the petitioner could not have taken admission into the P. P. Class with Mathematics as a subject as he had failed in that subject in P. U. Examination.

10. On behalf of the opposite parties a decision reported in ILR (1977) 1 Cut 33 : (AIR 1977 Orissa 107). (Pasant Pattajoshi v. Principal, Lingaraj Law College) has been cited. In that case in para. 8 of the judgment it has been held :—

"Denial of natural justice has not prejudiced the petitioner in any manner because the facts which led the Principal to reach his decision are not disputed. The insistence on grant of a hearing is on the footing that given an opportunity before the order was made, the petitioner could have shown to the Principal that the facts were untrue or even if the allegations were true, an order of expulsion was not warranted. Now that the factual basis is found to be true and goes almost undisputed, the question is whether there has been substantial prejudice to the petitioner by denying him an opportunity of showing cause against the expulsion. We think, even if an opportunity had been granted, the position would not have improved and, as we have already said, the antecedents are such that any Principal interested in maintaining appropriate discipline and order within his College would legitimately feel tempted to keep out a student with petitioner's antecedents from his institution. It is not the petitioner's case that the Principal acted mala fide or with bias and/or prejudice against him. In the greater interests of the institution, we are satisfied that it is a fit case where we should not intervene by exercise of our extraordinary jurisdiction."

Another decision reported in (1981) 51 Cut LT 455 : (AIR 1981 Orissa 91) (Krupasindhu Mallik v. Orissa Board of Secondary Education) has also been cited wherein it has been held (at p. 92) :—

"Fraud vitiates all actions and no Court can uphold a right based on fraud. Even for considering a claim of estoppel, the law is not different and one's own fraud can be allowed to support the claim of a right. The Board did not make any mistake. The fraud out of which petitioner claims benefit should be assumed to have been on the basis of some association of the petitioner with the racket that was operating. Otherwise, there could be no occasion for wrong information to be communicated to the Headmaster in regard to the petitioner. Admittedly, all the communications have not turned out to be wrong. Petitioner's counsel was anxious that petitioner must be protected by giving him compensation for the period he has lost by prosecuting higher studies by spending a huge sum of money. In the background indicated, no equity arises for consideration."

11. Keeping the principles enunciated in the decisions cited above in view, it is to be examined whether the petitioner is entitled to the reliefs claimed by him.

12. In this case, as would be evident from Annexure 2 dated 18-8-1976, the admission

of the petitioner to the R. E. College, Rourkela was cancelled as the petitioner had managed to take admission into the 1st Semester of B. Sc. (Engineering) Class by producing a false mark-sheet. The further ground was that the O. U. A. T. (O. P. No. 2) in their notification dated 7-6-1975 have also cancelled his Pre-Professional results of 1972-73 as he had got himself admitted to the P. P. Class by producing a false mark-sheet. Annexure 3, the notification of the O. U. A. T. dated 7-8-1976 shows that the P. P. result of 1972-73 of the petitioner was cancelled as he had managed to get himself admitted into the P. P. Class by producing a false mark-list. The actions in Annexures 2 and 3 have been taken after the petitioner studied in the R. E. College for about three years, after passing the P. P. Examination. It is not disputed that before cancelling the admission as per Annexure 2 and the result of P. P. Examination as per Annexure 3, the petitioner was not given any opportunity to show cause against the action proposed to be taken against him. He had not been given any opportunity to defend his case. The contention of O. P. No. 1 that notice in Annexure F was issued to the petitioner and he did not avail of the opportunity is of no avail. In Annexure F the petitioner was only asked to produce the certificates and mark-lists of Matriculation, P. U. Sc. and P. P. Examinations. Even if the petitioner failed to produce the same, it cannot be said that this amounts to a notice to show cause before cancelling his admission and against the allegation of production of a false mark-sheet. The notification in Annexure 3 has been issued without affording any opportunity to the petitioner and he had no chance to defend his case and this has been done after a lapse of three years. From the above facts it is quite evident that the principles of natural justice had been violated and the petitioner had never been given a chance to defend himself. Even assuming that the mark-sheet in Annexure 4 submitted by the petitioner is not the true mark-sheet and has been fabricated, before cancelling his admission to the R. E. College and also his results of the P. P. Examination, the principle of natural justice should have been followed and the petitioner should have been given opportunity to defend himself. In our view, the decision reported in AIR 1970 SC 1039 (supra) has full application to this case. In view of the above finding, the other questions raised by the parties need not be gone into.

13. In the result, therefore, the writ petition is allowed. The petitioner is entitled to the reliefs prayed for. Annexures 2 and 3

are hereby quashed. We direct the O. P. No. 1 to admit the petitioner as a student of the 7th Semester of this year of R. E. College, Rourkela, if possible, and if not, in the next year. We, however, express no opinion as to the correctness of Annexure 4.

14. No costs.

P. K. MOHANTI, J.:— I agree.

Petition allowed.

AIR 1982 ORISSA 48

R. N. MISRA, C. J. AND

R. C. PATNAIK, J.

Rahas Bewa, Petitioner v. Kanduri Charan Sutar and others, Opposite Parties.

Civil Revn. No. 534 of 1980, D/- 29-9-1981.*

Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act (21 of 1972), S. 4 (4) — Suit for permanent injunction pending at common law — It would not stand abated as a result of notification under the Act — Relief of injunction not available under the Act, immaterial. AIR 1980 Orissa 33, Overruled. Case law discussed. (Specific Relief Act (47 of 1963), S. 38). (Para 5)

Cases Referred: Chronological Paras
(1981) Civil Revision No. 195 of 1979, D/- 27-2-1981 (Orissa) 5

AIR 1980 Orissa 33 : ILR (1980) 1 Cut 203 5

(1979) 47 Cut LT 494 : (1979) 1 Cut WR 48 5

AIR 1973 SC 2451 : 1975 All LJ 175 : 1973 3

SCD 886 3

AIR 1968 SC 714 : 1968 All LJ 46 : (1968) 2 SCJ 480 3

(1859) 6 CB (NS) 336 : (1859) 141 ER 486, Wolverhampton New Waterworks Co. v. Hawkesford 3

R. N. Sinha and P. K. Rautray, for Petitioner; Mrs. A. K. Padhi, for Opposite Parties.

R. N. Sinha and P. K. Rautray, for Petitioner; Mrs. A. K. Padhi, for Opposite Parties.

R. N. MISRA, C. J.:— Plaintiff's suit for permanent injunction restraining the defendants from interfering with her possession and enjoyment of the property having been declared to have partly abated by the trial Court under the provisions of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act (Orissa Act 21 of 1972) (hereinafter referred to as the 'Act') she has filed this revision application challenging the order of partial abatement. When the revision petition came up for hearing

* From order of G. Narasimham, Munsif, Kendrapara. D/- 4-8-1980.

LY/LY/G47/81/SMA/SSG—HN

before one of us, it was directed to be placed before a Division Bench as some single Judge decisions to which we shall make reference later took contradictory views on the point in issue.

2. The suit properly covered both homestead and other lands. So far as homestead property is concerned, the learned Munsif held that there would be no abatement and accordingly in the impugned order he directed the suit to continue in regard to plots Nos. 534, 538, 539 and 540. He, however, directed the suit to stand abated so far as Khata Nos. 152, 249, 501, 537 and 271 are concerned.

3. There is no dispute that there is a notification under S. 3 of the Act in which the disputed properties are included. Section 4 of the Act makes provision as to the effect of the notification. Sub-section (4) thereof provides : —

“Every suit and proceedings for declaration of any right or interest in any land situate within the consolidation area in regard to which proceeding could be or ought to be started under this Act, which is pending before any Civil Court, whether of the first instance or appeal, reference or revision shall, on an order being passed in that behalf by the Court before which such suit or proceeding is pending, stand abated :

Provided”

Counsel for the petitioner contends that a suit for permanent injunction cannot abate under the provisions of the Orissa Act 21 of 1972, inasmuch as the authorities under the special Act have no jurisdiction to grant injunction. Counsel maintains that the relief of permanent injunction is a well-recognised one at law. Section 54 of the Specific Relief Act of 1977 made provision for such a suit and Section 38 of the new Specific Relief Act of 1963 is a provision following the old pattern. According to petitioner's counsel, since permanent injunction is a known form of remedy and a suit exclusively for that relief lay, unless there was clear provision or by necessary implication, the legislative intention became manifest, a pending action could not abate. The oft-quoted dictum of Willes J., in *Wolverhampton New Waterworks Co v. Hawkesford*, (1859) 6 CB (NS) 336, is to the following effect :—

“There are three classes of cases in which a liability might be established, founded upon statute. One is where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from

the remedy which existed at common law; there, unless the statute contains words which expressly or by necessary implication excludes the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form or remedy; there, the party can only proceed by action at common law. But there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class.”

The relief of injunction, as already pointed out, was an existing remedy at common law. No provision has been made in the Act empowering the authorities to grant injunction. Can the existing remedy at common law for which there is a pending action, in the circumstances, be held to have abated?

Undoubtedly, even to grant injunction it would be necessary for the Court to adjudicate upon the question of title or possession. There would be many suits where who the rightful owner is has to be ascertained even when the relief is one of permanent injunction simpliciter. Invariably, the question of possession in praesenti will have to be taken into account. There is force in the submission of counsel for opposite parties that possession is an ‘interest’ in land. A suit for declaration of right or interest including possession would, therefore, abate, as required by S. 4 (4) of the Act. The main plank in the stand taken by counsel for the defendants-opposite parties is that if a suit for declaration of right or interest abates, since even in a suit for injunction simpliciter, right and/or interest has to be ascertained before relief can be granted, it must follow that the mischief of abatement must extend even to a suit for permanent injunction only.

The legislative policy behind the Orissa Act 21 of 1972 is clear. In providing for abatement and temporarily taking away the jurisdiction of the Court during the currency of the notification under the Act, the legislature has intended that when the consolidation operation is on, all relevant disputes should come before the consolidation authorities and two forums should not be dealing with the same matter, as in that event there was likelihood of inconsistent situation arising. In the case of *Ram Adhar Singh v. Ramroop Singh*,

AIR 1968 SC 714, the Court considered the effect of S. 5 of the U. P. Consolidation of Holdings Act and observed (at p. 716):—

"We have already extracted the provisions of Section 5 of the Act as it originally stood, and as it now stands, after the amendment in 1966. No doubt, in Cl. (b) (i) of S. 5, as it originally stood, suits for possession of land were also expressly dealt with. But, under the amended Section 5, there is no direct reference to 'suits for possession of land'. It is, on this difference in phraseology of the new section, that Mr. Gupte, learned counsel for the respondent, has urged that his client's suit, being one for recovery of possession, instituted under Section 209 of the Abolition Act, is not hit by the provisions of Section 5, as it now stands. Mr. Gupte points out that when in the original Section 5, there was a specific reference to suits for possession of land, and which suits were to be stayed, there was a conscious departure, by the Legislature when Sec. 5 was amended, by omitting suits for possession of land. If the intention of the legislature was, Mr. Gupte points out, that the various types of suits or proceedings which had to be stayed, under the old Section 5, have to be declared, as abated under the new Section 5, the Legislature could have referred to all the types of actions which had been dealt with, under the original section. No doubt this line of reasoning, on the face of it, may appear to be attractive, but we are not satisfied that there is any merit in the contention. 'Suits for possession', as such, has not been expressly referred to, in the new Section 5, but, in our opinion, the expression 'every suit and proceeding in respect of declaration of rights or interest in any land', are comprehensive enough to take in suits for possession of land, because, before a claim for possession is accepted, the Court will have necessarily to adjudicate upon the right or interest of the plaintiff, in respect of the disputed property, taking into account the claim of the opposite party. Therefore, in our opinion, the suit, instituted by the respondent, is covered by the amended S. 5 of the Act."

These observations *prima facie* support the stand of the defendants to the effect that the suit would abate. We may usefully refer to another decision of the Supreme Court in the case of Gorakh Nath Dube v. Hari Narain Singh, AIR 1973 SC 2451, where referring to same S. 5 (2) of the U. P. Act, the Court held, with reference to a Bench decision of the Allahabad High Court (at p. 2453):—

"... .. Here, we find a fairly comprehensive discussion of the relevant authorities

of the Allahabad High Court the preponderating weight of which is cast in favour of the view that questions relating to the validity of sale deeds, gift deeds, and wills could be gone into in proceedings before the consolidation authorities, because such questions naturally and necessarily arose and had to be decided in the course of adjudications on rights or interests in land which are the subject matter of consolidation proceedings. We think that a distinction can be made between cases where a document is wholly or partially invalid so that it can be disregarded by any Court or authority and one where it has to be actually set aside before it can cease to have legal effect. An alienation made in excess of power to transfer would be, to the extent of the excess of power, invalid. An adjudication on the effect of such a purported alienation would be necessarily implied in the decision of a dispute involving conflicting claims to rights or interests in land which are the subject-matter of consolidation proceedings. The existence and quantum of rights claimed or denied will have to be declared by the consolidation authorities which would be deemed to have invested with jurisdiction, by the necessary implication of their statutory powers to adjudicate upon such rights and interests in land, to declare such documents effective or ineffective, but, where there is a document the legal effect of which can only be taken away by setting it aside or its cancellation; it could be urged that the consolidation authorities have no power to cancel the deed, and therefore it must be held to be binding on them so long as it is not cancelled by a Court having the power to cancel it. In the case before us, the plaintiffs' claim is that the sale of his half share by his uncle was invalid, inoperative, and void, such a claim could be adjudicated upon by consolidation Courts... .."

4. We may advert to Section 15 of the Orissa Land Reforms Act. Sub-section (7) thereof clothed the Revenue Officer with jurisdiction to pass interim orders relating to appointment of receiver. Jurisdiction to pass orders of injunction had not been vested. When dispute arose as to whether the Revenue Officer could restrain one party from interfering with the possession of the other, and whether a relief for such purpose would be barred by Section 67 of the Land Reforms Act; the Legislature advisedly amended sub-section (7) in incorporating therein words "restraining the landlord from interfering with the tenant's cultivation of the land or for such other purposes." Mrs. Padhi for the opposite parties does not contend that even

in the absence of the power to grant injunction, the Consolidation Officer would have a right to pass an order of that type. It becomes difficult for us, therefore, to accept the submission that a suit for permanent injunction pending at common law would stand abated as a result of the notification under the Orissa Act 21 of 1972 even though the relief of injunction is not available under the Act.

What would really be necessary to meet a situation of this type is to clearly authorise the Consolidation Officer by law to grant in appropriate cases the relief of injunction and where such relief is granted, it must also be declared to be a decree for the purposes of execution. The proceedings under the special Act are temporary in nature though the effect of several orders made therein are of permanent bearing. The consolidation process being temporary, an order of permanent injunction granted by the authorities under the Act, unless declared expressly to have the effect of decree would not be available to be executed. For instance, O. 21, R. 32 of C. P. C. makes provision for execution of decrees for injunction. Orders of the consolidation authorities should be deemed to be decrees so as to take advantage of the machinery of a permanent system for enforcing decrees for injunction. Until all that has been done, merely by construction of the scheme under the Orissa Act 21 of 1972, it becomes difficult to hold that the remedy at common law of permanent injunction is no more available either in the Civil Court or before the authorities under the Act, once there is a notification under S. 3 of the Act.

5. We are inclined, therefore, to hold that the suit for permanent injunction in the instant case did not abate. The view taken by P. K. Mohanti, J., in the case of *Puni Nawa v. Ananta Sahoo*, (1979) 47 Cut LT 494, where the learned Judge held that so far as the reliefs which relate to matters which are beyond the purview of the Act, the suit would not abate, and the single Judge decision in *Chintamani Bhanja v. Gokula Chandra Bhanja*, (Civil Revn. No. 195 of 1979, disposed of on 27th February, 1981) appear to be correct. The subsequent decision of our learned brother P. K. Mohanti, J. in *Bhagaban Prasad Das v. Narayan Prasad Das*, AIR 1980 Orissa 33, where he took a contrary view to his own in the earlier decision, in our opinion, does not state the correct position of the law.

6. We are inclined to think that the Legislature should step in and confer the jurisdiction on consolidation authorities to grant

injunction, both temporary and permanent, in regard to lands which are the subject-matter of consolidation proceedings and orders of permanent injunction should be deemed to be 'decrees' for purposes of execution so that the inconvenience which arises may not continue and the legislative intention may be effectively worked out.

7. In the view we have taken of the matter, the Civil Revision must be allowed and the impugned order declaring the suit to have abated for a part of the property must be set aside. We direct the trial Court to dispose of the suit quickly.

There would be no order for costs.

PATNAIK, J.:— I agree.

Revision allowed.

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R. N. MISRA, C. J. AND

R. C. PATNAIK, J.

Ajoy Kumar Singh, Appellant v. Pata Dei and others, Respondents.

A. H. Os. Nos. 25 and 26 of 1976, D/- 28-9-1981.*

(A) Motor Vehicles Act (4 of 1939), Sections 95 (5), 96 (2) and 111-A — Orissa Motor Vehicles (Accident Claims Tribunals) Rules (1960), R. 7 — Filing of written statement by Insurer under — It is not mandatory for the tribunal to call upon the insurer to file written statement — Plea under S. 96 (2) — Can be raised by Insurer by filing written statement — Failure of Insurer — Tribunal inviting written statement after closing of trial — Not valid. Decision in Misc. Appeals Nos. 148 and 181 of 1974, D/- 25-2-1976 (Orissa), Reversed.

Where the Tribunal invited a written statement from the insurer after the trial was closed and had adjourned his proceedings from day to day awaiting the filing thereof, the procedure adopted by the Tribunal was clearly contrary to the rules and accepted system which was prevalent in Motor Accidents Claims followed for disposal of claims.

It was for the insurer to raise a plea within the scope of S. 96 (2) of the Act. That could have been done only by filing a written statement and raising an issue at the appropriate stage. Though the insurer had full notice of the matter and should have taken a lesson

* Against judgment of B. K. Ray, J. in Misc. Appeals Nos. 148 and 181 of 1974, D/- 25-2-1976.

LY/LY/G49/81/SAD/MVJ

from the fact that it had once been set ex parte and that order had been recalled and indulgence had been extended to permit the insurer to contest the proceedings, the written statement was not filed and the specific plea within the ambit of S. 96 (2) of the Act was not raised. The appropriate issue was not struck and parties were not put to notice as to what special defence of the insurer had to be met by leading evidence, oral and documentary. The insurer knew what special defence it had and if it was permitted to raise it at a belated stage when the trial was over, the proceedings were bound to be prejudiced and the persons who were statutorily protected by a requirement of insurance would certainly be adversely affected. Decision in Misc. Appeals Nos. 148 and 181 of 1974, D/- 25-2-1976 (Orissa), Reversed. AIR 1976 Orissa 175 (FB), Foll. (Para 12)

(B) Motor Vehicles Act (4 of 1939), Ss. 99 (2) and 111-A — Orissa Motor Vehicles (Accident Claims Tribunals) Rules (1960), R. 7 — Accident claim — Owner of vehicle has no obligation to examine himself or his driver — Request by claimants to examine owner and driver refused — Closing of evidence — Reasonable opportunity should be given by Tribunal to claimants before adverse inference could be drawn for non-examination of owner and driver while granting permission to insurer at the belated stage. Decision in Misc. Appeals Nos. 148 and 181 of 1974, D/- 25-2-1976 (Orissa), Reversed. (Para 10)

(C) Motor Vehicles Act (4 of 1939), Ss. 95, 96 (2) (b) — Third party insurance policy — Breach of condition — No condition in bond to permit vehicle to be driven only by named driver — There is no breach of condition when vehicle is driven by any licensed driver. (Evidence Act (1872), S. 114). Decision in Misc. Appeals Nos. 148 and 181 of 1974, D/- 25-2-1976 (Orissa), Reversed.

Where the condition in the policy bond did not permit the vehicle to be driven by a named driver, any driver who was licensed under law was entitled to drive the vehicle and when such a driver drove the vehicle, it must be assumed that he had the authority of the owner to drive the vehicle. Consequently there could be no breach of the condition of the policy on that ground. In the instant case it was held that the vehicle was not at the garage and had been taken on the road, therefore there was no presumption that the driver of the vehicle had not operated it, nor was there any scope for assuming that the vehicle must have been driven by an employee of the garage. To assume such a fact by drawing an adverse inference is wholly

unwarranted by law. Decision in Misc. Appeals Nos. 148 and 181 of 1974, D/- 25-2-1976 (Orissa), Reversed. (Para 12)

(D) Motor Vehicles Act (4 of 1939), Ss. 95, 96, 2 (b) — Liability of insurer in respect of third party risks — Clause in policy that if accident took place insurer had to be notified within a time — Silence on part of owner to answer queries about by insurer — No breach of terms of policy can be assumed to have committed by owner — Liability of insurer cannot be affected. 1972 Acc CJ 153 (Ori) and AIR 1964 SC 1737, Rel. on. Decision in Misc. Appeals Nos. 148 and 181 of 1974, D/- 25-2-1976 (Orissa), Reversed. (Para 13)

Cases Referred: Chronological Paras
AIR 1976 Orissa 175 : 42 Cut LT 648 (FB)

1972 Acc CJ 153 (Ori)	7
AIR 1964 SC 1736 : (1964) 2 SCJ 428	13

P. Ray, for Appellant; A. K. Mohanty and G. B. Mohanty, for Respondents.

R. N. MISRA, C. J.:— These are appeals under the Letters Patent read with the Orissa High Court Order directed against the common appellate decision of B. K. Ray, J. under S. 110-D of the M. V. Act rendered in Miscellaneous Appeals Nos. 148 and 181 of 1974.

2. On 12-7-1973 at about 3.30 P. M. one Niranjana Senapati, a Class IV employee in the Establishment of the Gold Controller was knocked down while coming on bicycle on the Link Road within the town of Cuttack by a motor truck bearing registration number ORU 5905. Niranjana succumbed to the injuries while attempts were being made to take him to the hospital. His dependants filed a claim under S. 110-A of the M. V. Act asking for compensation of Rs. 40,000/-. They impleaded the owner of the truck as also the Insurer thereof as respondents. It was pleaded that at the time of death, Niranjana was getting a monthly salary of Rs. 157/-. He was aged about 30 and his contribution to the family was above Rs. 90/- per month. Niranjana's dependants happen to be the mother, the widow and a son.

3. Respondent No. 1, the owner, filed a written statement denying that his truck had caused the accident. He also denied all other allegations that were made in the petition of claim.

The Insurer did not file any written statement until the trial was over and the matter had been reserved for award. At that stage in its written statement, the Insurer pleaded that on account of breach of the conditions of the policy issued by it to the owner of the vehicle, it had no liability at all.

4. Before the Tribunal 5 witnesses were examined in support of the claim while the owner examined only one witness. Several documents were produced on behalf of the claimants while on behalf of the owner the route permit and the certified copy of the driving licence of the truck driver were marked as Exts. A-1 and B-1 respectively and on behalf of the Insurer the Policy Bond was marked as Ext. A-2.

The Tribunal held that the accident was caused due to rash and negligent driving of the truck in question and the claimants were entitled to compensation of Rs. 14,000/- besides costs. He further found that the Insurer was not liable to meet the compensation payable to the claimants as there was a breach of the condition of the Policy.

5. The claimants preferred Miscellaneous Appeal No. 181 of 1974 asking for higher compensation and the owner preferred Miscellaneous Appeal No. 148 of 1974 challenging the direction of the Tribunal that the entire compensation was payable by him and the Insurer was not liable for it.

The learned single Judge on re-assessing the evidence allowed the claimants' appeal by enhancing the quantum of compensation to 27,740/-. Besides the quantified amount, the learned single Judge directed that the order for costs of Rs. 400/- would stand and on the compensation amount the claimants would be entitled to receive six per cent interest per annum from the date of the claim till payment. In the appeal by the owner, the learned single Judge came to notice:—

"... .. A reading of the written statement of respondent No. 1 (owner) filed before the tribunal shows that he simply denied the allegations made by the appellants (claimants) in their claim petition. He never took the plea that the vehicle in question belonging to him was not involved in the accident. Curiously, however, during hearing before the Tribunal he came forward with a new stand that prior to the date of the accident the motor vehicle in question was in the garage of O. P. W. 1 for repairs and that it was made over to him after repairs in the evening of that day. Therefore, according to respondent No. 1, his truck could not have caused the accident resulting in the death of Niranjana. The tribunal, after very carefully scrutinizing the evidence of O. P. W. 1 and relying on the evidence of the witnesses to the accident, has recorded a definite finding that it was the truck of respondent No. 1 which had caused the accident. I do not see any reason to differ from this conclusion. It is thus clear that the plea

taken by respondent No. 1 at the time of trial was a false one... .."

Coming to the question of non-examination of the owner and the driver, the learned single Judge observed:—

"... .. respondent No. 2 (Insurer) filed an application during hearing of the case before the trial for examination of respondent No. 1 and his driver of the truck. Learned counsel for respondent No. 1 took time to produce respondent No. 1 and his driver for examination. In spite of this neither respondent No. 1 nor his driver Chandeswar was examined. Therefore, the tribunal is perfectly justified in drawing an adverse inference against respondent No. 1... .."

Dealing with the liability of the Insurer, the learned single Judge observed:—

"... .. It may be remembered in this connection that according to the terms of the Policy, respondent No. 2 was not to indemnify respondent No. 1 if the vehicle insured caused the accident while being driven by a person other than the owner having no authority or by a person without a driving licence. The written statement of respondent No. 2 reveals that it has taken the plea that on account of breach of conditions in the policy it is not liable to pay any damage. In view of the fact that neither respondent No. 1 nor his driver was examined in spite of orders of the tribunal, there can be no escape from the conclusion that the vehicle at the time of causing the accident was being driven by a person either without any authority from the owner of the vehicle or by a person without any driving licence. In such an event, it must be held that there has been breach of conditions in the policy issued by respondent No. 2 in favour of respondent No. 1. That apart, a reference to the policy filed in the case shows that it was incumbent on respondent No. 1 to inform respondent No. 2 about the accident immediately after it occurred. Admittedly, this has not been done. On the other hand, in spite of respondent No. 2 writing to respondent No. 1 for information about the accident, respondent No. 1 kept quiet without replying to the queries of respondent No. 2. This is another breach of a condition in the policy. Section 96 (2) (b) of the Act clearly provides that an Insurer can take a defence that there has been a breach of a special condition in the policy, such as excluding driving by any person who is not duly licensed or by any person who has been disqualified for holding or obtaining a driving licence. According to respondent No. 2, non-production of respondent No. 1 and his driver for examination raises an inference that the vehicle at the time

of causing the accident was being driven rashly and negligently by an unauthorised person. That apart, as has been indicated above, the attitude of respondent No. 1 which has been noticed by the tribunal in its judgment shows that by not informing respondent No. 2 about the accident, respondent No. 1 was guilty of breach of another special condition in the policy.

On the aforesaid analysis I have no doubt in my mind that the tribunal is right in exonerating respondent No. 2 from the liability to pay damages to the appellants... "

The owner has carried these two appeals against the common judgment of the learned single Judge.

6. At the commencement of arguments, Mr. Ray for the owner-appellant has candidly stated that the quantum of compensation determined in appeal is not open to challenge as it is a fair estimate on the basis of materials taken into account. We must, therefore, hold that there is no merit in A. H. O. No. 26 of 1976. That appeal is directed to be dismissed without any order for costs.

7. A. H. O. No. 25 of 1976 has been directed against the judgment of the learned single Judge in M. A. No. 148 of 1974. The main question for determination in this appeal is as to whether the Insurer has liability to satisfy the demand of compensation in terms of the award. Chapter VIII of the M. V. Act makes insurance of motor vehicles against third party risks mandatory. Section 95 (5) of the Act provides :—

"Notwithstanding anything elsewhere contained in any law, a person issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons."

There is no dispute that the truck in question had been insured with respondent No. 2 covering the risk referred to in S. 95 of the Act. Therefore, under sub-section (5) of Section 95, the Insurer has to indemnify the owner of the vehicle unless there be any exemption of liability.

Section 96 (2) of the Act provides that the Insurer shall be entitled to defend an action on two grounds, namely—

"(a) that the policy was cancelled by mutual consent or by virtue of any provision contained therein before the accident giving rise to the liability, and that either the certificate of insurance was surrendered to the insurer or that the person to whom the certificate was

issued has made an affidavit stating that the certificate has been lost or destroyed, or that either before or not later than fourteen days after the happening of the accident the insurer has commenced proceedings for cancellation of the certificate after compliance with the provisions of S. 105; or

(b) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely :—

(i) a condition excluding the use of the vehicle—

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached, where the vehicle is a motorcycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(c) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular."

A Full Bench of this Court in the case of National Insurance Co. v. Magikhaia Das, AIR 1976 Orissa 175 (FB) has held (at p. 177) :

"The statutory provision is clear that an insurer who has been made a party to a proceeding for recovery of compensation can resist the claim only on those grounds mentioned in sub-section (2) and it is not open to it to raise any other plea. The consensus of judicial opinion is to the same effect"

Admittedly, the owner entered contest in the proceeding and, therefore, the Insurer could only raise a defence in tune with S. 96 (2) of the Act.

8. Before the Tribunal, the Insurer had been set ex parte. On 5-2-1974, the application of the Insurer was allowed and the order setting him ex parte was recalled. Issues were settled on 1-5-1974. Two witnesses were examined on that day for the claimants and some documents were exhibit-

ed. The Insurer was again set ex parte. On 9-5-1974, at the instance of the Insurer the ex parte order was recalled. That day the Insurer applied that the owner should produce the insurance policy and the driving licence. An authenticated copy of the insurance policy was filed by the Insurer. On 10-5-1974, some more witnesses were examined. The trial continued on 14-5-1974 and on that day the Insurer wanted a direction to the owner to produce the route permit. Further trial was taken up on 15-5-1974 and 16-5-1974 and the evidence was closed. The route permit and the certified copy of the driving licence produced by the owner were exhibited. On that day, the Insurer applied for a direction that the owner should examine himself as also his driver and failing non-examination, adverse inference would be drawn against the owner. That prayer was dealt with by the Tribunal thus:—

“..... Heard the learned counsel on both sides. The learned counsel for O. P. No. 1 that he wants time till coming Monday to examine the driver and the owner if available. Now the case is in the stage of arguments. As such, such a long date cannot be given. The O. P. No. 1 can examine himself and his driver either today or tomorrow. The petition is therefore allowed.”

At that stage, the Insurer also filed an application for framing of an additional issue on the question of insurance and the Tribunal raised the following issue:—

“Whether the insurer is liable to pay compensation to the petitioners (claimants) on behalf of the owner under the terms and conditions of the policy?”

The authenticated copy of the policy of insurance was marked as an exhibit that day. Arguments were heard in part and the matter was adjourned till next day. On 17-5-1974, the Tribunal recorded the following order:—

“..... Heard arguments. Posted to 24-5-74 for Judgment.”

Judgment was not ready on the 24th of May, 1974. The matter was adjourned to 29-5-1974 for such purpose. On that day, as order No. 35 shows, the Tribunal stated:—

“At the time of dictating the judgment it is found that a formal defect crept into the record on 5-2-74 on which date the learned counsel for the O. P. No. 2 filed a petition to set aside the ex parte order passed against him and to allow him one month time to file his written statement. The ex parte order was set aside but the Insurance Company was not directed to file its written statement. Neither Order 1, Rule 8 C. P. C. nor Rule 7

of the Orissa Motor Vehicles Rules (Accident Claims Tribunal) Rules, 1960 casts any duty upon the defendant to file written statement, unless the Tribunal specifically called upon to file written statement.

Rule 7 of the Claims Tribunal Rules, 1960 reads as follows :

“The owner of the motor vehicle and the insurer may, and if so required by the Claims Tribunal shall at or before the first hearing or within such further time as the Claims Tribunal may allow, file a written statement dealing with the Claims raised in the application and any such written statement shall form part of the record.”

It is clear that a duty is cast upon the Tribunal by the above Rule to call upon the Opposite parties to file their written statement but that has not been done and all the parties missed this most important legal imperative violation of which vitiates entire procedure and trial of the case. In exercise of the inherent powers to remove any formal defect it is ordered under Rule 7 of the Claims Tribunal Rules to call upon O. P. No. 2 to file its written statement within 10 days hence, failing which it will be deemed that opposite party No. 2 has no written statement to file. The Judgment is accordingly stayed and the case is posted to 8-6-74 for filing the written statement by the opposite party No. 2 — Insurance Company.”

On 8-6-1974, the Insurer did not file the written statement and was absent. The case was adjourned to 15-6-1974 for Judgment. On 10-6-1974, the Insurer filed a written statement and an application for staying delivery of judgment. The Tribunal stayed the judgment and directed that the matter would be further heard on 15-6-1974. On that day the Insurer filed fresh draft issues, the Tribunal recast them and adjourned the proceeding to 19-6-1974 for evidence. The Insurer no more participated in the proceeding. The award was ultimately delivered on 6-7-1974.

9. We have referred to the various orders at length with a view to pointing out that the Tribunal appears to have completely misconducted himself by falling into a trap of errors. Rule 20 of the Orissa Motor Vehicles (Accident Claims Tribunal) Rules, 1960 (hereinafter referred to as the ‘Rules’) made under S. 111-A of the Act makes certain provisions of the Civil P. C. applicable to the proceedings. Order 9 of the Code has been applied. Rule 7, which we have already extracted, nowhere makes it mandatory for the Tribunal to call upon the insurer to file a written statement. It enables the insurer to file a written statement dealing

with the claim raised in the application. It also authorises the Tribunal to make a special direction in that behalf, if found necessary. At its instance the ex parte order was withdrawn. In the application for recalling the ex parte order the insurer had indicated that it would file its written statement. It failed to do so. It was again set ex parte obviously on the ground that no written statement was filed. The insurer participated at the trial and cross-examined witnesses. It follows that it did not want to file any written statement. After the trial was over and the matter was reserved for delivery of award, the Tribunal had no business to be solicitous for a written statement from the insurer and to have adjourned his proceedings from day to day awaiting the filing thereof. The Tribunal seems to have conducted itself in a way which gives us the impression that it abdicated its powers to regulate the proceedings and permitted the insurer to control the proceeding at its choice.

Issues had been settled in the presence of the parties. There was no occasion for the insurer to put in issues on the basis of its written statement after the trial was closed. The procedure adopted by the Tribunal is clearly contrary to the rules and the accepted system which is prevalent in Motor Accidents Claims or followed for disposal of claims.

10. The owner had no obligation to examine himself or his driver. If the Tribunal thought that the request to examine these 2 persons should be allowed after evidence had been closed, the owner should have been given a reasonable opportunity for these persons to be called to the Court for being examined as witnesses. A reasonable request was made on the claimants' behalf. That was, however, rejected on the ground that the stage of argument had reached. Certainly the stage of argument had reached by the time the prayer of the insurer was made. That could have been a valid ground to reject the request of the insurer at the belated stage, but in case the Tribunal thought that should be done, a reasonable opportunity should have been extended to the claimants before any adverse inference could be drawn for non-examination. It is the party's choice as to who would be examined in support of his stand, and when the Tribunal at the instance of the adversary wanted some one to be examined, a reasonable opportunity should have been extended.

11. It was for the insurer to raise a plea within the scope of S. 96(2) of the Act. That could have been done only by filing a

written statement and raising an issue at the appropriate stage. Though the insurer had full notice of the matter and should have taken a lesson from the fact that it had once been set ex parte and that order had been recalled and indulgence had been extended to permit the insurer to contest the proceedings, the written statement was not filed and the specific plea within the ambit of S. 96(2) of the Act was not raised. The appropriate issue was not struck and parties were not put to notice as to what special defence of the insurer had to be met by leading evidence, oral and documentary. The insurer knew what special defence it had and if it was permitted to raise it at a belated stage when the trial was over, the proceedings were bound to be prejudiced and the persons who were statutorily protected by a requirement of insurance would certainly be adversely affected.

12. The learned single Judge is wrong in saying that the owner had not indicated denial of the involvement of his truck in the accident. Paragraph 10 of the written statement specifically denied the allegations made with reference to truck No. ORU 5905 of which he was owner. It is true that he had never pleaded that the vehicle had been left at a garage for repairs and since the vehicle had not been taken out of the garage by the time of the accident, that truck could not have caused the accident. This was for the first time introduced at the trial. Both the Tribunal as also the learned single Judge have discarded this defence, the result of which is that the allegation that the vehicle was made over to the garage for repairs and was at the garage when the accident is said to have taken place is a false one. Once it is held that the vehicle was not at the garage and had been taken on the road, there was no presumption that the driver of the vehicle had not operated it, nor was there any scope for assuming that the vehicle must have been driven by an employee of the garage. To assume such a fact by drawing an adverse inference is wholly unwarranted by law. We are not prepared to go that length to accept as a fact that the vehicle was being driven at the time it met with an accident by an unauthorised person. The learned single Judge in our view committed an error in assuming that the person who drove the vehicle, even if he belonged to the garage, was an unlicensed driver. The condition in the policy bond did not permit the vehicle to be driven by a named driver. Any driver who was licensed under the law was entitled to drive the vehicle and when such a driver drove the vehicle, it must be

assumed that he had the authority of the owner to drive the vehicle. There could be no breach of the condition of the policy on that ground.

13. The learned single Judge has also relied upon a clause in the policy that if the accident took place, the insurer had to be notified within a time. On the basis of silence on the part of the owner to answer the queries made by the insurer, the learned single Judge has assumed that a breach of the terms of the policy had been committed. Here again, we think the learned single Judge went wrong because, as was pointed out by this Court in the case of the New India Assurance Co. Ltd. v. Srikanta Ghosh, 1972 Acc CI 153, such a defence for the insurer to avoid liability under the Act would not be available. One of us in the reported decision referred to above quoted what was said by the Supreme Court in the case of New Asiatic Insurance Co. Ltd. v. Pesumal Dhanamal Aswani, AIR 1964 SC 1736, which we may usefully quote here (at p. 1741):

"Thus the contract between the insured and the company may not provide for all the liabilities which the company has to undertake vis-a-vis the third parties, in view of the provisions of the Act. We are of opinion that once the company had undertaken liability to third parties incurred by the persons as specified in the policy, the third parties' right to recover any amount under or by virtue of the provisions of the Act is not affected by any condition in the policy. Considering this aspect of the terms of the policy, it is reasonable to conclude that Proviso (a) of para 3 of S. II is a mere condition affecting the rights of the insured who effected the policy and the persons to whom the cover of the policy was extended by the company, and does not come in the way of third party's claim against a person specified in para 3 as one to whom cover of the policy was extended."

We are inclined to agree in the facts of the case with the submission advanced on behalf of the appellant that the insurer was not entitled to raise the defence on account of its conduct and there was no scope for drawing any adverse inference for non-examination of the owner and the driver of the truck and there was no foundation for the finding that there was a breach of the terms of the policy which led to the position that the insurer was absolved of its statutory liability.

14. A. H. O. No. 25 of 1976 is accordingly allowed. The decisions of the Tribunal as also of the learned single Judge are reversed and the insurer is held liable for the

entire compensation payable to the claimants as it is within the statutory limit prescribed under the Act. The claimants shall be entitled to costs from the insurer only. Hearing fee is assessed at Rs. 200/- (Two hundred).

PATNAIK, J.:— I agree.

Order accordingly.

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P. K. MOHANTI AND B. N. MISRA, JJ.

Smt. Reena Padhi and others, Plaintiffs v. Owners and parties, interested, in the motor vessel 'Jagdhir' No. 1623 registered at the Bombay Port of Registry, India, and another, Defendants.

Admiralty Suit No. 1 of 1980. D/- 21-10-1981.

(A) Orissa High Court Order (1948), Article 4 — Admiralty jurisdiction of Orissa High Court — It is same as conferred on Supreme Court of Judicature at Fort William, Bengal by Charter of 1974. (Colonial Court of Admiralty Act (1890), S. 3; Letters Patent (Cal.) Pre.; Government of India Act (1935), S. 106, Letters Patent (Patna), Cls. 24, 25; Constitution of India. Art. 225; Admiralty jurisdiction — Scope).

The origin and development of the Admiralty jurisdiction of the Orissa High Court is as follows:—

The Charter dated 26th March, 1774, established a Court of record to be called "the Supreme Court of Judicature at Fort William in Bengal" consisting of a Chief Justice and three other Judges. Thus from 1774 the Supreme Court of Judicature at Fort William began to exercise Admiralty jurisdiction. Cl. 26 of the Charter dated 26th March, 1774 declared the Supreme Court of Judicature at Fort William in Bengal to be a "Court of Admiralty", in and for the provinces, countries, or districts, of Bengal, Bihar and Orissa and all other dependent territories and islands adjacent thereunto. (Para. 7)

The Admiralty jurisdiction of the Calcutta High Court commenced with the Charter of 1774 and without extension or expansion continued by the Letters Patent of 1862 and 1865. It was finally extended and improved by the Colonial Courts, and Admiralty Act, 1890 and the Colonial Courts of Admiralty (India) Act, 1891 and it was the same as the Admiralty

jurisdiction of the High Court in England in 1890. The said jurisdiction was preserved and continued by S. 106 of the Government of India Act, 1915. This was the Admiralty jurisdiction of the Calcutta High Court in the year 1916. On 22nd March, 1912, Bihar and Orissa were taken out of the limits of the Presidency of Fort William in Bengal and constituted into a separate Province. The High Court of Judicature at Patna was constituted as a Court of Record in 1916, the Letters Patent. Thus from 1916, the Patna High Court became authorised to exercise Admiralty jurisdiction in the Province of Bihar and Orissa.

(Paras 10, 11)

Orissa was created a separate Province on the 1st of April, 1936. In exercise of the powers conferred by subsec. (1) of S. 229 of the Government of India Act, 1935 as adapted by the India Provisional Constitution (Amendment) Order, 1940, the then Governor-General of India made the Orissa High Court Order, 1948 vide Notification No. S. O. 10 dated the 30th April, 1948, Government of India, Ministry of Law (Reforms), and constituted the High Court of Orissa as a Court of Record for the Province of Orissa. There is no specific mention of Admiralty jurisdiction in any of the Articles of the Orissa High Court Order, 1948. The expression "all such original, appellate and other jurisdiction" occurring in Art. 4 of the 1948 Order by necessary implication includes the Admiralty jurisdiction. The Admiralty jurisdiction of the Patna High Court which was transferred to Orissa High Court in 1948 was the jurisdiction which had been conferred by the Charter of 1774 on the Supreme Court of Judicature at Fort William in Bengal, continued and conferred on the Calcutta High Court by Letters Patent of 1862 and 1865 and the jurisdiction of the Calcutta High Court under the 1890 Act. That in essence is the Admiralty jurisdiction of the Orissa High Court up-to-date. The Admiralty jurisdiction of the Orissa High Court was preserved and continued by Art. 225 of the Constitution of India.

(Para 12)

It cannot be said that even in the absence of internal municipal law in that regard, the Admiralty jurisdiction of the Orissa High Court should include 'international law maritime'. With regard to Admiralty Orissa High Court is a Court of prescribed jurisdiction. It cannot go

beyond the instrumentalities of internal municipal law which have conferred upon it the Admiralty jurisdiction.

(Para 12)

(B) Orissa High Court Order (1948), Article 4 — Admiralty jurisdiction of Orissa High Court — Scope of — Not concurrent with other High Court — Suit filed under its Admiralty jurisdiction — Defendant not residing within High Court's jurisdiction — Suit not maintainable. (Colonial Courts of Admiralty Act (1890), Pre.; Civil P. C. (5 of 1908), S. 9; Admiralty jurisdiction — Scope).

It cannot be said that all the High Courts in India exercising Admiralty jurisdiction have concurrent powers to entertain causes of action arising in the high seas or foreign territorial waters irrespective of where the defendants reside, carry on their business or personally work for gain. On the other hand, the Letters Patent of 1916 under which the Admiralty jurisdiction of the Calcutta High Court was passed on to the Patna High Court in respect of the Province of Bihar and Orissa High Court Order, 1948, under which the Admiralty jurisdiction in respect of Orissa was passed on from Patna High Court to Orissa High Court clearly, indicate that the Admiralty jurisdiction of the Orissa High Court is exclusive, distinct and separate from that of any other High Court. Law in all civilized countries tends to prescribe the definite forum where dispute of any particular nature would be entertainable. This is done with a view to avoiding uncertainty and conflict of jurisdiction.

(Para 13)

The Orissa High Court has not been declared as a Colonial Courts of Admiralty and the Colonial Courts of Admiralty Act (1891) has no application to the Orissa High Court. Hence the 'Statement of Objects and Reasons' of the 1891 Act cannot throw any light on the territorial limits of the Admiralty jurisdiction of the Orissa High Court. On the other hand the Proviso to Cl. 28 of the Charter dated 26-3-1774 which even now controls the Admiralty jurisdiction of the Orissa High Court indicates that the powers and authorities under it to proceed in maritime causes and according to the laws of the Admiralty shall extend and be construed to extend only to the citizens of India residing in the State of Orissa and to persons who on the date of the cause of action were in the ser-

vice of the Government or in the service of the citizens who are residents of Orissa. (Para 14)

In the instant case an employee of a Shipping Company died due to explosion in a ship which was at the relevant time harboured at a port in Japan. The legal representatives of the deceased filed a suit for damages in Orissa High Court under its Admiralty jurisdiction against the shipping Company owning the ship. The Company carried on its business at Bombay i.e. outside the jurisdiction of the Orissa High Court.

Held that the defendant Company did not belong to any of the three categories of persons described in the Proviso to Cl. 28 of the Charter of 1774. Accordingly, the defendant could not be proceeded against in an action in personam in the Admiralty jurisdiction of the Orissa High Court. (Paras 14, 18)

The Admiralty jurisdiction of the High Court has to be tested by the rules of procedure laid down in the Civil P. C. (5 of 1908). There can be no doubt that the cause of action can never arise within the local limits of a Court's jurisdiction in cases of maritime torts committed upon the high seas or foreign territorial waters. S. 20 (c), C. P. C. cannot be invoked in such cases. Therefore either the conditions laid down in S. 20 (a) or those laid down in Section 20 (b), C.P.C. must be satisfied before the Court can entertain a suit. Where the defendants do not voluntarily reside or carry on their business or personally work for gain within the local limits of the jurisdiction of the High Court. S. 20, C. P. C. would bar the jurisdiction of the Court to entertain the suit. S. 112, Civil P. C. would not be attracted in such situation. (Para 15)

Cases Referred: Chronological Paras

(1981) 2 Cal LJ 129	10
AIR 1973 Bom 18: 74 Bom LR 514	10
(1972) AC 242: (1971) 2 WLR 970: (1971) 1 All ER 1110 (H. L.) E. The Tojo Maru	12
(1968) 72 Cal WN 635	10
AIR 1961 Bom 186: 62 Bom LR 1017	4, 5, 10
1927 AC 906: 43 TLR 698, The Yuri Maru. The Woron	10

Samareswar Mohanty, for Plaintiffs; Govind Das, Pradyumna Kumar Mohanty and Karunakar Jena, for Defendants.

B. N. MISRA, J.:— This is the first suit filed in the Admiralty jurisdiction

of this Court. Reena Padhi, widow of the late Rabindranath Padhi, is plaintiff No. 1 Rinku plaintiff No. 2 and Rajat plaintiff No. 3 are respectively the minor daughter and son of plaintiff No. 1 and the late Rabindranath Padhi. Minor plaintiffs 2 and 3 are represented in the suit by their mother plaintiff No. 1 who has filed an affidavit that her interest is not adverse to that of her minor daughter and son. The owners and parties interested in the ship "Jagdhir" are described as defendant No. 1 and Messrs Great Eastern Shipping Company, Limited having their registered office at Mercantile Bank Building, 60 Mahatma Gandhi Road, Bombay are defendant No. 2. In the plaint both 'action in rem' and 'action in personam' are combined and pleaded against the defendants. However, Mr. S. Mohanty, learned counsel for the plaintiffs, submitted to the Court that for the present he was not pressing for an action in rem. Therefore, the present claim is an action in personam. The defendants have entered appearance and filed objection to the maintainability of the suit. It was decided that the question of maintainability of the present suit in the Admiralty jurisdiction of this Court should be first considered as a preliminary issue. Plaintiffs and defendants have been heard on this preliminary issue and the present order is confined to the question of maintainability of the present action in personam.

2. Facts necessary for a proper determination of the question of maintainability are noted hereunder. The late Rabindranath Padhi, husband of plaintiff No. 1 and father of plaintiffs 2 and 3, graduated as a Marine Engineer and joined service under defendant No. 2 on the 28th October, 1967 as the Fifth Engineer. In June, 1973, Rabindranath had risen to the position of a Chief Engineer and at the time of his death his total annual emoluments from service were Rs. 78,040.00 being his basic wages and allowances as per details given in Schedule 'A' appended to the plaint. As per the terms and conditions of his service Rabindranath would have retired from service at the age of 60 years, but there were reasonable prospects of his continuing in service even beyond that age. Out of his aforesaid earnings Rs. 3,600/- per annum was being spent by him for himself. Had he lived, Rabindranath would have spared the

balance amount as assets to his family, namely, the plaintiff, Rabindranath was the sole earning member of the family. He was of good health and was expected to live up to the age of 85 years. On 12th May, 1978, Rabindranath took over charge as the Chief Engineer of the ship 'M. V. Jagdhir' at Kandla port in the State of Gujarat, India. The ship started its voyage on or about the 2nd June, 1978 and thereafter called at Haladia and Paradip. After loading was over in these ports, the ship sailed to the Japanese port of Sakai with a halt for a few hours at Singapore. The ship was dry-docked at the port of Osaka in Japan and after some repairs on shore it moved to the port of Mizushima in Japan for loading of cargo. It is alleged that from the beginning of the voyage the ship was not seaworthy in all respects and in particular the air-conditioning equipment had serious defects exposing the engineers and engine crew to a high degree of risk to their lives. These defects were present while the ship was at Mizushima. Defendant No. 2 had failed to exercise due diligence and care to make the ship seaworthy in all respects before commencement of the voyage. Since long before the voyage the air-conditioning equipment in the vessel had been deliberately or negligently kept in a state of disrepair, thereby endangering the lives of the crew. Defendant No. 2 had taken no steps to remove the defects either before the voyage or during the voyage. On the 20th of July, 1978, while the ship was at Mizushima port and Rabindranath was working in the room housing the air-conditioning equipment, there was an explosion in the said equipment. Rabindranath who was injured in the said explosion succumbed to his injuries on the 25th July, 1978 at Mizushima Seamen's Clinic, Mizushima Daiichi Hospital (Annexe), Kurashiki City, Okayama, Prefecture, Japan. It is stated that on account of Rabindranath's death, his estate and the plaintiffs suffered loss amounting to Rs. 15,14,000.00 as described in Schedules B, C and D appended to the plaint. According to the plaintiffs, the aforesaid amount constitutes a maritime lien on the vessel M. V. Jagdhir and all her engines, gear, tackles, machinery, plants, apparel and furniture. It is asserted that Rabindranath's death took place on board the ship upon the waters of Mizushima harbour which is a part of the 'high seas' as that term

is understood in Admiralty law and that the present suit lies only in the Admiralty jurisdiction of this High Court and not within the jurisdiction of any other Civil Court anywhere else in India. In the absence of any Admiralty Rules of the High Court of Orissa, a sum of Rs. 15.00 has been paid as court-fees according to Rule 49 of the Admiralty Rules of the Calcutta High Court. The cause of action is stated to have arisen on the 20th July, 1978 when the explosion took place on board the ship and on the 25th July, 1978 when Rabindranath succumbed to the injuries he had suffered in the said explosion. The plaintiffs have accordingly prayed that the defendants be ordered to pay a sum of Rs. 15,14,000.00 with pendente lite and future interest. Prayers (ii), (iii) and (iv) in the plaint have not been pressed by the plaintiffs as they have confined their present claim to item (i) being an action in personam against the defendants.

3. The defendants have challenged the maintainability of the suit. It is stated in their objection that the Admiralty jurisdiction vested in the Calcutta High Court was transferred by Letters Patent to the Patna High Court. Under the Orissa High Court Order, 1948 the Admiralty jurisdiction of the Patna High Court has been transferred to this High Court. It is stated that the Admiralty Court Act, 1861 (24 and 25 Vict. c. 10) (hereinafter referred to as the 1861 Act) governs the field of Admiralty law in the State of Orissa. Section 7 of the said Act provides for jurisdiction in case of damage done by any ship and the present cause involving a fatal accident to an employee cannot be entertained within the Admiralty jurisdiction of the 1861 Act. The expression "by a ship" in Section 7 of the 1861 Act refers to external and extraneous action by an offending ship when any such ship is an active instrument of any damage, it does not include a cause of action on board the ship when on voyage. The right of action under the Fatal Accidents Act in a case like the present one, cannot be said to be a "claim for damage done by a ship" within the meaning of Section 7 of the 1861 Act. The suit discloses a cause of action under the Fatal Accidents Act, 1855 and such action cannot be entertained by the High Court in its Admiralty jurisdiction. It is stated that no action in rem lies against the defendants. It is further asserted that a suit in

personam can be instituted where the defendants reside or the cause of action arises. In the present case the defendants do not at the time of commencement of the suit or thereafter actually and voluntarily reside or carry on their business or personally work for gain within the jurisdiction of this High Court nor has the cause of action arisen within the jurisdiction of this High Court and therefore the present action is not maintainable. It is stated that the plaint should be rejected under Order VII, Rule 11, C. P. C. as it does not disclose any cause of action, the plaint is written on insufficiently stamped paper and the suit appears from the statement of plaint as barred by the law of Admiralty. It is pointed out that the Calcutta High Court Admiralty Rules cannot govern the suits instituted in Orissa. The defendants have accordingly prayed that the plaint should be rejected with costs.

4. First it is necessary to indicate the scope, nature and extent of the Admiralty jurisdiction of this High Court. It would not be out of place to briefly refer to the origin and growth of the Admiralty law and practice in England which is the source of the Admiralty jurisdiction of the Courts in India. We may begin with the following passage at pages 2 and 3 of Roscoe's Admiralty Practice (5th Edition) extracted in Kamalakar Mahadev Bhagat v. Scindia Steam Navigation Co. Ltd., Bombay (AIR 1961 Bom 186) — vide para. 17.

"In mediæval times not only was there a Lord High Admiral, but also Admirals for different portions of the seas around the British Islands; there was, for instance, an Admiral of the West and an Admiral of the North. These officers necessarily possessed disciplinary powers over vessels under their command, and in addition were in a sense sea magistrates, for they were the only maritime officials with both authority and power. They had especially to determine disputes in regard to the capture at sea of enemy property; in other words, in regard to prize. By a natural evolution they became also arbitrators in maritime disputes. It was an obvious step from the exercise of a personal jurisdiction of rude legal kind by officials whose functions were primarily executive to the appointment of deputies who became recognized judges. Finally there

emerged from among these deputies a personage who, from deputy of the Lord High Admiral, became the appointed judge of the English High Court of Admiralty, who had criminal jurisdiction, who in time of war fulfilled duties as a judge of the Prize Court and exercised in the Instance Court jurisdiction finally limited to certain maritime causes. The germs of these two jurisdictions, which eventually became quite separate, we have already noted in the functions in mediæval times of the Lord High Admiral and his fellows. This is in a few lines an epitome of the genesis of the High Court of Admiralty which struggled on for centuries side by side with the Common Law and Chancery Courts of England the one seeking to enlarge the others to limit its jurisdiction."

5. This old conflict and rivalry between the jurisdiction of the High Court of Admiralty and the Common Law and Chancery Courts of England were eventually taken note of by the British Parliament which in 1389 passed an Act (13 Ric. 2 (1389) — Jurisdiction of Admiral and Deputy), to prescribe the limits of the jurisdiction of the High Court of Admiralty. The Act provided—

"That the Admirals and their deputies shall not meddle from henceforth of anything done within the realm, but only of a thing done upon the sea as it hath been used in the time of our noble prince King Edward grandfather of our Lord the King that now is."

In spite of legislation forbidding the High Court of Admiralty from meddling in things not wholly and exclusively done upon the sea, the said Court continued to encroach upon the jurisdiction forbidden to it. It is on account of this attitude of the High Court of Admiralty that in 1391 another Act (15 Ric. 2 (1391) Jurisdiction of the Admiral) was passed which provided—

"It is declared, ordained and established that of all manner of contracts, pleas, and quarrels, and all other things rising within the bodies of the counties, as well by land as by water, and also of wreck of the sea, the Admiral's Court shall have no manner of cognizance, power, nor jurisdiction; but all such manner of contracts, pleas, and quarrels and all other things, rising within the

bodies of counties, as well by land as by water, as afore, and also wreck of the sea, shall be tried, determined, discussed and remedied by the laws of the land, and not before nor by the Admiral nor his lieutenant is any wise."

This Act made it clear that the jurisdiction of the High Court of Admiralty was confined to things done upon the high seas and it had absolutely no jurisdiction to deal with things arising out of the body of a county. However the 1391 enactment also failed to bring about cessation of the conflict of jurisdiction. Even after further legislation the contest of jurisdiction did not fully disappear. The ultimate fate of the rivalry as to jurisdiction has been extracted from Roscoe's Admiralty Practice in *K. M. Bhagat v. Scindia Steam Navigation Co. Ltd., Bombay* (AIR 1961 Bom 186).

"To examine the various cases of prohibition relating to the Admiralty, which are to be found in the early reports, would be a long and tedious labour. It is sufficient to observe that although the common lawyers were notable always to hold, firmly and consistently, the ground which they had taken, they seem, so far as they could, to have acted upon the broad rule that nothing was to be left to the Admiralty of which the common law could conveniently take cognizance. This principle, though not always and often hidden behind quaint arguments, and sometimes only loosely enforced, seems to have been the guiding principle of all the early decisions. Had the system of common law procedure been more elastic than it was, doubtless it would have been made to embrace the whole jurisdiction of the Admiralty, and one great anomaly in our law would thus have been removed. But the technical process of the Courts of common law limited their jurisdiction, and hampered their procedure; and it was impossible, with any show of justice, to prohibit suitors from resorting to the Admiralty in cases where the Court alone could afford a satisfactory remedy. So that as matters at last adjusted themselves, the Admiralty judges, although compelled to abandon all claim to general maritime jurisdiction, were yet suffered to exercise undisputed authority in all maritime cases where the common law could not give redress.

"The Admiralty Court was left in possession of its jurisdiction over torts com-

mitted on the high seas, for that had never been disputed, and in suits of salvage also its authority prevailed, for that was regarded as a branch of the royal prerogative, with the exercise of which the Court was properly entrusted. The Court had jurisdiction over tortious acts done upon the high seas. This jurisdiction has not been affected or altered by modern legislation, and has been exercised by the High Court in recent times to restrain such acts by injunction. In suits of possession the Admiralty acquired jurisdiction because it afforded a summary process unknown to the common law, by which the possession of the very thing in dispute was at once dealt with. Again, in cases of hypothecation the Admiralty was suffered to exercise jurisdiction, because the contract of hypothecation was not recognised by the common law, and it was only in the Admiralty that the thing hypothecated could be directly proceeded against. Over seamen's wages the Court, though only after a severe struggle, obtained jurisdiction, apparently, on the grounds that as the crew could sue together in the Admiralty Court, the remedy there was more convenient than at law, and that seamen were entitled to the advantage the Admiralty afforded them of having the ship itself arrested as a security for their wages. These were the principal matters left within the jurisdiction of the Court, and even as to some of these the Admiralty judges were compelled to move within very limits..."

6. An Ordinance was passed in 1648 prescribing the jurisdiction of the Court of Admiralty, but it was set aside and thereafter the High Court of Admiralty lost its importance for nearly two centuries. Then in 1840 the British Parliament passed an Act (3 & 4 Vict. c. 65 — The Admiralty Court Act, 1840 hereinafter referred to as the 1840 Act) to improve the practice and extend the jurisdiction of the High Court of Admiralty. A significant feature of this Act is that the High Court of Admiralty could also take cognizance of the things arising within the body of a county in the same manner as the Common Law Courts. The 1840 Act inter alia provided for claims in respect of damage received by a ship. By 1861 Act the Parliament further extended the jurisdiction of the High Court of Admiralty. One of the significant changes introduced by the

1861 Act was that the High Court of Admiralty instead of confining its jurisdiction only to cases of "damage received by a ship" could now entertain claims in regard to "damage done by a ship". An important thing to note is that the jurisdictions of the High Court of Admiralty and the Common Law and Chancery Courts in respect of "damage received by a ship" were concurrent under the 1840 Act, but the jurisdiction of the High Court of Admiralty in regard to "damage done by a ship" under the 1861 Act was exclusive. The 1861 Act further provides that in cases of damages done by a ship on the high seas the aggrieved party had the choice to move the High Court of Admiralty either for an action in rem or for an action in personam.

7. We may next turn to the origin and development of the Admiralty jurisdiction in India with particular reference to Calcutta High Court. It appears that the first Charter granted to the United Company (after the union of the old and new Companies) was that of the 13th Geo. I in 1726, and it established at the settlements of Madras, Bombay and Calcutta, the Mayors' Courts each comprising of a Mayor and nine Aldermen. The Mayor's Court was a Court of Record and it had jurisdiction to try, hear and determine all civil suits, actions and pleas within the respective towns. "The Governor and the 5 Seniors of the Council" were appointed Justices of the peace with power to hold Quarter Sessions of the Peace and they were constituted into a Court of Record for the trial of all offences (except high treason) committed within the said towns or within ten miles of the same. By Charter 26th Geo. II. 1753 the Mayor's Courts, the Courts of Quarter Sessions, etc., were re-established with re-distribution of jurisdiction amongst them. In 1773 the Committee of Secrecy appointed to enquire into the state of the East India Company submitted its report. This report led to the passing of "the Regulating Act", 13 Geo. III c. 63. This Act authorised His Majesty to establish a Supreme Court of Judicature at Fort William in Bengal, to consist of a Chief Justice and three other Judges to exercise and perform all Civil, Criminal, Admiralty and Ecclesiastical jurisdiction. The Supreme Court of Judicature at Fort William was to be a Court of Record. Accordingly the Charter dated 26th

March, 1774, established a Court of Record to be called "the Supreme Court of Judicature at Fort William in Bengal" consisting of a Chief Justice and three other Judges. Thus from 1774 the Supreme Court of Judicature at Fort William began to exercise Admiralty jurisdiction. Clause 26 of the Charter dated 26th March, 1774, declared the Supreme Court of Judicature at Fort William in Bengal to be a "Court of Admiralty" in and for the provinces, countries, or districts, of Bengal, Bihar, and Orissa, and all other dependent territories and islands adjacent thereunto. The said Supreme Court was given full power and authority to take cognizance of, hear, examine, try and determine all causes, civil and maritime, and all pleas of contracts, debts, exchanges, policies of assurance, accounts, charter-parties, agreements, leading of ships, and all matters and contracts, which in any manner whatsoever relate to freight, or money due for ships hired and let out transport-money, maritime usury or bottomry, and matters civil and maritime, whatsoever, between merchants, owners, and proprietors of ships and vessels, employed or used within the jurisdiction aforesaid, or between others contracted, done, had, or commenced, in, upon or by the sea, or public rivers, or ports, creeks, harbours, and places, overflowed, within the ebbing and flowing of the sea, and high-water mark, within about, and throughout Bengal, Bihar and Orissa and the dependent territories adjacent thereunto, the cognizance whereof belonged to the jurisdiction of the Admiralty, as the same was used and exercised in that part of Great Britain called England. Clause 27 of the Charter gave to the said Supreme Court full power and authority to exercise jurisdiction in regard to maritime crimes according to the laws and customs of the Admiralty in England committed upon the high seas within the aforesaid limits of jurisdiction, to punish offenders according to the civil and maritime laws and to deliver and discharge them and to take recognizances, etc. and to arrest ships, persons, goods etc. Clause 27 further prescribed that the proceeding in such cause or causes were to be according to the civil and maritime laws and customs and also according to the course, and order of the Admiralty, as the same was then used in England. Clause 28

of the said Charter dated 26th March, 1774 inter alia provided that jurisdiction in causes maritime extended only to the subjects of the King residing in the kingdoms or provinces of Bengal, Bihar and Orissa and to persons in the service of the Company or of any of the subjects.

8. An Act (Stat. 24 and 25 Vict. Cap. 104) was passed by the British Parliament in 1861 for establishing High Courts of Judicature in India which inter alia authorised Her Majesty to establish a High Court of Judicature at Fort William in Bengal for the Bengal Division of the Presidency of Fort William by Letters Patent under the Great Seal of the United Kingdom. Section 9 of the Act authorised the High Courts established under the Act to exercise all such civil, criminal, admiralty and vice admiralty, testamentary, intestate, and matrimonial jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice in their respective presidencies as Her Majesty might by Letters patent grant and direct. Letters Patent dated 14th May, 1862 established the High Court of Judicature at Fort William in Bengal on 1st July, 1862, Clause 31 of the Letters Patent of 1862 inter alia provided that the High Court was to have such civil and maritime jurisdiction as was then exercised by the Supreme Court of Admiralty. Clause 32 also gave the High Court such criminal jurisdiction as was then exercised by the Supreme Court as a Court of Admiralty. The jurisdiction vested in the High Court by the aforesaid Clauses 31 and 32 of the Letters Patent, 1862 was continued by Clauses 32 and 33 of the Letters Patent dated 28th December, 1865.

9. In 1890, the British Parliament passed the Colonial Courts of Admiralty Act (53 & 54 Vict. c. 27) (hereinafter referred to as the 1890 Act). Section 3 of the Act provides as follows:—

"3. Power of Colonial legislature as to Admiralty jurisdiction.— The legislature of a British possession may by any Colonial law

(a) declare any court of unlimited civil jurisdiction, whether original or appellate, in that possession to be a Colonial Court of Admiralty, and provide for the exercise by such court of its jurisdiction under this Act and limit territorially, or

otherwise, the extent of such jurisdiction; and

(b) confer upon any inferior or subordinate court in that possession such partial or limited Admiralty jurisdiction under such regulations and with such appeal (if any) as may seem fit.

Provided that any such Colonial law shall not confer any jurisdiction which is not by this Act conferred upon a Colonial Court of Admiralty."

Pursuant to the aforesaid provision contained in Section 3 of the 1890 Act, the Indian Legislature passed Act XVI of 1891. The Colonial Courts of Admiralty (India) Act, 1891 (hereinafter referred to as the 1891 Act) wherein the High Court of Judicature at Fort William in Bengal, being a Court of unlimited civil jurisdiction, was declared to be a Colonial Court of Admiralty along with the High Courts at Madras and Bombay and some other Courts. Sub-section (2) of Section 2 of the Colonial Court of Admiralty Act, 1890 provides that the jurisdiction of a Colonial Court of Admiralty shall be the same as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations. The effect of this sub-section is to limit the jurisdiction of Colonial Court of Admiralty established under the 1890 Act to the Admiralty jurisdiction of the High Court of England as it existed at the time of passing of the Act. As already indicated, the jurisdiction of the High Court of Admiralty in England had been considerably expanded by the Acts of 1840 and 1861 passed by the British Parliament. This expanded jurisdiction of the High Court of Admiralty in England was conferred on the Colonial Court of Admiralty by the 1890 Act and the High Courts including the High Court of Judicature at Fort William in Bengal derived the authority to exercise such jurisdiction upon necessary declaration made by the Indian Legislature by Act XVI of 1891.

10. Post 1890 British Statutes affecting the Admiralty jurisdiction of the High Court in England do not apply to the Colonial Courts of Admiralty. This

view was first authoritatively laid down by the Privy Council in *The Yuri Maru*. The *Woron*, (1927 AC 906). Their Lordships held:—

"A construction of the statute of 1890 which would have the singular effect of introducing by an automatic process unasked changes in the jurisdiction and procedure of the Courts of self governing dominions, with possible power in the local legislature by a cumbrous process to revoke an extension of jurisdiction in rem but no power to undo on unwelcome abatement, manifestly could not be adopted unless the words of the statute should be found to leave no alternative.

Neither the early history of the overseas Courts, the course of modern legislation, continuity of policy, nor practical convenience appear to their Lordships to require that the jurisdiction defined in the Act shall be declared to be that "from time to time existing" in the High Court in England. On the whole, the true intent of the Act appears to their Lordships to have been to define as a maximum of jurisdictional authority for the Courts to be set up thereunder, the Admiralty jurisdiction of the High Court in England as it existed at the time when the Act passed. What shall from time to time be added or excluded is left for independent legislative determination."

The Calcutta High Court in *National Co. Ltd. v. Asia Mariner*. M. S. The Owners and Parties interested ((1968) 72 Cal WN 635) held:

"The High Court at Calcutta as a Court of Admiralty is, therefore, a Court of prescribed jurisdiction. Its jurisdiction is prescribed by Clause 26 of the Charter of 1774 and by Section 2 (2) of the Colonial Courts of Admiralty Act, 1890. The jurisdiction has not been extended or modified by any statute. None of the subsequent British statutes by which the Admiralty Jurisdiction of the High Court in England has been extended or affected has been made applicable to India." (Emphasis added)

The aforesaid decision has been noted with approval in a recent decision of the same High Court in *Mohamed Saleh Behbehari & Co.* also known as *Md. Saleh Behbehari v. Owners and Parties*

interested in the Vessel *M. V. "Notis"* also known as "*Broja Trader*" ((1981) 2 Cal LJ 129). The same view has been expressed by the Bombay High Court in *K. M. Bhagat v. Scindia Steam Navigation Co. Ltd.* (AIR 1961 Bom 186) and in *Mrs. Sahida Ismail v. Petko R. Salvejkov* (AIR 1973 Bom 18). Thus, the Admiralty jurisdiction of the Calcutta High Court commenced with the Charter of 1774 and without extension or expansion continued by the Letters Patent of 1862 and 1865. It was finally 'extended and improved' by the Colonial Courts and Admiralty Act, 1890 and the Colonial Courts of Admiralty (India) Act, 1891 and it was the same as the Admiralty jurisdiction of the High Court in England in 1890. The said jurisdiction was preserved and continued by S. 106 of the Government of India Act, 1915. This was the Admiralty jurisdiction of the Calcutta High Court in the year 1916.

11. On 22nd March, 1912, Bihar and Orissa were taken out of the limits of the Presidency of Fort William in Bengal and constituted into a separate Province. The High Court of Judicature at Patna was constituted as a Court of Record in 1916 by Letters Patent, Clauses 24 and 25 of the Letters Patent, 1916 provide as follows:—

"24. And We do further ordain that the High Court of Judicature at Patna shall have and exercise in the Province of Bihar and Orissa all such civil and maritime jurisdiction as was exercisable therein immediately before the publication of these presents by the High Court of Judicature at Fort William in Bengal as a Court of Admiralty, and also such jurisdiction for the trial and adjudication of prize causes and other maritime questions as was so exercisable by the High Court of Judicature at Fort William in Bengal.

25. And We do further ordain that the High Court of Judicature at Patna shall have and exercise in the Province of Bihar and Orissa all such criminal jurisdiction as was exercisable therein immediately before the publication of these presents by the High Court of Judicature at Fort William in Bengal as a Court of Admiralty, or otherwise in connection with maritime matters or matters of prize."

The Admiralty jurisdiction of the Patna High Court is founded upon the aforesaid two clauses. Patna High Court has

not been declared as a Colonial Court of Admiralty under S. 3 of the 1890 Act. However, it is clear from Clauses 24 and 25 that the entire Admiralty jurisdiction of the Calcutta High Court including the jurisdiction under the 1890 Act which it possessed in 1916 as a Court of Admiralty or otherwise was transferred to the Patna High Court by Letters Patent. The words in Clauses 24 and 25 are not at all suggestive of the inference that with regard to the province of Bihar and Orissa the jurisdiction of the Calcutta High Court under the 1890 Act was to be retained by it or that the same was to be denied to Patna High Court. On the other hand, Clause 39 of the Letters Patent provides that the jurisdiction of the Calcutta High Court ceased with regard to matters in respect of which jurisdiction was transferred to the Patna High Court on coming into force of the Letters Patent. Thus from 1916, the Patna High Court became authorised to exercise Admiralty jurisdiction in the Province of Bihar and Orissa. There is however no instance of Patna High Court having ever exercised its Admiralty jurisdiction. As regards Admiralty, what was transferred from Calcutta High Court to Patna High Court was the Admiralty jurisdiction of the former High Court conferred on it under the Charter of 1774 continued under the Letters Patent of 1862 and 1865 and the jurisdiction conferred by the Colonial Court of Admiralty Act, 1890. The Admiralty jurisdiction of the Patna High Court was preserved by S. 223 of the Government of India Act, 1935.

12. Orissa was created a separate Province on the 1st. of April, 1936. In exercise of the powers conferred by sub-s. (1) of S. 229 of the Government of India Act, 1935 as adapted by the India Provisional Constitution (Amendment) Order, 1948 the then Governor-General of India made the Orissa High Court Order, 1948, — vide Notification No. S. O. 10 dated the 30th April, 1948, Government of India, Ministry of Law, (Reforms), and constituted the High Court of Orissa as a Court of Record for the Province of Orissa. There is no specific mention of Admiralty jurisdiction in any of the Articles of the Orissa High Court Order, 1948. However, Article 4 provides as follows:—

"4. The High Court of Orissa shall have, in respect of the territories for the

time being included in the Province of Orissa, all such original appellate and other jurisdiction as under the law in force immediately before the prescribed day is exercisable in respect of the said territories or any part thereof by the High Court of Patna."

The expression "all such original, appellate and other jurisdiction" must by necessary implication include the Admiralty jurisdiction. Under Article 12, subject to the exceptions contained therein with which we are not concerned, the Patna High Court ceased to have jurisdiction in respect of the Province of Orissa on the coming into force of the Orissa High Court Order. The Orissa High Court derives its Admiralty jurisdiction solely from the Orissa High Court Order, 1948. It has not been declared as a Colonial Court of Admiralty under Section 3 of the 1890 Act. However, by operation of the Orissa High Court Order from 1948 the entire Admiralty jurisdiction of the Patna High Court was transferred to the High Court of Orissa and the Patna High Court ceased to have jurisdiction with regard to the Province of Orissa. The Admiralty jurisdiction of the Patna High Court which was transferred to Orissa High Court in 1948 was the jurisdiction which had been conferred by the Charter of 1774 on the Supreme Court of Judicature at Fort William in Bengal, continued and conferred on the Calcutta High Court by Letters Patent of 1862 and 1865 and the jurisdiction of the Calcutta High Court under the 1890 Act. That in essence is the Admiralty jurisdiction of Orissa High Court up-to-date. The Admiralty jurisdiction of the Orissa High Court was preserved and continued by Art. 225 of the Constitution of India.

It has been urged by learned counsel for the plaintiffs that even in the absence of internal municipal law in that regard, the Admiralty jurisdiction of this High Court should include 'international law maritime'. Learned counsel has not cited any authority to show that this principle has been accepted by any Court in India. With regard to Admiralty, this High Court is a Court of prescribed jurisdiction. It cannot go beyond the instrumentalities of internal municipal law which have conferred upon it the Admiralty jurisdiction. In England, an attempt to enter the field of "maritime law of the world" beyond the internal municipal law of England

was disapproved by the House of Lords on the ground that such a theory was based upon a misconception. In *The Tojo Maru* (1972) AC 242, Lord Diplock held:—

"...Outside the special field of "prize" in times of hostilities there is no "maritime law of the world" as distinct from the internal municipal laws of its constituent sovereign states, that is capable of giving rise to rights or liabilities enforceable in English Courts....." What has been said in respect of English Courts should also hold good for this High Court. This contention of the learned counsel must accordingly be rejected.

13. As regards maintainability of the suit filed by the plaintiffs, one of the main questions which arises for determination is whether the High Court has jurisdiction to entertain this suit in view of the admitted position that the cause of action for the suit arose within the territorial waters of Japan and the assertion of the defendants that they do not reside or carry on their business or personally work for gain within the territorial jurisdiction of this Court. The plaintiffs' case is that Rabindranath, husband of plaintiff No. 1 and father of minor Plffs. 2 and 3, died in Japan on account of injuries received by him in an explosion which took place on board the ship, of which the defendants are the owners, on the 20th July, 1978, while the ship was docked at Mizushima harbour in Japan. In their objection, the defendants have positively asserted that they do not reside or carry on their business or personally work for gain within the jurisdiction of this High Court. Mr. Mohanty, learned counsel, for the plaintiffs without disputing this stand of the defendants, urged that for a cause of action which has arisen in the high seas or foreign territorial waters, all the High Courts in India exercising Admiralty jurisdiction have concurrent powers to entertain the cause irrespective of where in India the defendants reside or carry on their business or personally work for gain. On the other hand, Mr. Das, appearing on behalf of the defendants, contends that this High Court cannot entertain the claim against the defendants who do not reside or carry on their business or personally work for gain within Orissa and, therefore, not amenable to the jurisdiction of

this Court. The contention of learned counsel for the plaintiffs that all the High Courts in India exercising Admiralty jurisdiction have concurrent powers to entertain causes of action arising in the high seas or foreign territorial waters irrespective of where the defendants reside, carry on their business or personally work for gain, is not supported by any text or authority and is also too far-fetched and wide to be accepted. On the other hand, the Letters Patent of 1916 under which the Admiralty jurisdiction of the Calcutta High Court was passed on to the Patna High Court in respect of the Province of Bihar and Orissa and the Orissa High Court Order, 1948 under which the Admiralty jurisdiction in respect of Orissa was passed on from Patna High Court to Orissa High Court clearly indicate that the Admiralty jurisdiction of the Orissa High Court is exclusive, distinct and separate from that of any other High Court. Law in all civilized countries tends to prescribe the definite forum where dispute of any particular nature would be entertainable. This is done with a view to avoiding uncertainty and conflict of jurisdiction. There can be no force in the submission of Mr. Mohanty for the plaintiffs that the law is such that plaintiffs' claim could be entertained anywhere in India. There may be an occasion where from out of the same incident more than one claim would arise and if what Mr. Mohanty contends is true, separate claims arising out of the same event, could be laid before different High Courts in India. This could not have been the intended position of procedure. So far as this High Court is concerned, I would unhesitatingly reject the theory of concurrent jurisdiction. It has already been pointed out that the law as developed in England after 1890 has no application to India, but it is useful to take note of the fact that in England, in "Admiralty actions to enforce a claim for damage, loss of life or personal injury arising out of collision, carrying out or omission to carry out manoeuvres in the case of one or more of two or more ships, or non-compliance with collision regulations, and limitation actions, service may be effected outside the jurisdiction with leave of the Court only in cases where either (1) the defendant has his habitus residence or a place of business within England and Wales, or (2) the cause of

action arose within inland waters or port limits in England and Wales or (3) an action arising out of the same incident or series of incidents is proceeding in the High Court, or has been heard and determined in the High Court, or (4) the defendant has submitted or agreed to submit to the jurisdiction of the High Court," (Halsbury's Laws of England, Fourth Edition, Volume I, page 260).

14. Learned counsel for the plaintiffs drew our attention to the following extract in para 5 of the "Statement of Objects and Reasons of the Colonial Courts of Admiralty (India) Act, 1891 published at page 197 of Volume IV of the AIR Manual, Third Edition:—

"5. The Governor-General in Council accepted the opinion of the Governor of Bombay in Council, and the unanimous opinion of the Honourable the Chief Justice and the Judges of the Calcutta High Court, that the jurisdiction of Colonial Courts of Admiralty in India should not be limited territorially or otherwise."

As already stated, the Orissa High Court has not been declared as a Colonial Court of Admiralty and the 1891 Act has no application to this High Court. Hence the above extracted passage from the 'Statement of Objects and Reasons' of the 1891 Act cannot throw any light on the territorial limits of the Admiralty jurisdiction of this High Court. On this question I would rather go back to Clause 28 of the Charter dated 26th March, 1774. This clause first deals with Court affidavits and affirmations, their form and manner, their weight, authority and effect and then states—

".....provided always that the several powers and authorities hereby to proceed in maritime causes, and according to the laws of the Admiralty shall extend and be construed to extend only to the subjects of us, our heirs, or successors, who shall reside in the Kingdoms or provinces of Bengal, Bihar and Orissa, or some of them and to persons who shall, when the cause of suit for complaint shall have arisen, have been employed by, or shall then have been, directly or indirectly, in the service of the said United Company, or of any of our subjects."

Subsequent laws dealing with Admiralty and maritime jurisdiction applicable to this High Court have left this clause untouched. The proviso is as much alive

to-day as it was in 1774 though to-day in respect of Orissa it would obviously mean that the powers and authorities under it to proceed in maritime causes and according to the laws of the Admiralty shall extend and be construed to extend only to the citizens of India residing in the State of Orissa and to persons who on the date of the cause of action were in the service of the Government or in the service of the citizens who are residents of Orissa. In the present case, the defendants do not belong to any of the three categories of persons described above. Accordingly, it must follow that the defendants cannot be proceeded against in an action in personam in the Admiralty jurisdiction of this High Court in view of the provisions contained in Clause 28 of the 1774 Charter.

15. It has been urged on behalf of the defendants that the cause of action in the present suit did not arise within the local limits of the jurisdiction of this High Court and the defendants do not actually or voluntarily reside or carry on their business or personally work for gain within the said jurisdiction and as such Section 20 of the Code of Civil Procedure is a bar to the institution of the suit before this Court. In order to meet this objection learned counsel for the plaintiffs relies on sub-section (2) of Section 112 of the Code of Civil Procedure wherein it is provided that nothing therein contained applies to any matter of criminal or admiralty or vice-admiralty jurisdiction, or to appeals from orders and decrees of Prize Courts. It may be seen that Section 112 comes within Part VII of the Code of Civil Procedure. Part VII deals with 'Appeals'. Sections 96 to 99A are placed under the sub-heading 'Appeals from original Decrees'; Sections 100 to 103 are placed under the sub-heading 'Appeals from Appellate Decrees'; Sections 104 to 106 are placed under the sub-heading 'Appeals from Orders'; Sections 107 and 108 are placed under the sub-heading 'General Provisions relating to Appeals'; and finally, Sections 109 to 112 are placed under the sub-heading 'Appeals to the Supreme Court'. The scheme of Part VII and the language of Section 112 suggest that only the provisions as to appeals do not apply to matters coming within the Admiralty jurisdiction. The present suit is, however, not concerned with any ap-

peal in the Admiralty jurisdiction. Support is available for the proposition that the Code of Civil Procedure applies to civil action under the admiralty jurisdiction from the fact that provision had to be made under sub-section (2) of Section 112 of the Code to exclude the application of some provision in the Code to a given situation. If the entire Code was not applicable to disputes under the admiralty jurisdiction, a provision as found in sub-section (2) of Section 112 of the Code would have been made elsewhere and possibly under Section 9, to indicate the legislative intention of the Code being kept out. Therefore, the bar of sub-section (2) of Section 112, C. P. C. does not apply to the present suit. Undoubtedly the present dispute relates to a claim of civil nature. Civil courts are courts of general jurisdiction and the people have a right to insist for free access to the courts. Plaintiffs have in the instant case invoked the admiralty jurisdiction of this Court with reference to a civil action. Unless there be exclusion of the procedure prescribed for civil courts or there be an independent set of rules different from the procedure normally applicable to civil proceedings, the Code of Civil Procedure which applies to civil proceedings before Courts would also have application to civil disputes in admiralty jurisdiction. That again is a feature in support of the contention of counsel for defendants that jurisdiction of this Court has to be tested by the rules of procedure laid down in the Code. Section 20, Civil Procedure Code provides:—

"20. Other suits to be instituted where defendants reside or cause of action arises:

Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction—

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business,

or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.

Explanation: A corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place."

There can be no doubt that the cause of action can never arise within the local limits of a Court's jurisdiction in cases of maritime torts committed upon the highseas or foreign territorial waters. Section 20 (c), C. P. C. cannot be invoked in such cases. Therefore, either the conditions laid down in Section 20 (a) or those laid down in S. 20 (b), C. P. C. must be satisfied before the Court can entertain a suit. In the present case the defendants do not voluntarily reside or carry on their business or personally work for gain within the local limits of the jurisdiction of this Court. Hence Section 20, C. P. C. bars the jurisdiction of this Court to entertain the present suit.

16. Learned counsel on both sides had addressed the Court at length as to whether the accident on the 20th July, 1973 on board the ship at Mizushima harbour resulting in the death of Rabindranath can be said to be damage done by that ship within the ambit of Section 7 of the 1861 Act and if so, whether the provisions of the Fatal Accidents Act 1885 bar the application of the said Section 7 of the 1861 Act. I have already held that this Court has no jurisdiction to entertain the present suit. Order 14, Rule 2 (2) of the Civil Procedure as amended in 1976 provides that an issue relating to jurisdiction of the Court should be decided preliminarily and law is fairly settled that where it is a case of absence of total jurisdiction, findings on questions of fact should not be given. Hence, it is not necessary that the said matter which requires consideration and determination of factual aspects of the case should be decided by this Court.

17. The Letters Patent of 1916 constituting the High Court of Judicature at Patna and the Orissa High Court Order, 1948 constituting the High Court of Orissa do not contain any provision making the Calcutta High Court Admiralty Rules, 1912 applicable to the Admiralty jurisdiction of this Court. The said Rules cannot apply to regulate

the procedure and practice in cases instituted in the Admiralty jurisdiction of this Court. In the absence of any law or rules relating to court-fees payable in an action in the Admiralty jurisdiction of this Court, the question whether court-fees paid by the plaintiffs in the present suit are sufficient or not does not arise for determination by this Court.

18. For the reasons stated above, the present suit cannot be entertained by this Court in its Admiralty jurisdiction. The plaint be returned to the plaintiffs' counsel for presentation before a proper Court of law. There shall be no order as to costs.

P. K. MOHANTI, J.:— I agree.
Order accordingly.

AIR 1982 ORISSA 70

N. K. DAS, J.

Orissa State Commercial Transport Corporation, Cuttack, Appellant. v. Smt. Dhumali Bewa and others, etc., Respondents.

Misc. Appeal Nos. 88, 90, 93 and 94 of 1979, D/- 7-12-1981.*

Motor Vehicles Act (4 of 1939), S. 110-B — Truck accident — Cleaner holding no driving licence causing death by running truck over victims — Accident occurring in private place — Owner is liable — Insurer is not liable — Res ipsa loquitur applies. (i) Tort — Negligence — Vicarious liability; (ii) Maxims — Res ipsa loquitur.)

The ill-fated truck was unloaded and thereafter the deceased coolies were engaged in filling up the unloaded chromite ore into the baskets behind the truck for the purpose of loading the ore into waiting barges. The driver of the truck had left the ignition key on the switch board of the vehicle and had gone for having tea. The cleaner who did not possess any driving licence reversed the vehicle without blowing any horn and ran over the deceased resulting in their death. The accident took place on a spot which was not a public place.

Held, that there was complete negligence on the part of the driver and it was in course of employment of the

*From order of N. Mohapatra, Motor Accident Claims Tribunal, Cuttack, D/- 5-3-1979.

owner and hence the owner was liable to compensate. (Para 6)

Held, further, that the accident occurred in a private place and not in a public place and the person driving the vehicle at the time of the accident had no licence to drive the vehicle. Therefore, the Tribunal was right in exonerating the insurer from the liability and saddling the liability on the owner.

(Para 6).

Normally it is for the plaintiff to prove negligence, but as in some cases considerable hardship is caused to the plaintiff as the true cause of the accident is not known to him but is solely within the knowledge of the defendant who caused it, the plaintiff can prove the accident but cannot prove how it happened to establish negligence on the part of the defendant. This hardship is sought to be avoided by applying the principle res ipsa loquitur. In the instant case the fact the accident took place by reversing the vehicle is not disputed. The plea taken by the owner in the written statement is different from what is stated by the driver of the vehicle. It appears that the owner is not coming up with a true version. In these circumstances, it must be held agreeing with the findings of the Tribunal that the claimants are entitled to compensation and that from the appellant. AIR 1966 SC 1697; AIR 1977 SC 1735 and AIR 1982 Orissa 12, Foll. (Para 6)

Cases Referred : Chronological Paras
AIR 1982 Orissa 12: 52 Cut LT 19 6
AIR 1977 SC 1735 6
AIR 1966 SC 1697 6

Bijoy Mohanty and B. C. Sahu for Appellant; A. K. Mohanty and Puranjan Roy, for Respondents.

JUDGMENT:— In an accident by truck ORU 7741 belonging to the appellant Corporation, three persons namely, Bansidhar Mohanty, Kulamoni Das and Sunakar Mallick died and Nachha Swain was injured. This happened at the time of unloading in the jetty No. 1 of the Paradip Port on 26-4-1975 at about 3 A.M. M. A. No. 93/79 relates to the claim made by the widow and other claimants of Bansidhar. M. A. No. 90/79 relates to the claim made by the widow and other claimants of Kulamoni. M. A. 88/79 relates to the claim made by the widow and other claimants of Sunakar Mallick. The injured Nachha Swain is the claimant in M. A. 94 of 1979.

2. Their case is that the vehicle was being driven by one S. Appa Rao, an employee of the appellant. After this truck was unloaded, the coolies, namely, three deceased persons and the injured along with others, were engaged in filling up the unloaded chromite ore into the baskets behind the truck for the purpose of loading the said ore into waiting barges. The driver of the truck reversed the vehicle without blowing any horn and ran over them which resulted in the death of the aforesaid three persons and injured Nachha Swain. The claimants of late Bansidhar have claimed Rupees 40,000/-, of Kulamoni have claimed Rs. 40,000/-, and of Sunakar Rs. 40,000/- as compensation. The injured Nachha Swain has claimed Rs. 50,000/- as compensation including medical expenses. Bansidhar was aged 30 years and was earning Rs. 300/- per month, Kulamoni was aged 30 years and was earning Rupees 300/- per month, Sunakar was aged 35 years and was earning Rs. 300/- per month and Nachha Swain was aged 35 years and he was earning Rs. 300/- per month.

The appellant in the common written-statement in all these four cases which have been heard analogously denied that S. Appa Rao was driving the vehicle. It is admitted that S. Appa Rao is only a helper of the truck. He was not authorised to drive this vehicle. One Khirod Kumar Sahu was the driver of the vehicle. At the relevant time Khirod Kumar Sahu was taking tea in a nearby hotel who left the ignition key on the switch board of the vehicle and at that time S. Appa Rao was sleeping inside the vehicle. Under these circumstances the accident took place. Appellant is not aware as to how the accident took place. Therefore, the appellant is not liable.

The insurer who is Opp. Party No. 2 in the common written statement denied the averments made in the petitions. It contended that it not liable to compensate the appellant as the vehicle was driven by S. Appa Rao who had no driving licence. Further the accident took place near Jetty No. 1 which is not a public place. For the aforesaid reasons, it is contended that Opp. Party No. 2 is not liable to indemnify Opp. Party No. 1.

3. The tribunal has held that S. Appa Rao was driving the vehicle at the time of the accident. He was not authorised

to drive this vehicle. He was not holding a licence as driver at the time of the alleged accident. The accident took place in a private area. The real driver Khirod Kumar Sahu was negligent in his duties. Therefore, the insurer is not liable and the owner is liable.

4. In case of Bansidhar, the Tribunal has awarded Rs. 25,000/-. In case of Kulamoni it has awarded Rs. 25,000/- and in case of Sunakar, it has awarded Rs. 15,000/-. In case of Nachha Swain it has allowed Rs. 5,000/-. Interest has been allowed at the rate of 6% per annum from the date of application till the date of payment. A consolidated cost of Rs. 250.00/- has been allowed.

5. It appears that the plea taken in the written-statement by the present appellant and the statement of the driver O. P. W. 2 are not in consonance with each other. From the evidence of P. Ws. 4, 5 and 6, it is clear that the accident was due to rash and negligent driving of the vehicle. There is no dispute about the fact that the accident took place by the reverse movement of the vehicle when the deceased persons and the injured were busy behind the truck in filling up their baskets with unloaded chromite ore for the purpose of loading them into barges. While they were so busy, the vehicle suddenly reversed without blowing horn or giving any indication that the vehicle would be backed. Thus, the vehicle suddenly backed and ran over the three deceased persons while severely injuring Nachha Swain. The appellant has not adduced any evidence to justify reversing of the vehicle. Therefore, the sudden reversal and backward movement of the vehicle without blowing any horn had caused the death of three persons and injured Nachha Swain.

6. It is the definite case of the claimants that S. Appa Rao was driving the vehicle. The case of the appellant in the written statement is that S. Appa Rao was not the driver and he was the clearer and the driver was taking tea in a nearby hotel and had left the ignition key on the switch board. The driver O. P. W. 3 says that while unloading was going on he informed S. Appa Rao to keep watch over the vehicle as well as belongings as he was feeling like going out to respond the call of nature. He admits that he was informed by another driver and the Field Assistant that S. Appa Rao had caused the accident.

He accordingly informed the office. Evidently, therefore, the stand taken by the appellant that S. Appa Rao was not driving the vehicle is not true. It is proved from the evidence of the appellant that S. Appa Rao was only a helper and had no authority to drive the vehicle. It is not disputed that the Jetty No. 1 was a private place and was not a public place. It is admitted by the appellant that S. Appa Rao had no licence to drive the vehicle. In view of the aforesaid circumstances, the learned tribunal has rightly exonerated the insurer from the liability and has saddled the liability on the appellant. The evidence of O. P. W. 3 is contrary to the pleadings. After going through the pleadings and the evidence in the case, I am satisfied that the driver had left the ignition key on the switch board and it was S. Appa Rao without having licence had put the vehicle in the back gear and while the vehicle was driven back the unfortunate accident took place. It would thus appear that there was complete negligence on the part of the driver and it was in course of employment of the owner, namely, the appellant (See *Sitaram Motilal Kalal v. Santanuprasad Jai-shankar Bhatt*, AIR 1966 SC 1697 and *Puspa Bai Parshottam Udeshi v. Ranjit Ginning & Pressing Co. Pvt. Ltd.* AIR 1977 SC 1735). It has also been held in *Mst. Amruta Dei v. State of Orissa*, (1981) 52 Cut LT 19: (AIR 1982 Orissa 12), that normally it is for the plaintiff to prove negligence, but as in some cases considerable hardship is caused to the plaintiff as the true cause of the accident is not known to him but is solely within the knowledge of the defendant who caused it, the plaintiff can prove the accident but cannot prove how it happened to establish negligence on the part of the defendant. This hardship is sought to be avoided by applying the principle *res ipsa loquitur*. The general purport of the words *res ipsa loquitur* is that the accident "speaks for itself" or tells its own story. There are cases in which the accident speaks for itself, so that it is sufficient for the plaintiff to prove the accident and nothing more. It will then be for the defendant to establish that the accident happened due to some other cause than his negligence. When the maxim is applied the burden is on the defendant to show either that in fact he was not negligent or that the accident might more pro-

bably have happened in a manner which did not connote negligence on his part. For the application of the principle it must be shown that the vehicle was under the management of the defendant and that the accident is such as in ordinary course of things does not happen if those who had the management used proper care.

In the instant case the fact that the accident took place by reversing the vehicle is not disputed. The plea taken by the appellant in the written statement is different from what is stated by the driver of the vehicle. It appears that the appellant is not coming up with a true version. In these circumstances, I am in agreement with the findings of the Tribunal that the claimants are entitled to compensation and that from the appellant.

7. The age of Bansidhar as stated by P. W. 1 has not been challenged. He would have lived up to the age of 60 years and could have worked as a coolie for another 25 years. Bansidhar was not only working as a road repairer but also as agriculturist. The monthly income has been rightly assessed by the Tribunal at Rs. 200/- on the average of Rs. 6/- to Rs. 7/- per day. Had he not died he would have contributed towards the maintenance of the claimants at the rate of Rs. 100/- per month for 25 years.

The age of Kulamoni Das as stated by P. W. 2 has not been challenged. He was working as a coolie along with aforesaid Bansidhar. His monthly income has, therefore, been assessed at Rs. 200/- and his contribution would be valued at Rupees 100/- towards the maintenance of the claimants for about 25 years. On the same par as in the case of Bansidhar, the case of Kulamoni is to be considered and after considering the evidence, I am in agreement with the Tribunal that the assessment has been rightly made at Rs. 25,000/-.

The age of Sunakar Mallick as stated by P. W. 3 stands un-challenged. He was working as a coolie along with Bansidhar. His age was 35 years and he would have at least lived for fifteen years more and contributed Rs. 100/- per month. The gross compensation amount comes to Rs. 18,000/-. After deducting one-sixth for lump sum payment and uncertainties, the compensation has been rightly assessed at Rs. 15,000/-.

Nachha Swain was hospitalised for fifteen days. His case is that on ac-

count of injury to his thigh he is feeling pain if he works for a long time. Further he says that he is not able to carry any load or do chromite loading work. He has not adduced any satisfactory evidence about medical expenses. Nowhere he has stated that he is not able to earn anything after the accident. Moreover, the nature of the injury is such that one cannot believe that he was completely disabled. He was not a regular employee of any contractor or institution for loading only chromite ore. Under these circumstances, an amount of Rupees 5000/- for the fracture of the thigh bone and further pain and suffering appears to be reasonable. A cross appeal has been filed M. A. 88/79 but as I have discussed above, there being no satisfactory evidence adduced from the side of appellants, there is no merit to allow the cross appeal.

The award of interest as made by the Tribunal appears to be reasonable and there is no ground to interfere.

8. In the result, all the aforesaid appeals as well as the cross-appeal are dismissed. In the circumstances of the case, there will be no order as to costs.

Order accordingly.

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R. C. PATNAIK, J.

Hadibandhu Ho and others, Appellants
v. Luchia Ho and others, Respondents.

Second Appeal No. 296 of 1977, D/- 5-12-1981.*

Transfer of Property Act (4 of 1882), S. 105 — Transfer of land — Possession of tenant if permissive — Defendant paying rent and obtaining receipt in name of plaintiff — Possession of tenant if permissive.

If rent is paid by a trespasser ordinarily the receipt would be granted in the name of the person in whose name the property stands recorded. Until the name of the recorded owner is changed by mutation or otherwise, the receipt perforce, would be granted in his name. A trespasser to protect his interest, i.e., to avoid sale of the property on account of non-payment of rent, may be obliged to pay the rent and he cannot obtain a receipt in his name so long as his name

has not been mutated in place of the owner and such mutation may be possible only after his adverse possession matures into title by lapse of the period prescribed. In such a situation, it would be incorrect to state that the trespasser by paying rent and obtaining receipt in the name of the recorded owner acknowledged the title of the recorded owner. The receipt would be granted in the name of the recorded owner despite his hostile animus. (1974) 40 Cut LT 294 Foll. (Para 9)

Cases Referred: Chronological Paras
(1974) 40 Cut LT 294: 1974 Rent Cas 104 9

AIR 1955 NUC 715: (1954) 20 Cut LT 586 (Orissa) 9

S. C. Mohapatra and D. K. Mohapatra, for Appellants; P. K. Dhal, for Respondents.

PATNAIK, J.;— The plaintiffs, who have been unsuccessful before the courts below, filed the suit for declaration of title, confirmation or in the alternative recovery of possession and for grant of mandatory injunction restraining the defendants from going upon the suit property.

2. Their case was that their father Matai was the owner of plots Nos. 395 and 425 in village Ghulghulia. Not being capable of cultivating his entire land, he got the suit land cultivated through Randa, the deceased father of defendants 1 and 2. In April, 1975, when he went with his labourers for conducting agricultural operation, the defendants obstructed and threatened with evil consequences. So an application under S. 145 Cr. P. C. was filed. Since the proceeding was protracted, the suit was filed. The plea of the defendants was that the property was sold orally to Randa their father, for a consideration of Rs. 90/- about 30 years back and possession was delivered to him. After the death of their father, they were in peaceful enjoyment of the property and paying rent therefor.

3. The findings of the courts below are that the plaintiffs have failed to establish that the possession of the defendants was permissive and the defendants have been able to establish their case or oral sale in favour of Randa by Matai.

4. There is no dispute that the title originally inhered in Matai. It is also

*From decision of J. K. Mohapatra, Sub. J. Rairangpur, D/- 2-8-1977.

not in dispute that the defendants are in possession since some years before 1955.

5. The plaintiffs have sought to characterise the possession of the defendants as permissive whereas the defendants assert possession by virtue of their own right as owners, pursuant to the purchase by their father from Matai under an oral sale.

6. The plaintiffs having alleged that the possession of Randa, the predecessor-in-interest of the defendants, was initially permissive, the burden is on them to establish the said plea and to satisfy by cogent and convincing evidence that Randa was let in to cultivate the land. The trial court has discussed this question under issue No. 4 and after an analysis of the evidence has observed:

"On the above evidence it is seen that the plea of the plaintiffs is not believable at all None of the P. Ws. have also stated that in their presence, the land was allotted to Randa".
and has concluded that:

"the plaintiffs have failed to prove the claim that the land was allotted to Randa only for a temporary period and defendants were in permissive possession."

The lower appellate court has independently analysed the evidence and held:

"the learned Munsif has come to the right conclusion that the onus of permissive possession has not been proved by the plaintiffs."

7. Mr. S. C. Mohapatra appearing for the appellants in this Court has strenuously urged that the courts below have failed to draw the correct legal inference from the proved facts and Ext. 3 executed by defendant No. 1 before the police authorities undertaking to give up possession has not been properly considered and due evidential weight has not been given to this document. He has further urged that the defendants having admitted that they were paying rent for the suit land in the names of the plaintiffs, have acknowledged the title of the plaintiffs and cannot plead adverse possession.

8. The submissions though attractive are untenable. Defendant No. 1 is an illiterate person. His thumb impression appears to have been affixed to Ext. 3. Ext. 3 purports to record an undertaking given by the defendant No. 1 before the police authorities that possession would be handed over to the plain-

tiffs. Such an undertaking would not confer title if the plaintiffs had none, nor would divest the defendants of title if they had it. In my opinion, Ext. 3 is innocuous in character. It contained a mere promise. I am not going into the question whether the said document was duly executed by the illiterate defendant No. 1 though the counsel for the respondents has vehemently urged that there is no evidence to prove due execution by defendant No. 1. The counsel for the respondents has further urged that the fact that the document was executed in presence of the police authorities, does not rule out duress and intimidation. Since this document, in my opinion, is irrelevant, I do not feel called upon to settle this aspect of the controversy.

9. The other submission of Mr. Mohapatra, however, merits careful consideration. Relying on Endumuru Nagaya Boitharu v. Potaju Raghunath Boitharu (1954) 20 Cut LT 586: (AIR 1955 NUC 715) (Orissa) he has contended that the defendants, having paid rent and obtained receipt in the names of the plaintiffs, have acknowledged the title of the plaintiffs and, as such, their possession is permissive.

The aforesaid holding of Sri S. P. Mohapatra, J. has not been followed by this Court in Arjun Samal's case ((1974) 40 Cut LT 294). Chief Justice G. K. Misra referring to the said decision observed:

"With great respect, I am unable to agree with this wide proposition. Merely because a party files receipt in support of his case that he made payment in the name of the person in whose name the record stands, it does not follow that the title of the other party has been acknowledged."

and then referring to a number of other decisions observed:

"The aforesaid decisions were cited only to show that the wide conclusion drawn by Mohapatra, J. in Endumuru Nagaya Boitharu v. Potaju Raghunath Boitharu (AIR 1955 NUC 715) (Orissa), cannot be indiscriminately applied to all cases. What inference is to be drawn in a particular case would depend upon the facts and circumstances of that case." I respectfully concur in the aforesaid opinion of the Hon'ble Chief Justice. If rent is paid by a trespasser ordinarily the receipt would be granted in the name

of the person in whose name the property stands recorded. Until the name of the recorded owner is changed by mutation or otherwise, the receipt, perforce, would be granted in his name. A trespasser to protect his interest, i. e., to avoid sale of the property on account of non-payment of rent, may be obliged to pay the rent and he cannot obtain a receipt in his name so long as his name has not been mutated in place of the owner and such mutation may be possible only after his adverse possession matures into title by lapse of the period prescribed. In such a situation, it would be incorrect to state that the trespasser by paying rent and obtaining receipt in the name of the recorded owner (Revenue authorities can grant receipt only in the name of the recorded owner) acknowledged the title of the recorded owner. The receipt would be granted in the name of the recorded owner despite his hostile animus.

In my humble opinion, the principle laid down by Mohapatra, J. has been too broadly stated and should be confined to the facts and circumstances of the case of Endumuru (AIR 1955 NUC (Orissa) 715) (supra).

10. The last point urged by Mr. Mohapatra has also no merit. The courts below have rightly found that the plaintiffs have failed to establish that the father of the defendants was permitted to cultivate the land and hence the possession of the defendants was permissive in character. They have also found that the defendants have been able to establish that the suit property was purchased by their father under an oral sale. The question is a dead question of fact and is binding on me since no perversity in the finding is shown.

11. Agreeing with the courts below, I hold that the plaintiffs have no merit. Their suit as well as this appeal deserved dismissal and the appeal is hereby dismissed. In the circumstances, no costs. Appeal dismissed.

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P. K. MOHANTI AND B. K.

BEHERA, JJ.

Narasingha Charan Swain, Petitioner v. Jairam Jena and others, Opposite Parties.

Misc. Judl. Case No. 66 of 1980, D/- 25-11-1981.

LY/AZ/G38/81/AAJ/SNV

(A) Orissa High Court Rules, Part I, Chapter III, R. 8 — Civil P. C. (5 of 1908), S. 148 — Peremptory order of Court allowing the appellant specific period only, to file paperbooks on compulsory documents — Non-compliance of — Appeal does not come to an end when order did not provide for consequence of failure to comply.

The Court passed a peremptory order allowing the appellant 'A', the time to file the paperbooks on compulsory documents. 'A' failed to comply with the order within the time prescribed by the Court. There was no direction by the Court that on failure to comply with the peremptory order the appeal shall stand dismissed without further reference to the Bench. The Deputy Registrar passed an order of dismissal of appeal in default of 'A' to comply with the order.

Held, that the order of dismissal could not be recorded by the Deputy Registrar without anything more being said by the High Court. The Court's order simply said that time was allowed peremptorily. This only meant that the time was allowed finally and that 'A's failure to comply with the order within the time an adverse order against him might be passed. In view of Court's power to extend time under S. 148 the Court could not be said to have lost seisin over the case. (1896) 1 Ch D 644; AIR 1969 Orissa 7; AIR 1954 Orissa 136 and AIR 1961 SC 882, Rel. on. (Para 8)

(B) Limitation Act (36 of 1963), Article 122 — Orissa High Court Rules Part I, Chapt. III, R. 13, Second proviso — Dismissal of appeal under by Deputy Registrar and not by High Court — Appeal would be deemed to be pending — Limitation would not apply to application for restoration of appeal. AIR 1973 Orissa 169, Disting. (Para 5)

Cases Referred: Chronological Paras
AIR 1973 Orissa 169: ILR (1973) Cut 267 (FB) 5

AIR 1969 Orissa 7 10

AIR 1961 SC 882 9

AIR 1954 Orissa 136: 20 Cut LT 324 10

(1896) 1 Ch D 644: 74 LT 78: 44 WR 311.

Collinson v. Jeffery 10

S. K. Mohanty, for Petitioner; M. Patra, B. Dagara, P. C. Singh and G. B. Panda, for Opposite Parties.

P. K. MOHANTI, J.:— This is an application under S. 151, C. P. C. for restoration of First Appeal No. 47 of 1974 which was dismissed for default on 29-1-1979.

2. The First Appeal was dismissed because the appellant failed to comply with a peremptory order to file the paperbooks on compulsory documents within the time fixed by the Court. The petitioner's contention is that he did not know that a peremptory order had been passed and that when the connected appeal (F. A. No. 310 of 1978) was listed in the Cause List on 7-5-80 he came to know about the dismissal of the appeal.

3. The application for restoration was filed on 12-5-80; that is, after a delay of about 523 days. The petitioner has filed another application for condonation of delay on the ground that he was not aware of the peremptory order and he came to know about dismissal of the appeal for the first time when the matter was listed in the Cause List on 7-5-80.

4. The Opposite Party No. 1 Jairam Jena has opposed the prayer for condonation of delay. His contention is that there was wilful laches on the part of the petitioner in not filing an application for restoration in time.

5. The appeal was not dismissed for non-compliance with the provisions of O. 41, Rr. 11, 17 and 18. Consequently the application for restoration cannot be treated as one under O. 41, R. 19, C.P.C. The appeal purports to have been dismissed under the second proviso to R. 13 of Chapt. III, Part I of the Rules of the High Court of Orissa, Volume I. The Rules of the High Court do not prescribe any period of limitation for restoration of an appeal dismissed for default. The power of restoration is to be exercised under S. 151, C.P.C. for which no period of limitation is prescribed by the Indian Limitation Act. No doubt, in the case of *Bimala Devi v. Patitapaban Dev*, ILR (1973) Cut 267; (AIR 1973 Orissa 169) a Full Bench of this Court held that an appeal dismissed for non-compliance with the High Court Rules is none-the-less an appeal dismissed for want of prosecution and as such an application under S. 151, C.P.C. for restoration of such an appeal falls within the ambit of Art. 122 of the Indian Limitation Act. But in the present case, the petitioner's contention is that the order of dismissal was not passed by the Court but by the Deputy Registrar under a mistaken impression that the appeal came to an end on the expiry of the time granted by the Court to file the paperbooks on compulsory documents. The argument is that

the appeal is deemed to be pending and the order of dismissal recorded by the Deputy Registrar is a nullity. There is considerable force in this argument. We accordingly hold that the question of limitation does not arise in this case.

6. Mr. S. K. Mohanty, learned counsel appearing for the petitioner submitted that in the absence of any direction by the Court that on failure to comply with the peremptory order the appeal shall stand dismissed without further reference to the Bench, it was necessary to place the matter before the Bench for final orders.

7. Under R. 8 of Chapt. XI of the Rules of this Court the appellant was required to supply along with the appellant's list the requisite number of typed cyclostyled paperbooks containing the compulsory documents. The appellant's list was filed on 4-5-76. It was not accompanied by the paperbooks on compulsory documents. The appeal was listed on 6-10-78 with the office note that the paperbooks on compulsory documents had not been filed and the Court passed the following order:

xxx xxx xxx xxx

Two weeks' time after the ensuing Puja holidays of the Court is granted peremptorily to file requisite number of copies of paperbook on compulsory papers."

The above order having not been complied with the appeal was dismissed for default on 29-1-1979 as per the order of the Deputy Registrar which runs as follows:

"25. 29-1-79. The required number of paperbooks on compulsory documents not having been filed this appeal stands dismissed pursuant to Order No. 24 dated 6-10-78."

8. The real question is what is the effect of the Court's order dated 6-10-78. The order does not say anything as to the consequences of the default by the party. If the order had contained the words "in default, the appeal shall stand dismissed without further reference to the Bench" we should have thought that on the expiry of the period allowed by the Court the appeal came to an end. But we think, having regard to the terms of the order, a further order was necessary by the Court before the appeal came to an end. The order simply says that time was allowed peremptorily. This only means that the time

was allowed finally and that on appellant's failure to comply with the order within the time, an adverse order against him might be passed. In our opinion, the order of dismissal could not be recorded by the Deputy Registrar without anything more being said by the Court.

9. Under S. 148 of the Code of Civil Procedure, the Court is vested with the power to extend the time even after expiry of the time allowed by it. The power being there, it was for the Court to exercise it in its discretion either by extending or refusing to extend time. The Court did not lose seisin of the case after the expiry of the period notwithstanding the default. As observed by the Supreme Court in AIR 1961 SC 382: *Mahanth Ram Das v. Ganga Das*, such procedural orders, though peremptory (conditional decrees apart) are, in essence, in terrorem, so that dilatory litigants might put themselves in order and avoid delay. They do not, however, completely estop a Court from taking note of events and circumstances which happen within the time fixed.

10. We think it is going a little too far to say that the order is a complete final order and that the appeal was dead on the expiry of the period allowed by the Court. In the absence of the words "in default, the appeal shall stand dismissed without further reference to the Bench" the Court retained control over the case. A further order by the Court was, therefore, necessary for final disposal of the appeal. We may, in this connection, rely on a decision in the case of *Collinson v. Jeffery*, (1896) 1 Ch. L. 644. That case arose out of a redemption action. An order was made giving the plaintiff leave to lodge the mortgage money in Court and it was directed that in default of such lodgement, within two months from the date of the order, the action would be dismissed with costs. The plaintiff failed to lodge the money in Court until after two months fixed by the Court. It was held that notwithstanding the expiry of the period of two months, the action was not dead, but that the Court had jurisdiction to extend the time limited by the order. The order did not contain the clause "the action do stand dismissed without further order". The Court, therefore, held that it was necessary to pass a final order of dismissal. Kekewich, J. observed as follows:

".....It appears to me, however, that

this action is not dead. It is comatose; it is moribund; but a final stroke is required to effect death. That final stroke has not been delivered, and therefore, in my opinion, the application is properly made and the order asked for may be granted."

This decision was followed by a Division Bench of this Court in the case of *Hati Pratibari v. Alekh Mohapatra* (1954) 20 Cut. LT 324: (AIR 1954 Orissa 136) and by a single Bench in the case of *Kanhu Charan Behera v. Jagabandhu Behera*, AIR 1969 Orissa 7.

11. In the premises aforesaid it must be held that a final order has yet to be passed on the expiry of the period allowed by the Court.

12. In the result the M. J. C. is allowed, but without any order as to costs. First Appeal No. 47 of 1974 is deemed to be pending. It may now be listed for orders.

BEHERA, J. :— I agree.

Order accordingly.

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N. K. DAS AND R. C. PATNAIK, JJ.

Premananda Moher, Petitioner v. Revenue Officer-cum-Additional Tahsildar, Bargarh and others, Opposite Parties.

Original Jurisdiction Case No. 579 of 1977, D/- 29-10-1981.

(A) Orissa Land Reforms Act (16 of 1966), S. 43 — Ceiling proceedings — Case fixed for spot verification for ascertaining proper classification of land — Roving enquiry and recording of evidence from persons assembled on spot — Principles of natural justice, held, violated. (Constitution of India, Art. 226).

Where in a proceeding under S. 43, the land-holder in his objection questioned the correctness of land shown as surplus and alleged that the classification of land was not correct and the Revenue Officer fixed the case for spot verification for the purpose of ascertaining the proper classification of lands the only matter that that could be taken up, at the spot was verification of classification of land, because the parties were informed of only that and nothing more, by making a roving enquiry on the spot about questions of which land-holder had no notice, and recording evidence from persons assembled on the

LY/AZ/G40/81/VCD/MVJ-H

spot on such questions, the Revenue Officer violated the principles of natural justice.

(Paras 6, 7)

A cardinal principle of administration of justice is that justice must not only be done but seem manifestly to have been done. Not only should the judge administer justice according to law but it must also appear that the party or his cause is being dealt with justly and fairly. The principles of natural justice are the bedrock of rule of law to which our democracy is wedded. It behoves all authorities — high or low — to bear the same in mind while dealing with citizens or their rights and obligations. (Para 5)

(B) Orissa Land Reforms Act (16 of 1960), S. 43 (2) — Orissa Land Reforms (General) Rules (1965), R. 30 (2) — Proceeding under S. 43 — Revenue Officer holding several persons as land-holders — Each person is entitled to notice — Revenue Officer serving notice only on one person — Proceeding, held, vitiated.

Where in a proceeding under S. 43 of the Act the Revenue Officer by his order held several persons to be the land-holders, and the draft statement also contained the names of those seven persons, it was incumbent on the Revenue Officer to serve notices on all the seven persons. Since the Revenue Officer served notice only on one person and not on all, the procedure, offended the mandatory requirements of both S. 43 (2) of the Act and R. 30 (2) of the Rules, and the proceeding was vitiated. (Para 8)

B. K. Behura, for Petitioner; Addl. Govt. Advocate, for Opposite Parties.

PATNAIK, J.— In this writ application, the petitioner challenges the decisions of the revenue authorities under Chapter IV of the Orissa Land Reforms Act.

2. A *suo motu* proceeding under Section 43 of the Orissa Land Reforms Act (hereinafter referred to as the 'Act') was started by the Revenue Officer and notices were directed to issue to one Lambodar Moher in O. L. R. Case No. 152 of 1975. Lambodar, however, had died in the year 1966. So, the petitioner, one of the sons of Lambodar, appeared before the Revenue Officer and filed his objection and affidavit. His brother, Pitambar, also filed an affidavit before the Revenue Officer. After holding an enquiry, the Revenue Officer, by his order dated 15-9-75 held that the petitioner (Premananda) and his

brothers (Nityananda, Pitambar and Duryodhan), sisters (Shanti and Srimati) and mother (Tilottama) were each entitled to a separate ceiling area and all of them together were to retain 72 standard acres, the balance land was to vest in the Government as surplus land. On the basis of the said order, a draft statement was prepared and published on 30-9-75 under Section 43 of the Act showing the petitioner and 6 others as land-holders. Notice was however, issued to the petitioner alone requiring him to file objections, if any, within the date specified. No notice was issued to the other 6 persons who were held as land-holders by order dated 15-9-75 and were shown as such in draft statement. In his objection the petitioner questioned the correctness of the land shown as surplus. He contended that certain lands which had been transferred long back were included and the classification was not correct. The case was adjourned from date to date until on 6-2-76 the Revenue Officer on the motion of the petitioner directed that verification of the land at the spot was necessary to ascertain the correct classification, and posted the matter for spot verification on 12-2-76. On that day, he went to the area along with the petitioner and the local Revenue Inspector. Some inhabitants of the area also gathered at the place. He verified the classification of certain lands, and also gathered from one Fakira Sand and other villagers that Lambodar Moher was dead, his sons Premananda and Nityananda were major, married and separated before the relevant date, i.e., 26-9-70 and the third son Pitambar, however, married in the year 1975. Statement of no other person except Fakira Sand was, however, recorded. Relevant portion of the order dated 12-2-76 reads as follows:—

"It is ascertained from Fakira Sand and other villagers that Lambodar Moher is dead. His son Premananda Moher is major, married and separated, the 2nd son Nityananda is also married and separated prior to 26-9-70. 3rd son Pitambar married in the year 1975. Put up on 26-2-76 for hearing party informed."

3. At the hearing on 26-2-76, the petitioner objected to the procedure adopted by the Revenue Officer and contended that the order passed under Section 43 of the Act was not available to be reopened by the successor Revenue Officer in a proceeding for confirmation

of draft statement. The object of the notice under Section 43 (2) was to give notice to persons interested requiring them to file their objections to the statement contained in the draft statement and it was not open to the Revenue Officer to totally annihilate the draft statement under the garb of altering or amending all or any of the particulars specified in the draft statement.

Final order was passed on 19-3-76 holding that the successors of Lambodar Moher constituted three families and not seven as had been held by order dated 15-9-75 and were entitled to retain 32 standard acres of land instead of 72. An appeal carried by the petitioner was unsuccessful. The appellate authority, however, remanded the matter with certain directions namely, for exclusion of lands transferred before 26-9-70 etc. The revision carried by the petitioner was also unsuccessful. So, the petitioner has approached this Court making a grievance of denial of natural justice to him in the proceeding before the Revenue Officer and violation of mandatory provisions contained in the Orissa Land Reforms Act, 1960 and the rules framed thereunder.

4. Sri B. K. Behura, learned counsel for the petitioner, submitted the following for consideration by this Court—

(a) The Revenue Officer on receipt of the return or after considering all relevant materials, is required by Sec. 43 to record his findings in a draft statement. The important findings must necessarily be who is the land-holder or raiyat, the classification of the area to be retained as ceiling area.

(b) On the basis of the findings, notices must be issued to persons interested.

(c) It is not open to the Revenue Officer to make a complete change of front in the subsequent stage of the proceeding under sub-section (2) of Section 43.

(d) The Revenue Officer having posed the case for the sole purpose of spot verification of land for the purpose of ascertaining the proper classification, it was not open to him to record evidence from persons assembled at the spot on questions which had never been mooted, or of which the petitioner had been given no notice; and

(e) Each of the persons held as land-holders by order dated 15-9-75 was entitled to notice under Section 43 (2) read with Rule 30 (2) and notice to the peti-

tioner alone and not to the rest. vitiated the proceeding and the order dated 19-3-76. There is much substance in the submissions of the learned counsel.

5. A cardinal principle of administration of justice in this country is: Justice must not only be done but seem manifestly to have been done. Not only should the judge administer justice according to law but it must also appear that the party or his cause is being dealt with justly and fairly. The principles of natural justice are the bedrock of rule of law to which our democracy is wedded. It behoves all authorities — high or low — to bear the same in mind while dealing with citizens or their rights and obligations.

6. In the proceeding, after publication of the draft statement, the petitioner was called upon to file objection. His objections inter alia were to the classification of land and exclusion of lands transferred before 26-9-70. With a view to ascertain the correctness of the challenge, made by the petitioner to the classification, the Revenue Officer fixed a date for spot verification and for no other purpose. His previous order dated 6-2-76 reads as follows:—

"Advocate for Premananda Moher appears and stated that plots Nos. 849 (4.36), 1077 (0.70), 1310 (4.36), 1311 (1.03), 1312 (2.36), 1313 (1.85) and 1341 (2.45) though taken as Class I are not irrigated lands and prays for spot verification. Put up on 12-2-76 for spot verification. Ask R. I. to be present on the spot with the relevant records. Case to 12-2-76. Party informed".

There could be no doubt that, at the spot, the only matter that could be taken up was verification of classification of land. Parties had been informed of that only and nothing more. Hence, it was not open to the Revenue Officer to make a roving enquiry at the spot about any other questions, nor was it open to the Revenue Officer to ascertain and collect information from persons gathered at the spot on the questions whether there was one family or number of families, details of members of the family of Lambodar, their age and status etc. The procedure adopted must have come to the petitioner as a surprise because no enquiry other than verification of classification was contemplated and the case was not posed for any other purpose. No impression had been conveyed to the petitioner that the enquiry could take

any different turn. The petitioner could legitimately complain that it was impossible for him to meet the unforeseen situation at the spot. He was not a person trained in law nor was he aware of the complexities and niceties of the various questions that might be involved. The provisions of the Orissa Land Reforms Act are technical in many respects and he was ill equipped to take up and discharge the job of a lawyer by cross-examining the witnesses examined at the spot.

7. We feel, the Revenue Officer offended against the principles of natural justice and violated the procedure by examining Fakira Sand at the spot and ascertaining from other villagers. The simple reason being that the case was not posted for taking evidence or gathering information from certain villagers and utilising the same as the basis for the decision. Gathering information and not keeping the same on record is unknown to judicial process. The names of the villagers from whom information was gathered are not to be found within the folds of the record.

8. After the draft statement is prepared, Section 43 (2) enjoins, that the same should be published inviting objections from persons interested. Rule 30 (2) mandatorily requires the Revenue Officer to serve a notice on the person to whom the statement relates informing him that objections, if any, to any entry in or omission from the draft statement might be filed within 30 days from the date of publication. By order dated 15-9-75, the Revenue Officer held seven persons to be the land-holders. The draft statement contained the names of those seven persons. It was, therefore, incumbent on the Revenue Officer to serve notices on all the seven and not only on one of them. Admittedly, the notice in this case was served on Paramananda alone. The procedure, therefore, offended the requirements of both Section 43 (2) and Rule 30 (2).

9. In view of our conclusions that the procedure adopted by the Revenue Officer on 12-2-76 was contrary to the principles of natural justice and all the persons interested had not been notified, it is not necessary to answer the third question raised by Mr. Behura. The question will be considered on an appropriate occasion.

10. In the result, the writ application is allowed, the order dated 12-2-1976 of the Revenue Officer and the appellate and revisional orders are quashed. The Revenue Officer is directed to dispose of the ceiling proceeding after issuing notice to all persons interested, according to law. No. costs.

DAS, J.:— I agree.

Petition allowed.

AIR 1982 ORISSA 80

DR. B. N. MISRA, J.

Sri Kasi Biswanath Dev, Petitioner v. Paramananda Routrai and others, Opposite Parties.

Civil Revn. No. 611 of 1981, D/- 10-12-1981.*

Civil P. C. (5 of 1908), S. 35-B — Provision is directory and not mandatory — Procedural provision — Whether mandatory or directory — Test to determine. AIR 1981 Punj and Har 269 (FB); Dissented from. (Interpretation of Statutes — Procedural provisions; Evidence Act (1872), S. 115).

Section 35-B is admittedly a procedural provision. Undoubtedly, it was introduced into the statute with a view to controlling the conduct of parties in litigations. The language of S. 35-B indicates that it is directory. If the provision is taken to be mandatory it will take away the Court's right to exercise its discretion in the interest of justice. The cause of justice is paramount and a procedural law cannot be raised to the pedestal of being such a mandatory provision as would take away the Court's right in a given case to exercise its discretion in the interests of justice. AIR 1981 Punj and Har-269 (FB), Dissented from. (Case law discussed). (Para 3)

In the instant case the plaintiff was directed by court to pay adjournment cost of Rs. 15/- but he defaulted. The defendant participated in the proceeding on several dates after the default had occurred and when the suit had reached the stage of arguments the defendant made application that the suit be dismissed for non-payment of adjournment cost.

*From order of G. N. Panda, Munsif, Second Court, Cuttack, D/- 3-10-1981.

AZ/AZ/A76/82/DVT

Held that the defencant had participated in the proceeding and was estopped by his conduct from raising the plea at such a belated stage. (Para 4)

Cases Referred: Chronological Paras

AIR 1981 Punj and Har 24	3
AIR 1981 Punj and Har 269 (FB)	2, 3
AIR 1980 Punj and Har 317	2, 3
AIR 1979 Punj and Har 229	2
AIR 1978 Orissa 228	3
(1970) 36 Cut LT 1152	2, 5
AIR 1969 NSC 184: (1970) 2 SCR 875	3
AIR 1969 Orissa 28	2, 5
AIR 1962 Punj 180	3
(1879) 4 AC 504: 41 LT 418: 28 WR 97	
(HL), Henry J. B. Kendall v. Peter Hamilton	3

R. K. Mohapatra, for Petitioner; E. C. Mohanty, for Opposite Parties.

ORDER:— Defendant No. 1 in a suit for declaration of title and permanent injunction has carried this application under S. 115 of the Civil P. C. assailing the order of the Second Munsif of Cuttack dated third October, 1980.

2. The trial of the suit opened on 17-8-1981 when examination of witnesses on the plaintiff's side began. On 14-9-1981, plaintiff applied to the Court for re-issue of summons to the Settlement Officer for production of certain documents. Summons was ordered to be issued at plaintiff's risk and the suit was adjourned to 15-9-1981. On 15-9-1981 as the summons had not returned after service, it was directed to be reissued by adjourning the suit to the next date i.e. 16-9-1981 on terms of costs and plaintiff was directed to pay adjournment cost of Rs. 15/-. On 16-9-1981 the witnesses did not appear. The trial Court closed the evidence on the plaintiff's side and witnesses of the defendant were examined. The trial continued and defendant's witnesses were examined on the 17th and 18th of September, 1981. On 19-9-1981 defendant applied for time and the suit was adjourned to 21-9-1981 when further witnesses on the defendant's side were examined. Trial continued day after day between 21st and 25th of September, 1981. On 29-9-1981 the evidence was closed. On 30th of September, 1981 plaintiff applied for an opportunity of leading rebuttal evidence and the learned trial Judge allowed an opportunity on terms of costs. On 30th of September, 1981 the Court directed that

evidences on both sides be taken as closed. On that day an application was made relying upon Section 35-B of the Code of Civil Procedure (hereinafter referred to as the Code) for dismissal of the suit on the ground that adjournment cost of Rs. 15/- as directed on 15-9-1981 had not been paid by the plaintiff to the defendant. The relevant portion of the order of that day ran thus:—

"The Advocate for the defendant filed a petition under Section 35-B, C. P. C. with a prayer to dismiss the suit on the ground that costs awarded previously unpaid. Copy of the petition served upon the other side. The Advocate for the plaintiff filed a memo stating that costs although offered was not received by the defendant's side. Copy not served as (it is) stated that the defendant's advocate refused to receive the same and it is attached....."

On 3-10-1981 the impugned order was passed. The whole of it is extracted for convenience:—

"The plaintiff filed objection to the petition of advocate for the defendants along with treasury chalan for deposit of cost. Perused the petition and its objection. Of course, the cost awarded against plaintiff has not been paid to the defendants so far. But it is alleged by the plaintiff's advocate that the cost offered was not accepted by the advocate for the defendants and more so the defendants have participated in the further hearing of the suit without objecting for payment of cost till 30-9-81. It is seen that the evidence of both the sides have already been closed. The suit is pending at the stage of hearing arguments. Considering the above fact and that the allegation of the plaintiff that cost offered was not accepted, I feel in the interest of justice to reject the petition and to post the suit to 20-10-81 for hearing arguments. Let the chalan be passed for the like amount."

By the Amending Act of 1976, Section 35-B of the Code was brought into the statute book. It provides:—

"35-B Costs for causing delay:—

(1) If, on any date fixed for the hearing of a suit or for taking any step therein, a party to the suit—

(a) fails to take the step which he was required by or under this Code to take on that date, or

(b) obtains an adjournment for taking such step or for producing evidence or on any other ground.

the Court may, for reasons to be recorded, make an order requiring such party to pay to the other party such costs, as would, in the opinion of the Court, be reasonably sufficient to reimburse the other party in respect of the expenses incurred by him in attending the Court on that date of such order, shall be a condition precedent to the further prosecution of—

(a) the suit by the plaintiff, where the plaintiff was ordered to pay such costs.

(b) the defence by the defendant, where the defendant was ordered to pay such costs.

.....”

Reliance has been placed by Mr. Mohapatra on the aforesaid provision in support of his contention that the plaintiff was not entitled to further prosecute the suit and the provision being mandatory, the trial Court was obliged to dismiss the suit. Support for this contention is claimed from a Full Bench decision of the Punjab High Court in the case of Anand Parkash v. Bharat Bhushan Rai, (AIR 1981 Punj and Har 269). Counsel for the other side relies on a single Judge decision of the Punjab High Court in Manak Chand v Suresh Chand Jain (AIR 1979 Punj and Har 229) and another Division Bench decision of that High Court in the case of Manjit Singh v. State Bank of India (AIR 1980 Punj and Har 317) where referring to Section 35-B of the Code, the learned Judges have taken the view that the provision is directory or at any rate, the Court looking into the facts of the case and keeping the interests of justice in view, could make appropriate directions. It has also been contended by counsel for the plaintiff opposite party that the jurisdiction of this Court under S. 115 of the Code is discretionary and if the impugned order of the trial Court has advanced the cause of justice, no interference should be made. For such a proposition reliance is placed on two single Judge decisions of this Court being Dinamani Dass v. Bimbadhar Padhan (AIR 1969 Orissa 28) and Bhimaraj Onkarmal Firm v. Satyanarayan Satpathy ((1970) 36 Cut LT 1152).

3. Section 35-B of the Code is admittedly a procedural provision. Undoubtedly, it was introduced into the statute with a view to controlling the

conduct of parties in litigations. As was pointed out by the Supreme Court in the case of State of Gujarat v. Ramprakash P. Puri ((1970) 2 SCR 875): (AIR 1969 NSC 184):

“Procedure has been described to be a hand-maid and not a mistress of law, intended to subserve and facilitate the cause of justice and not to govern or obstruct it. Like all rules of procedure, this rule demands a construction which would promote this cause.....”

Lord Buckmaster had once stated the law thus:—

“All rules of Court are nothing but provisions intended to secure proper administration of justice. It is, therefore, essential that they should be made to serve and be subordinate to that purpose.”

A Division Bench of this Court in the case of Maguni Dei v. Gouranga Sahu (AIR 1978 Orissa 228) had occasion to deal with the provision in O. 18, R. 3-A of the Code which also was introduced into the statute by the same Amending Act. In the said Bench decision, a statement of Lord Penzance in (1879) 4 AC 504 (Henry J. B. Kendall v. Peter Hamilton) was quoted which runs thus:—

“Procedure is but the machinery of the law after all — the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when, in place of facilitating, it is permitted to obstruct, and even extinguish, legal rights, and is thus made to govern where it ought to subserve.”

This Court in the said decision referred to several authorities and ultimately came to hold that the provision in O. 18, R. 3-A of the Code was directory and not mandatory. While overruling a single Judge decision, this Court ultimately observed:—

“Rule 3-A, therefore, introduced the rule to be applied to ordinary cases and the hardship arising from special features of a given case was left to be dealt with in exercise of discretionary power of the Court. What the rule intended to emphasise upon was that ordinarily the party who wants to examine himself in support of his cause must come to the witness box as the first witness on his side and discretion is vested in the Court to make an exception. If the Court exercises the discretion in favour of the defaulting party it has to record reasons

therefor. What was considered to be an obnoxious practice by Dua, J. in the Punjab case (AIR 1962 Punj 180) or by the Law Commission in its 54th Report, was intended to be avoided by requiring the party to examine himself first and leaving it to the Court to regulate the situation by sound exercise of judicial discretion. There is no justification to hold that the Court loses jurisdiction to deal with the application of the defaulting party once it has not been made before evidence on his side began."

I am inclined to take the view that the cause of justice is paramount and a procedural law cannot be raised to the pedestal of being such a mandatory provision as would take away the Court's right in a given case to exercise its discretion in the interests of justice.

Out of the three learned Judges who constituted the Full Bench in the Punjab High Court in Anand Parkash's case (AIR 1981 Punj and Har 269) one learned Judge has taken a different view and I am of the view that the learned single Judge in his dissenting view has come to the correct conclusion. That is in keeping with the two earlier decisions of the same High Court being AIR 1979 Punj and Har 229 and AIR 1980 Punj and Har 317. I may refer to one more single Judge decision of the Punjab High Court not referred to at the Bar and that is the case of Simpy Films No. 12, Jullundur v. Rajdhani Films (P) Ltd. (AIR 1981 Punj and Har 24). These decisions in my view had reached the correct conclusion. The reasoning given by a Division Bench of this Court which I have referred to above, in my opinion, indicates the true test for finding out whether a procedural provision is mandatory in the true sense so as to take away the discretion of the Court. The language in which S. 35-B has been expressed, when applied with the test indicated by the Division Bench of this Court in the reported decision must also be considered as directory.

4. I cannot lose sight of the fact that the defendant participated in the proceeding and all the witnesses examined on his side were brought to the court on several dates after the default had occurred. The plaintiff cross-examined the witnesses and the suit has already reached the stage of argument. It was only at that stage the defendant put in an application for dismissal of the suit. The defendant's conduct has been rightly re-

lied upon by the trial Court for estopping him from raising the plea at such a belated stage.

5. In this background, it is appropriate to take note of a well-known situation relating to jurisdiction of the High Court under S. 115 of the Code and the two decisions of this Court being AIR 1969 Orissa 28 and (1970) 36 Cut LT 1152 correctly represent the judicial view about such jurisdiction. I am inclined to think that this is a fit case where I should refuse to exercise the discretionary jurisdiction of the Court. The order of the learned trial Judge is in furtherance of the interests of justice and, therefore, there should be no interference. The revision application is dismissed. Parties are directed to bear their own costs here.

Revision dismissed.

AIR 1982 ORISSA 83

R. N. MISRA, C. J. AND

B. K. BEHERA, J.

Sri Bhanuganga Tribhuban Deb, Petitioner v. Tahsildar-cum-Revenue Officer, Sambalpur and others, Opposite Parties.

Original Jurisdiction Case No. 83 of 1977, D/- 21-10-1981.

(A) Orissa Land Reforms Act (16 of 1960), Ss. 38 (b), 40-A; 43 (1); 44 (2) (b) and 44 (3) — Computation of ceiling area — Tenure-holder claiming exemption of certain land — Part of claim allowed — No appeal preferred by State — Assessee preferring appeal against order rejecting other part of claim — Appellate authority vacating order regarding land exempted — Order of appellate authority is illegal. (Constitution of India, Art. 226).

Subject to appeal every order of the Revenue Officer is final. Where the right of appeal against a relief granted by the Revenue Officer was not availed of by the State, the order of the Revenue Officer in that respect became final and the appellate authority has no jurisdiction to interfere with that part of the order while dealing with the tenure-holder's appeal against the other part. The tenure-holder could not be prejudiced in his own appeal by vacating a favourable direction in his favour, par-

LY/LY/F653/81/AGM/MVJ

ticularly when there was no challenge to that part of the order. (Paras 4, 5)

(B) Orissa Land Reforms Act (16 of 1960), Sections 2 (1), 2 (5) (a) and 39 (a) — Computation of ceiling area — Tanks set apart for pisciculture are not excluded.

The scheme of the statute does not make any provision for excluding tanks and on the submission that certain tanks were meant for pisciculture, their exemption from computation of ceiling area cannot be obtained. (Para 6)

(C) Orissa Land Reforms Act (16 of 1960), Secs. 2 (14), 39 (a) — Computation of ceiling area — Lands located in urban area — Inclusion of — Onus of proving that such lands are connected with agricultural operations lies upon Revenue Officer, 43 Cut LT 681 : AIR 1977 NOC 298 (Orissa) Rel. on, (Evidence Act (1872), Ss. 101, 104).

(Para 7)

Cases Referred: Chronological Paras AIR 1977 NOC 298 (Orissa) : 43 Cut LT 681 7

R. Mohanty, M. C. Panda and K. Patnaik, for Petitioner; Govt. Advocate, for Opposite Parties.

R. N. MISRA, C. J.:— Challenge in this application is to the order of the Revenue Officer under the provisions of the Orissa Land Reforms Act (hereinafter referred to as the 'Act') and the further orders in appeal and revision passed under the Act.

2. The petitioner was the ex-Ruling Chief of the State of Bamra and held extensive properties. As the petitioner's claims for settlement of certain lands which had vested under the Orissa Estates Abolition Act were still to be disposed of under Chapter II of the Orissa Estates Abolition Act, when the Orissa Land Reforms (Amendment) Act of 1973 came into operation from 2-10-1973, he furnished a provisional return on 31-12-1973 under S. 40-A of the Act. Orissa Land Reforms Ceiling Case No. 30 of 1974 was instituted on the basis of the return and a draft statement was published on 3-9-1975 under Sec. 43 (1) of the Act. The petitioner preferred objection to the draft statement and contended that Ac. 72.09 decimals of land were held by an industrial and commercial undertaking and were exempt from ceiling under S. 38 (b) of the Act.

He also contended that there were certain tanks with an area of a little more than six acres which were exclusively used for pisciculture and were not connected with agricultural operations and such tanks were also not to be taken into account for determining the ceiling. The petitioner's third contention was that he had lands and houses located in certain areas situated within the Deogarh Municipal limits and since such lands were not connected with agricultural operations they were also not to be taken into account. The Revenue Officer negatived all the contentions of the petitioner except holding that Ac. 72.09 decimals of land were exempt under Sec. 38 (b) of the Act and he called upon the petitioner to make a formal application. The petitioner preferred an appeal to the Sub-divisional Officer asking for relief on other scores. Though under S. 44 (2) (b) of the Act an appeal at the instance of the State Government lay against the order of the Revenue Officer, no appeal was filed and the Revenue Officer's direction exempting Ac. 72.09 decimals of land while determining the ceiling was allowed to become final. Sub-section (3) of Section 44 of the Act makes the confirmed statement final and the order of the Revenue Officer unless modified in appeal receives statutory finality. The appellate authority, even though there was no appeal, looked into the propriety of the Order of the Revenue Officer in regard to Ac. 72.09 decimals of land and observed :—

"So the Tahasildar is advised to reconsider his decision in the light of the above discussion and take steps to make necessary amendment in the confirmed draft statement."

He rejected all the other contentions of the petitioner. The petitioner thereupon carried a revision to the Revenue Divisional Commissioner. All the contentions referred to above were re-canvassed before the revisional authority. The revisional authority sustained the appellate order except giving a direction that as far as homestead lands were concerned, the case would be remanded for enquiry as to whether the homestead was used for agriculture or was ancillary to agriculture.

3. Before us, Mr. Mohanty for the petitioner raises three questions, namely,

(1) In the absence of an appeal the appellate authority had no jurisdiction to go into the question of exemption of Ac. 72.09 decimals under S. 38 (b) of the Act. The order of the Revenue Officer having become final the appellate authority's jurisdiction to deal with the question was not open to entertain that point. (2) Lands located within the urban area were exempt from consideration for computing the ceiling unless such lands were found to be connected with agricultural operations; and (3) Tanks were not connected with agriculture and since pisciculture was not within the definition of agriculture, the tanks claimed as exempt should have been kept out.

4. As we have already indicated, the Revenue Officer's order with reference to 72.09 acres became final in the absence of any challenge in appeal by the State. It is not disputed before us that the impugned order of the Revenue Officer was open to challenge in appeal at the instance of the State Government as clearly provided in S. 44 (2) (b) of the Act. Where there was a right of appeal and the same was not availed, relief granted by the Revenue Officer should not have been questioned by the appellate authority. The petitioner could not be prejudiced in his own appeal by vacating a favourable direction in his favour, particularly when there was no challenge to that part of the order. The direction of the appellate authority that the Revenue Officer should reconsider the question, therefore, was not a valid one.

5. The learned Government Advocate canvassed before us that the direction of the appellate authority was in accordance with law and since a non-sustainable relief had been granted by the Revenue Officer and that had been vacated, our extraordinary jurisdiction should not be permitted to be invoked in support of the erroneous order. Reliance has been placed on certain authorities in support of this submission of the learned Government Advocate. We are inclined to agree with Mr. Mohanty for the petitioner that in the facts of the case the precedents have no clear application. The scheme of the Statute is that both the parties, i.e. the landholder as also the State Government, have been given a right of appeal

against the order of the Revenue Officer. Subject to appeal, every order of the Revenue Officer has been made final under sub-sec. (3) of S. 44 of the Act. In view of such clear-cut provisions, in the absence of an appeal the order of the Revenue Officer became final and the appellate authority should not have, while dealing with the petitioner's appeal, interfered with the relief granted by the Revenue Officer.

6. The petitioner claimed exemption in respect of tanks with an area of about 6 acres of land. Undoubtedly, the Statute deals with agrarian reforms. Section 2 (1) defines "agriculture" and the definition is an inclusive one. Certain operations which may not ordinarily go under the head of "agriculture" have been included in the definition. Mr. Mohanty for the petitioner relied upon the fact that even though the definition was inclusive, pisciculture had not been included. Therefore, tanks should not be taken into account while determining the ceiling. The learned Government Advocate on the other hand placed reliance on the Explan. appearing in S. 2 (5) (a) of the Act which states that for the purposes of the said clause tanks were to be deemed as class III land. The petitioner's contention has been that such tanks as are connected with agricultural purpose were required to be treated as class III land and unless a tank set apart for pisciculture came within land to be taken into account, merely by placing reliance on the Explanation the petitioner's contention could not be negatived. Section 39 (a) of the Act provides that homestead lands, or tanks with their embankments, or both, to the extent of three acres in the aggregate shall not be taken into account in determining the ceiling area. Such tanks as are exempt u/s. 39 (a) of the Act are not connected with agriculture, but the legislative intention is clear that tanks would be taken into account. If within the homestead lands tanks of more than 3 acres exist, the exemption covered only 3 acres and the rest were to be taken into account. The scheme of the Statute in our opinion does not make any provision for excluding tanks, and on the submission that the tanks were meant for pisciculture the petitioner cannot obtain exemption of tanks in the matter of computation of the ceiling.

area. The second contention of the petitioner must fail.

7. Certain lands are located within the urban area. Unless such lands or buildings are connected with the agricultural operation of the petitioner, they cannot be taken into account. Reference to S. 73 of the Act by the appellate and revisional authorities was wholly unwarranted. Where lands are located in the urban area it is for the Revenue Officer to establish the link, that is to show that such lands were connected with agricultural operations and, therefore, were to be taken into account; otherwise, as pointed out by this Court in the case of Mahurilal Agarwalla v. Dusan Sahu, 43 Cut LT 681 : (AIR 1977 NOC 298 (Orissa)), a house located in the urban area would not be includible. The Revenue Divisional Commissioner has directed an enquiry regarding the homestead. We think, interests of justice would be best served if that direction is slightly clarified so as to include an enquiry into this aspect. The law has been clearly indicated in the decision referred to above and the Revenue Officer shall now have a direction to also enquire into the tenability of the petitioner's contention as to whether the urban lands are to be taken into account.

8. The writ application is disposed of with the aforesaid directions. There would be no order for costs.

BEHERA, J.:— I agree.

Order accordingly.

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P. K. MOHANTI AND

B. N. MISRA, JJ.

Rama Subudhi and others, Appellants
v. Bhagirathi and others, Respondents.

A. H. O. No. 7 of 1976, D/- 28-9-1981.*

(A) Civil P. C. (5 of 1908), O. 21 R. 35 and R. 36 — Executing Court — Competency to direct fresh delivery of possession of immovable property.

If the decree-holder is satisfied with the alleged delivery of possession of immovable property, whether physical

*Against judgment of B. K. Ray J., in Misc. Appeal No. 155 of 1973, D/- 5-1-1976.

or symbolical, he cannot on a subsequent date ask for actual possession by filing a second execution petition. A prayer for fresh delivery of possession can be entertained only in cases where there was no legal, complete and effective delivery of possession on the earlier occasion. Therefore, since there was no legal, complete or effective delivery of possession on the earlier occasion it is competent for the decree-holder to apply again before the executing Court for physical delivery of possession. Case law discussed. (Para 8)

(B) Civil P. C. (5 of 1908), S. 47, O. 21 Rule 35 — Executability of decree — Description of land vague and uncertain — Executing Court cannot deliver actual physical possession of mere portion of plot not specified in decree. Misc. Appeal No. 155 of 1973 D/- 5-1-1976 (Orissa) Reversed. (Para 9)

Cases Referred : Chronological Paras

AIR 1966 SC 470 : (1966) 1 SCA 379 8

AIR 1964 Mad 53 : (1963) 2 Mad LJ 162 (FB) 8

AIR 1961 SC 137 : (1961) 1 SCJ 322 7

AIR 1957 Assam 123 8

AIR 1957 Punj 17 : ILR (1957) Punj 246 8

AIR 1955 Nag 79 : 1955 Nag LJ 160 8

B. R. Rao, for Appellants; P. C. Misra, for Respondents.

P. K. MOHANTI, J.:— This appeal is directed against the decision of a learned single Judge of this Court confirming an order for delivery of possession of immovable property under O. 21 R. 35, C. P. C. passed by the learned Subordinate Judge of Bhubaneswar. The appeal poses for determination a question as to the competency of the executing Court to direct a fresh delivery of actual possession of immovable property there having been earlier a symbolical one.

2. The short facts are the following: Respondent No. 1 obtained a decree for delivery of possession of 0.523 acre of land out of plot No. 1108 which comprises an area of 0.535 acre. He levied execution of the decree and applied for delivery of actual possession after demarcation and identification of the land by a survey knowing commissioner. The executing Court issued a writ of delivery of possession under O. 21, Rule 35, C. P. C. and appointed a commissioner to demarcate the property at the time of

delivery of possession. The process server entrusted with the writ reported that he had delivered physical possession of the property to the decree-holder after evicting the judgment-debtors therefrom. The commissioner appointed by the Court also reported that he had demarcated the land at the time of delivery of possession. The decree-holder also made an endorsement on the back of the writ that he had got actual physical possession. Thereafter the judgment-debtors 5 to 7, 9 and 14 filed a petition on 10-11-1972 in the executing Court alleging that delivery of possession was only a paper delivery and not actual physical delivery and that they were still continuing in possession of the property. According to them, the process server and the commissioner had submitted false returns about actual delivery of possession. The executing Court held an enquiry into the allegations and found by its order dated 27-1-1973, that there was no demarcation of the property at the time of delivery of possession and that the possession which had been delivered to the decree-holder was only symbolical in nature. On 26-2-1973 the decree-holder filed a petition for fresh delivery of possession of 0.523 acre out of 0.535 acre and the judgment-debtors 5 to 7, 9 and 14 filed an objection under 3, 47 C. P. C. Their contention was that symbolical delivery of possession having been given by the Court to the decree-holder, there could be no further jurisdiction (sic) having been overruled by the executing Court, the judgment-debtors came up in appeal to this Court.

3. The learned single Judge who heard the appeal came to hold that the decree-holder being entitled to actual physical possession, the symbolical possession was a nullity and accordingly maintained the order of the executing court for fresh delivery of possession. It was contended before the learned single Judge that the decree was incapable of execution as it does not specify the particular portion of plot No. 1108 which the decree-holder claimed in the suit. The learned Judge repelled the contention with the following observations :

".....But the court below has directed the decree-holder to take steps for appointment of a commissioner for demarca-

tion of the property according to the decree. This shows that the point now raised by the appellants has not been disposed of by the Court below, because the occasion for such disposal has not arisen as yet. So, I do not express any opinion on the point. It is open to the appellants to agitate the point in the Court below at proper time."

Aggrieved by this decision, the judgment-debtors have preferred this appeal. The names of appellant No. 1 Rama Subudhi and appellant No. 5 Raghunath Sadangi have been deleted as per order No. 7 dated 22-4-1976.

4. The points that arise for consideration in this appeal are : (1) whether the executing Court has jurisdiction to direct fresh delivery of possession, there having been earlier a symbolical delivery of possession, and, (2) whether actual physical delivery of possession of a portion of the plot can be given by the executing Court when it has not been specified in the decree.

5. The Civil Procedure Code contains various provisions as to when actual, joint or symbolical possession can be given. Possession referred to in sub-rules (1) and (2) of O. 21, R. 35 is khas or actual possession, while that referred to in sub-rule (2) and R. 36 is formal or symbolical possession. If the immovable property of which possession is directed by the decree to be delivered to the decree-holder is in possession of the judgment-debtor, actual possession must be delivered to the decree-holder under sub-rule (1) of R. 35. Where it is in possession of a tenant or other person entitled to occupy the same, only symbolical possession can be delivered and that is to be done under R. 36. Symbolical possession may in such cases operate as actual possession against the judgment debtor. In the present case, the decree-holder did not apply for symbolical possession under O. 21, R. 35. The writ of delivery of possession issued by the Court says that the decree-holder must be put in possession and the process-server was authorised to remove any person bound by the decree who refused to vacate. The executing Court found that the requirements of sub-rule (1) of R. 35 of O. 21 were not complied with and that a false return was made as if they were complied with. On the finding of the ex-

executing Court that the statutory requirements were not complied with, the possession obtained by the decree-holder may be correctly described as paper possession only. The characterisation of possession as symbolical is hardly justified and runs counter to the provisions of O. 21, R. 35 C. P. C. The so-called paper possession or possession on paper is no delivery of possession, actual, formal or symbolical.

6. It is submitted on behalf of the appellants that once the decree has been executed by delivery of symbolical possession, the executing Court cannot once more execute the decree which has been already executed in full. We regret our inability to accede to this contention. If possession had been delivered legally and actually and subsequent to that possession, the judgment-debtor has taken possession of the property, no second execution will lie after the satisfaction of the decree. In such cases, a suit alone will lie. In the present case, the judgment-debtors themselves took the stand that the alleged delivery of possession by way of execution was only a paper delivery and not actual physical delivery. The Court after enquiry found that actual possession had not been delivered in accordance with the provisions of O. 21, R. 35 C. P. C. In such a case, it cannot, therefore, be said that the decree has been executed in full until the Court satisfies itself that there has been actual physical delivery of possession as claimed by the decree-holder. Once it is found that there is no actual possession given in accordance with the provisions of O. 21, R. 35 C. P. C. there cannot be any finality in the execution proceedings and as such a subsequent application is maintainable for actual delivery of the property.

7. Mr. Rao, the learned counsel for the appellants cited the case of *Shew Bux Mohata v. Bengal Breweries Ltd.*, AIR 1961 SC 137, wherein their Lordships observed as follows (at p. 141) :

"It is true that the Nazir's return showed that defendant No. 4 had not been bodily removed. But the same return also shows that it had not been so removed because of certain arrangement arrived at between it and the decree-holders and as the decree-holders had not required the removal of defendant No. 4 from the premises. Now

under O. 21, R. 35 a person in possession and bound by the decree has to be removed only if necessary, that is to say, if necessary to give the decree-holder the possession he is entitled to and asked for. It would not be necessary to remove the person in possession if the decree-holder does not want such removal. It is open to the decree-holder to accept delivery of possession under that rule without actual removal of the person in possession. If he does that, then he cannot later say that he has not been given that possession to which he was entitled under the law. This is what happened in this case. The decree-holders in the present case, of their own accepted delivery of possession with defendant No. 4 remaining on the premises with their permission. They granted a receipt acknowledging full delivery of possession. They permitted the execution case to be dismissed on September 8, 1949, on the basis that full possession had been delivered to them by defendant No. 4. The fact that they put their guards on the premises as mentioned in the Nazir's return would also show that they had obtained full possession. It was open to the decree-holders to accept such possession. Having once done so, they are bound to the position that the decree has been fully executed, from which it follows, that it cannot be executed any more."

8. In our opinion, it is clear from the above decision that if the decree-holder is satisfied with the alleged delivery of possession, whether physical or symbolical, he cannot on a subsequent date ask for actual possession by filing a second execution petition. A prayer for fresh delivery of possession can be entertained only in cases where there was no legal, complete and effective delivery of possession on the earlier occasion. Similar view has been taken in AIR 1966 SC 470 (*M. V. S. Manikayala Rao v. M. Narasimhaswami*) AIR 1964 Mad 53 (FB) (*Ramaganessan Pillai v. Rajah Ayyar*) AIR 1955 Nag 79 (*Radhalal v. Chabilchand*) and AIR 1957 Punj 17 (*Jaimal Singh Dasaundha Singh v. Rakha Singh*). In the case of *Ghanashyam Das Mour Agarwalla v. Fatik Chandra Das*: AIR 1957 Assam 123 it has been held that if the fact was that actual delivery of possession was not obtained by the decree-holder in the previous execution

case there was no justification for holding that the decree-holder be deprived of his right to come before the executing Court and pray for a fresh delivery of possession when there was no other bar to his right for executing the decree. In view of the principles laid down in the aforesaid cases, we agree with the learned single Judge that since there was no legal, complete or effective delivery of possession on the earlier occasion it is competent for the decree-holder to apply again for physical delivery of possession. We hold that the first point urged on behalf of the appellants-judgment-debtors is devoid of any force.

9. The difficulty of the decree-holder however, is on the second point. The description of the land as given in the plaint, the decree and the execution petition is quite vague and uncertain. The land is described as "Plot No. 1108 A. 0.523". Admittedly, Plot No. 1108 comprises an area of 0.535 acre. The decree directs delivery of possession of a portion of the land, that is, 0.523 acre. The remaining portion of 0.012 acre was not the subject matter of the suit. The portion measuring 0.523 acre has not been specified by boundaries or a sketch map. In the absence of sufficient particulars, it is difficult to fix up its identity. Order 7, Rule 3 C.P.C. provides that where the subject matter of the suit is immovable property the plaint shall contain a description of the property sufficient to identify it and in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or particulars. Order 20, R. 9, C.P.C. also provides that where the subject-matter of the suit is immovable property, the decree shall contain a description of such property sufficient to identify the same. In the present case, the decree-holder claims delivery of possession in respect of a portion of the plot. There is however, nothing to show from which side of the plot he is entitled to take possession. It is difficult to understand why the executing court appointed a commissioner for demarcation of the land when it has not been specified in the decree. It is not open to the executing court to divide the plot and deliver possession of any specific portion. It would be impossible to

demarcate and deliver possession of any specific portion unless its identity is known. Mr. P. C. Misra who appeared for the respondent-decree-holder in this court when confronted with the situation could not satisfactorily meet the point.

10. In view of our above finding, we allow the appeal and set aside the order for fresh delivery of possession in favour of the decree-holder. We make no order as to costs.

B. N. MISRA, J.:— I agree.

Appeal allowed.

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R. N. MISRA, C. J. AND

R. C. PATNAIK, J.

Dolagobinda Panigrahi, Petitioner v. The Orissa University of Agriculture & Technology and others, Opposite Parties.

Original Jurisdiction Case No. 1955 of 1980, D/- 26-9-1981.

Constitution of India, Art. 226 — Orissa University Semester Regulations, Regn. 37 (c) (ii) — Academic Council imposing punishment on student on allegation of malpractice in examination under Regn. 37 (c) (ii) — University recalling such punishment on same being challenged — Student again punished for one more year in contravention of provisions of Regulation 37 (c) (ii) — Order is liable to be quashed.

Where the University had recalled the order of punishment which was imposed by the Academic Council under Regn. 37 (c) (ii) on a student on the allegation of malpractice in the examination of final B. V. Sc. & A. H. When the student challenged the imposition of penalty by a writ petition as it did not conduct its disciplinary proceeding in keeping with the rules of natural justice, subsequent order of University imposing higher punishment of debarring him from two semesters in contravention of the Regulation 37 (c) (ii), would be liable to be quashed. (Para 8)

Dr. S. C. Dash and B. K. Patnaik, for Petitioner; Lingaraj Rath, A. K. Misra and B. S. Misra, for Opposite Parties.

R. N. MISRA, C. J.:— This application under Art. 226 of the Constitution calls in question the punishment imposed on

the petitioner on the allegation of malpractice by the Orissa University of Agriculture & Technology (hereafter referred to as the 'O. U. A. T.') under Annexure-12.

2. Petitioner sat at the final B. V. Sc. & A. H. Examination, 8th Semester, held by the O. U. A. T. One of his papers, being 'Fish Disease and Sanitation', was scheduled for the second sitting on 8-6-1979 from 3 P. M. to 5 P. M. One Dr. Maheswar Misra, Professor and Head of the Department of Animal Production was the Senior Invigilator. On 14th of June, 1979, Petitioner received notice from the Dean of the Faculty of Veterinary Science and Animal Husbandry, to show cause against a complaint made by Dr. Misra and an extract of the report was enclosed to the notice. Petitioner submitted his explanation on 19-6-1979 denying the allegations and explaining the background in which Dr. Misra had made false allegations. Petitioner received an intimation communicating the order dated 18-11-1979, from the Registrar of O. U. A. T., to the effect that petitioner's results of the Final Semester of 1978-79 stood cancelled and petitioner was deemed to have failed in all the courses of the 8th Semester and was debarred from registering till the corresponding Semester of the next academic session 1979-80. Petitioner filed a writ application before this Court in O. J. C. No. 1697 of 1979. During the pendency of the said application, the impugned order was withdrawn by notification dated 14-1-1980. On 15-1-1980, the writ application was dismissed as having become infructuous. The Academic Council set up a Board consisting of one of the Deans and two Professors for conducting an inquiry into the alleged misconduct of the petitioner and one Srinivas Das. Petitioner was served with a notice from the said Committee through its convener to show cause and petitioner in terms of Annexure-8 dated 5-3-1980, showed cause denying the allegations, pointing out the mala fides of Dr. Misra and also challenging the competency of the Committee to examine the matter. The matter was enquired into, Dr. Pani the then Dean and Dr. Misra were examined. On 11th of November, 1980, the following order was communicated to the petitioner:—

"Results of the final, 8th semester examination, 1978-79 stand cancelled. He is deemed to have failed in all the courses of 8th semester and is debarred from registering till the corresponding semester of the next academic session 1980-81."

This notification cancelling the petitioner's results and debarring him from registering again until end of academic session 1980-81 has been called in question in this writ application.

3. The University and its Dean have filed a common counter affidavit while Dr. Misra who has been impleaded as opposite party No. 3 has filed a separate counter affidavit. It may be pointed out that Dr. Pani who was then Dean was no more there and has been replaced by Dr. J. N. Mohanty. In the counter-affidavits, the allegations against the petitioner have been highlighted and it has been pleaded that the petitioner had not only committed malpractice at the examination but had also grossly misbehaved with Dr. Misra who was the senior invigilator when he had obstructed the petitioner from committing malpractice.

4. We are fully cognisant of the undisciplined conduct existing in educational institutions in this country. This is a phenomenon which is common more or less to every institution. Conducting fair examination in the traditional method has become almost impossible. We are also cognisant of the fact that Court's jurisdiction is not appellate and if there be a fair determination of the dispute in the hands of the body consisting of Professors, the Court should not ordinarily disturb the action taken in the field of maintaining discipline and order.

5. Yet, on the facts of this case, we are of the view that the impugned order should not be sustained. Though Mr. Rath for the opposite parties has strenuously contended that Dr. Misra acted fairly, having gone through the materials placed before us, we have a feeling that the petitioner has been a victim of what appears to be a dispute between Dr. Pani, the then Dean and Dr. Misra who was then Professor and Head of the Department of Animal Production. There is no dispute that under the Statutes of the University the Academic Council is the body responsible for maintenance of discipline and the

Council is entitled to function through a Committee, as has been done in the instant case. The Semester Regulations framed under proper authority specifically deal with malpractice in examination, Regulation 37 provides:—

"The case of malpractice in the Semester examinations shall be dealt with as indicated below:

(a) The Dean of the College in which the student is registered shall be responsible for dealing with all cases of use of unfair means in the semester tests and examinations.

(b) The teacher concerned shall report to the Dean on the day of occurrence of each case of unfair means with full details of the evidence and explanation of the student concerned, if any.

(c) The Dean shall take appropriate action and the penalty may be as indicated below :

(i) Students found in possession of incriminating paper or material during a quiz, periodical test, practical or final examination shall be given zero in that course.

(ii) Students found using unfair means in any of the examinations shall be deemed to have failed in all the courses of the Semester and shall be debarred from registering till the corresponding semester of the next academic session in which he is deemed to have failed.

(iii) Due weight shall be given to the report of the Invigilator in deciding such malpractice cases.

(iv) In regard to any other offence of serious nature by a student pertaining to the examination, the Dean of the College shall report the matter together with all material evidence to the Registrar and the matter shall then be dealt with by the Academic Council."

From these provisions it is clear that the Dean is the prescribed functional authority to deal with cases of malpractice. It is only when offences of serious nature not covered by clauses (a) and (c) take place that the Dean has to report and the matter has to be handled by the Academic Council.

In the instant case though the alleged malpractice is said to be on 8-6-1979, the report was furnished by the Senior Invigilator on 11-6-1979. Clause (b) of Regulation 37 required the report to be

furnished on the same day. Dr. Pani in his report had specifically stated that he was available in his office for some time after the examination was over in the second shift of 8-6-1979. The explanation of Dr. Misra for the delay in furnishing the report is that it was already late in the evening that day and he assumed that the Dean would not be available in his office and as the following two days were holidays, the report was sent on the 11th of June, 1979. The prescription in the Regulation that there should be a contemporaneous report is a healthy one and the policy behind such a provision seems to be, as has rightly been contended before us on behalf of the petitioner, that everything would be fresh and there would be no scope to embellish matters. We do not intend to suggest that Dr. Misra made any attempt of adding to allegations against the petitioner, but since there is a prescription which appears to be wholesome and there is some allegation of the petitioner and Dr. Misra having fallen out, the report should have been made contemporaneously particularly when according to Dr. Misra he had been manhandled by the petitioner and he had been shocked at such treatment. The Dean's report shows:—

"However, since Dr. Misra has not mentioned in his report about explanations of the students, a clarification was sought from him under this office letter No. 29/S/DVC dt. 12-6-1979 about the reason for not reporting the matter to the Dean on the same day although the Dean was present in his office till 8.30 p.m. and also to forward the explanations of the concerned students along with all details of the evidences of the case for further action."

In reply, Dr. Mishra has stated (.....)

"I did not feel the necessity of immediately contacting the Dean since I did not expect any action from his side that could undo the things done by these students'.

.....Such a statement of Dr. Mishra is officially not acceptable, since irrespective of somebody's liking or confidence on others, in official matters, the recommended official procedures as per regulations have to be followed. This has become a serious flaw in the complaint made by Dr. Mishra. Also, such

a statement of Dr. Mishra clearly indicates his intention.

If the report would have been made on the same day, the Dean could have tried to find out evidence, if any, in support of the complaint made by Dr. Mishra. This could not be done since the complaint was received in the evening of the last date of the examination programme, by which time most of the students had left the college."

The Dean's report further stated:—

"Dr. Mishra, in his above-mentioned letter has stated that Sri Dolagobinda Panigrahi (petitioner) was talking with other students and copying from them. But Dr. Mishra has not reported the names and Adm. numbers of those students. This again, is a flaw in the complaint made by Dr. Mishra,

.....

As per the semester regulations, the invigilator is supposed to report the occurrence of any case of that particular examination only. But by reporting about some incidents of the past few years, Dr. Mishra has gone beyond his jurisdiction as an invigilator and thereby complicated the case to take any action as per provision in the semester regulations....."

Some of the objections indicated in the Dean's report seem to be germane. Dr. Mishra seemed to be making out allegations against the petitioner with reference to his past conduct and was making an attempt to indicate that the Dean would not take appropriate steps even if a complaint is made. In a complaint about malpractice detected by a senior invigilator on the particular day, there was no room for these historical events, nor was there any scope for Dr. Mishra to throw insinuations against the Dean by saying that the Dean would not have taken any action in the matter. These allegations either by Dr. Mishra or by the Dean go to suggest that relationship between them was not cordial and each was making an attempt to expose the other. It becomes difficult for the University to function with appropriate dignity and status when highly placed Professors working in the University do not maintain mutual respect, understanding, coordination and a sense of loyalty and devotion to the seat of

learning where they unite for a common laudable purpose.

6. There is another aspect which must receive immediate attention. Dr. Mishra was duty bound to bring the matter to the notice of the Dean and it was for the Dean to find out on the allegations made in the report whether it was a matter covered within his domain under Regulation 37 or was required to be reported to the Registrar in terms of Regulation 37 (c) (iv). In the instant case, Dr. Mishra took upon himself the burden of deciding that the matter must go beyond the Dean by addressing his complaint to the Registrar. That probably forced the Dean to send the matter to the Registrar for being handled by the Academic Council instead of he, himself entertaining the complaint to be dealt with at his level. Dr. Mishra should have scrupulously followed the requirements of the Regulation and should not have exhibited any special zeal in a matter of this type.

7. On the materials available, the complaint against the petitioner seems to be one of malpractice and nothing has been shown which would bring it squarely within Regulation 37 (c) (iv). While we have no hesitation in condemning malpractice in examinations without any reservation, we must also equally indicate our disapproval on the part of invigilators and examiners from not conforming to the prescribed code of conduct. If Dr. Mishra had remained content by bringing his complaint before the Dean, the matter would certainly have been handled in accordance with the prescribed procedure. There was no occasion for him to apprehend that the Dean would not do his job. At any rate, until he failed to do his job, it was not for Dr. Mishra to find fault with the Dean since power under the Regulation vests in the Dean to handle the situation.

8. The punishment imposed is in terms of Regulation 37 (c) (ii). We agree with Mr. Rath for the University that from the punishment imposed, we cannot conclusively find that it was not a case under cl. (c) (iv), but one under cl. (c) (ii) of Regulation 37. But as we have already pointed out, since the finding could not indicate any other offence of serious nature, it must follow that it was a case which squarely came under

Regulation 37 (c) (ii) and the Academic Council, therefore, imposed the punishment prescribed under sub-cl. (ii). That sub-clause authorised that the punishment shall be a deemed failure in all the courses of the semester and debarring from registering till the corresponding semester of the next academic session in which there is deemed failure. Under Annexure-4 that punishment had been imposed which, as already mentioned, was recalled by the University when the petitioner came before this Court on the earlier occasion. The maximum punishment that could have been given in the facts of the case was what had been done then. On account of the University's own mistake in not conducting its disciplinary proceeding in keeping with the rules of natural justice and, therefore, recalling the order of punishment, the petitioner could not have been actually made to suffer a higher sentence than contemplated under the Regulation. In fact, if the earlier punishment had been sustained, by now the petitioner could have taken the examination again and passed out. Loss of one year in human life is difficult to be compensated by any process and since petitioner has already been subjected to that, we are inclined to agree with counsel for the petitioner that no other punishment should really be imposed. Keeping the unsatisfactory aspects of the matter in view, as we have indicated, and taking into consideration the fact that the petitioner is being punished again for one more year beyond what is contemplated in Regulation 37 (c) (ii), we direct that the punishment be quashed and petitioner's results be declared in accordance with law.

Parties are directed to bear their own costs of the proceeding.

PATNAIK, J.— I agree.

Order accordingly.

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R. N. MISRA, C. J. AND N. K. DAS, J.

State of Orissa, Petitioner v. Laxminarayan Samantaray and another, Opposite Parties.

Original Jurn. Case No. 1356 of 1981, D/- 29-9-1981.

LY/LY/G150/81/SSG

(A) Constitution of India, Art. 226 — Writ against arbitrator — Arbitrator is not amenable to the extraordinary jurisdiction of High Court. Case law discussed. (Para 3)

(B) Arbitration Act (10 of 1940), Sections 13, 2 (a) — Merely naming of disputes by arbitrator — There is no necessity to hear parties. (Constitution of India, Art. 226 — Natural justice).

For merely naming the disputes there is no necessity for arbitrator to hear the parties. After all, these are matters with reference to which parties will have full liberty to lead evidence in such manner as the Arbitrator will permit, hearing will be extended and decision will be reached. In course of such hearing it would be open to any of the parties to satisfy the Arbitrator that what has been named as a dispute is not a dispute and with reference to the item, the claimant would have no case. Merely because the Arbitrator has now identified the disputes for convenience of the parties, no decision is reached which prejudices one party or the other. Such action of the Arbitrator cannot be called in question for want of natural justice even if the Arbitrator became amenable to jurisdiction of High Court. Therefore, the Arbitrator's action is not open on merit to challenge on the ground that he did not extend a hearing to the parties when he proceeded to do so. (Para 4)

(C) Arbitration Act (10 of 1940), Sections 24, 2 (a), 21, 8 — Reference — Joining of both parties in making reference — Not always necessary. AIR 1972 Delhi 263, ILR (1972) 1 Delhi 279 (FB) and AIR 1973 Madh Pra 261, Diss. from.

The Supreme Court in AIR 1955 SC 468 never intended to say that for every matter of arbitration there must be a joint reference of the disputes, otherwise the Arbitrator would have no jurisdiction to entertain the disputes. Where the arbitration clause vesting power in the Chief Engineer to appoint an arbitrator makes the nomination of the Arbitrator on the basis of consent of both the parties and the Arbitrator is named by the Chief Engineer, the forum is available for raising disputes. The claimant goes before the Arbitrator with a set of claims, and the other party either resists the claims by filing

a counter or advances counter claims, if there be any. This has been the age-old practice. Thus, there is no foundation for the contention that unless the two parties join in making a combined reference, the Arbitrator, though appointed by consent under the arbitration clause, would have no jurisdiction to entertain the dispute and enter upon the reference. AIR 1972 Delhi 263; ILR (1972) 1 Delhi 279 (FB) and AIR 1973 Madh Pra 261, Diss. from; AIR 1975 Delhi 54 and AIR 1961 Pat 228, Foll. Case law discussed.

(Paras 7, 8)

Cases Referred : Chronological Paras

AIR 1975 Delhi 54 :	1974 Rajdhani LR	
596		6, 7
AIR 1973 Delhi 108 :	(1972) 74 Pun LR	
(D) 112		3
AIR 1973 Madh Pra 261 :	1973 MPLJ	
786		5
AIR 1972 Delhi 263 :	(1972) 74 Pun LR	
(D) 223		5
ILR (1972) 1 Delhi 279 :	1971 Rajdhani	
LR 93 (FB)		5
(1972) 1 All ER 801 :	(1972) AC 1027 :	
(1972) 2 WLR 645 (HL),	Broomie v.	
Cassell & Co.		6
AIR 1966 SC 1652 :	(1964) SCD 787	6
(1966) 2 DLT 123 (Punj)		5
AIR 1964 All 108 :	1963 All LJ 693 :	
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(1953) 1 All ER 327 :	(1953) 1 QB 704 :	
(1953) 2 WLR 342 (DC),	R. v. Dis-	
putes Commr. of Dental Tech.		3
1901 AC 495 : 50 WR 139 :	85 LT 289,	
Quinn v. Leatham		6

Addl. Govt. Advocate, for Petitioner; R. K. Rath and B. K. Nayak, for Opposite Parties.

R. N. MISRA, C. J.:— This application under Art. 226 of the Constitution by the State of Orissa through an Executive Engineer calls in question the order passed on 11th of February, 1981 (Annexure 5) by the Arbitrator (opposite party No. 2) in a dispute referred to the said Arbitrator in terms of cl. 23 of an F-2 contract between the petitioner and opposite party No. 1.

2. Opposite party No. 1, a contractor, undertook execution of the work entitled "Improvement to Sikhar-Karuo Road

under M. N. P. from Kilometre 0/0 to 8/0." and F-2 contract No. 10 of 1978-79 was executed between the parties. Incorporated in the contract was an arbitration clause to the following effect:—

"Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawing and instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work, or as to any other question, claim, right, matter, or thing whatsoever, in any way arising out of, or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions, or otherwise concerning the work or the execution or failure to execute the same, whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of a Superintending Engineer of the Public Works Department, unconnected with the work at any stage nominated by the concerned Chief Engineer.

xx xx xx xx"

The Chief Engineer rescinded the said contract on 4-4-1980, as in his opinion the contractor did not stick, to the time schedule for the completion of the work and entrusted the work to a new agency and called upon the contractor to show cause as to why he may not be required to meet the difference in the costs of the execution of the work. Opposite Party No. 1 thereupon raised disputes relating to the contract and asked the Chief Engineer to appoint an arbitrator in terms of the arbitration clause. The Chief Engineer nominated opposite party No. 2 as the Arbitrator by order under Annexure 1 and stated therein:—

"The reference of the disputes as may be required will be made by the parties themselves."

When appointment of the Arbitrator was duly notified, the Arbitrator called upon the contractor (opposite party No. 1) to file his statement of claims and called upon the State represented by the Executive Engineer to file counter statement thereto. The contractor laid claim but the petitioner made an application to the Arbitrator to stay further proceedings till disputes were validly and legally referred to him. He also in-

formed the Arbitrator that as long as there was no joint reference by both the parties, he had no jurisdiction to entertain the claim and enter upon the reference. The Arbitrator rejected the application of the petitioner as not maintainable and called upon it to file its counter statement by 15-5-1980. The State Government, in the meantime, with a view to sustaining a counter claim against the contractor went before the Subordinate Judge of Cuttack in an application under Sec. 20 of the Arbitration Act and by that court's order dated 2-9-1980, the claims of the State Government, were referred to the same Arbitrator for adjudication. Petitioner moved this Court by filing an application under Art. 226 of the Constitution in O. J. C. No. 1977 of 1980 challenging the action of the Arbitrator and a Bench of this Court without going into the merits of the matter dispensed of the said application by saying:—

"The Chief Engineer, in exercise of authority conferred upon him under cl. 23 of the standard F-2 Agreement, appointed an arbitrator in the person of opposite party No. 2 and directed the parties to raise their disputes before him. The appointed arbitrator has now called upon the State to file its claim/counter statement. The State challenges the direction in Annexure 4 by which notice has been given by the arbitrator fixing a date and requiring compliance.

After parties are heard, there does not seem to be any dispute that the arbitrator can be called upon to clearly specify the disputes which he wants to examine and after the same is determined and indicated, the State (petitioner before us) is prepared to file its counter statement/claim. In that view of the matter which we think is in order, Annexure 4 should stand superseded with a direction that the arbitrator would at first determine the scope of enquiry clearly indicating the dispute which he intends to investigate and after that is done, the State would file its counter statement/claim, as it may be.

xx xx xx xx"

On receipt of the direction aforesaid, the Arbitrator passed an order on 11th February, 1981 (Annexure 5) and communicated copies thereof to the parties.

In the said order, the Arbitrator clearly specified:—

"Keeping the above order (of this Court) in view the disputes as mentioned by the claimant in his claim statement (copy already forwarded by the claimant.....) from page 7 to page 14 of the claim statement vide paragraph 15 of the same bearing claim item Nos. 1 to 18 (a & b) are now determined to be investigated."

This order of the Arbitrator is challenged on the ground that the Arbitrator failed to afford an opportunity of hearing to the petitioner before he came to the conclusion regarding which items were to be investigated. It is stated that that act of the Arbitrator was a quasi-judicial one and the impugned order made without hearing the petitioner could not be compliance of the direction of this Court.

3. Counsel for opposite party No. 1 took the stand that—

(1) the Arbitrator was not amenable to the extraordinary jurisdiction of this Court;

(2) the writ application was barred by constructive res judicata; and

(3) the stand taken by the petitioner, that the arbitrator got jurisdiction only when there was a joint reference by the parties, was an erroneous proposition in law and the Arbitrator's action, therefore, was not open to challenge.

We are inclined to take the view that on the earlier occasion, the matter was not examined at length and from all aspects as would appear from the second paragraph of the order extracted already. Learned Additional Government Advocate appearing for the petitioner does not dispute this position. In fact, counsel for both parties have placed a catena of precedents in support of their respective stands — petitioner contending that the Arbitrator is amenable to our extraordinary jurisdiction and the Arbitrator gets jurisdiction to entertain and enter upon a reference only when both the parties jointly make it and the opposite party No. 1 submitting that the Arbitrator does not come within our extraordinary jurisdiction and it is not necessary that there should be a joint reference of the dispute for the Arbitrator to enable him to entertain the same. We have, therefore, thought it

appropriate not to dispose of this writ application by deciding the limited question as to whether the order of the Arbitrator in identifying the disputes without hearing the parties is correct and shall proceed to examine the two propositions formulated hereunder:—

(i) Is the Arbitrator amenable to the extraordinary jurisdiction of this Court under Art. 226 of the Constitution? and

(ii) Is it necessary that there should be a joint reference of the disputes to enable the Arbitrator to entertain the same and enter upon the same for adjudication?

along with the question whether the action of the Arbitrator in identifying the disputes without hearing the parties is bad for want of compliance with rules of natural justice.

We shall not turn to examine the propositions. The matter we shall first examine is whether the Arbitrator is amenable to the extraordinary jurisdiction under Art. 226 of the Constitution.

As already pointed out, the Arbitrator in the instant case is a person nominated by the Chief Engineer under the arbitration clause in a contract. It was pointed out by Lord Chief Justice Goddard in *R. v. Disputes Commr. of Dental Tech.*, (1953) 1 All ER 327 thus:—

"That is simply a reference to an arbitrator, and I have never heard of certiorari or prohibition going to an arbitrator. Arbitration is a very old remedy in English law, but in all the centuries that have passed since the decisions of English courts first began there is no trace of an arbitrator being controlled by this court by writ of either prohibition or certiorari. The bodies to which in modern times the remedies of these prerogative writs have been applied are all statutory bodies on whom Parliament has conferred statutory powers and duties the exercise of which may lead to the detriment of subjects as, for instance, where a statute gives a certain body power for the compulsory acquisition of land and an arbitrator is set up by Parliament to assess the compensation, and it is essential that the courts should be able to control the exercise of the statutory jurisdiction within the limits imposed by Parliament. There is no instance of which I know in the books where certiorari or prohibition has gone to any

arbitrator except a statutory arbitrator, and a statutory arbitrator is a person to whom, by statute, the parties must resort. It would be an enormous departure from the law relating to prerogative writs if we were to apply these remedies to an ordinary arbitrator, whether he be a single arbitrator or a body of gentlemen called a committee or council, and I am of opinion that we must dismiss these applications on the ground that they are wholly misconceived."

The view expressed by Lord Goddard, C. J. seems to hold the field in England.

In the English and Empire Digest, Vol. 3 (1978 Re-issue) at page 152, this authority has been relied upon for the proposition that the court has no power to direct the issue of orders or certiorari to an Arbitrator.

In De Smith's *Judicial Review of Administrative Action*, 4th Edition (1980) at page 385, the following observation has been made:—

"For this purpose, 'legal authority' generally means statutory authority. Neither certiorari nor prohibition will issue to a private arbitral body which derives its jurisdiction from contract ... On the other hand, a body invested by statute with jurisdiction over persons who have entered into contractual relationships with it may be subject to certiorari and prohibition, although the occasion for the exercise of its jurisdiction does not arise until the contractual relationship is formed."

Several authorities have been indicated at page 385 for the proposition. In relation to arbitral bodies, it has been held that certiorari and prohibition will not lie unless resort to the arbitral jurisdiction is not only provided for but also mandatorily prescribed by statute.

In his classic work 'Administrative Law', Professor Wade in the 4th Edition (1977) of the Book at page 604 has also expressed the same view relying upon the decision of Lord Chief Justice Goddard.

In Halsbury's *Laws of England*, 4th Edition (1973), Vol. 2, paragraph 615 it has also been said that the court has no power to make orders of certiorari or prohibition addressed to an arbitrator unless he is acting under statutory powers.

We may refer to a single Judge decision of the Delhi High Court in the case of Balkishen Gulzari Lal v. Parma Lal Sud, AIR 1973 Delhi 108, where Sachar, J. quoted with approval what Lord Chief Justice Goddard had spoken, and observed (at p. 112):—

"12. Mr. Marwah suggested that the fact that the award given by the arbitrator is liable to be set aside or to be made a rule of the Court under the provision of the Arbitration Act makes the Arbitration a statutory one. In my view there is no merit in the argument. The learned counsel's submission that the Courts have been given power under the Arbitration Act to deal with the arbitrator or his award does not mean that the arbitrator is a statutory arbitrator in the sense of being a public body to whom either the arbitration has necessarily to be referred to or in the sense that his award by itself has been given a finality and recognition by a statute. It is these vital differences between a private arbitrator and an arbitrator under Section 10-A of the Industrial Disputes Act that make all the difference and make the private arbitrator not amenable to the jurisdiction of this Court under Article 226 of the Constitution. I can find no injustice or harshness in arriving at the conclusion that the private arbitrator is not subject to the writ jurisdiction of this Court. This is because the Arbitration Act, 1940 is a complete code which provides for control over the powers and functions of the arbitrator and any party aggrieved by it has ample remedy provided under the Act. The fact that the petitioner might have, for reasons into which it is not necessary to go into, debarred himself because of limitation to move the Court to give him relief, does not entitle him to invoke the jurisdiction of this Court against an arbitrator who is no more than a private person. It has been held that the writ of mandamus does not issue to a private individual and only issues to a person directing him to do a particular thing specified in the order which appertains to his office and is in the nature of public duty vide *Sohan Lal v. Union of India* (AIR 1957 SC 529).

13. I would, therefore, hold that the arbitrator appointed under the Arbitra-

tion Act, 1940, is not amenable to the jurisdiction of this Court under Art. 226 of the Constitution.

xx xx xx xx"

On the basis of these authorities and in the absence of any authority to the contrary, we must hold that the Arbitrator in the instant case is not amenable to the extraordinary jurisdiction of this Court.

4. It is proper that at this stage we deal with the question canvassed by learned Additional Government Advocate before us as to whether the Arbitrator violated rules of natural justice in identifying the disputes which he was to adjudicate upon without affording a hearing.

In England law has been settled as early as the 19th century that the Arbitrator who has judicial functions to discharge is bound to hear parties before he decides the disputes referred to him. There can be no second opinion to this proposition. In fact, there are abundant authorities of the Supreme Court which go to support the position that where there are two parties and a dispute, unless rules of natural justice have been kept away by a particular procedure being prescribed, the adjudicator must adopt rules of natural justice as his procedure. Without examining the amenability of the Arbitrator to the Court's extraordinary jurisdiction, there was a direction on the earlier occasion that the Arbitrator should identify the disputes, and the Arbitrator in the instant case has done so by naming the disputes he intends to adjudicate upon, but in doing so he did not hear the parties. The Arbitrator has not decided the disputes. All that he has done is, he has indicated in specific terms as to what disputes he shall entertain for adjudication.

We do not think for merely naming the disputes there was necessity to hear the parties. After all, these are matters with reference to which parties will have full liberty to lead evidence in such manner as the Arbitrator will permit, hearing will be extended and decision will be reached. In course of such hearing it would be open to any of the parties to satisfy the Arbitrator that what has been named as a dispute is not a dispute, and

with reference to the item, claimant would have no case. Merely because the Arbitrator has now identified the disputes for convenience of the parties, no decision has been reached which prejudices one party or the other and such action of the Arbitrator by which he has identified the disputes, we do not think, can be called in question for want of natural justice even if the Arbitrator became amenable to our jurisdiction. We are, therefore, of the view that the Arbitrator's action is not open on merit to challenge on the ground that he did not extend a hearing to the petitioner when he proceeded to do so.

5. The only other question left for consideration is whether it is necessary that there should be a joint reference of the dispute/s in order to entitle the Arbitrator to entertain the same and enter upon adjudication thereof. The learned Addl. Government Advocate has placed before us certain authorities in support of this proposition. The first is the case of *Thawardas Pherumal v. Union of India*, AIR 1955 SC 468. Reliance has also been placed on a Bench decision of the Delhi High Court in the case of *Madhubala Private Ltd. v. Naaz Cinema*, AIR 1972 Delhi 263; ILR (1972) 1 Delhi 279 (FB) (P. C. Aggarwal v. Banwari Lal Kotiya) and AIR 1973 Madh Pra 261 (Dilip Construction Company v. Hindustan Steel Ltd.). Several decisions of the different High Courts have drawn support for the proposition from the observations of the Supreme Court in *Thawardas's case* (AIR 1955 SC 468) where Bose, J., speaking for the Court, stated (at p. 474):—

"A reference requires the assent of 'both' sides. If one side is not prepared to submit a given matter to arbitration when there is an agreement between them that it should be referred, then recourse must be had to the Court under Section 20 of the Act and the recalcitrant party can then be compelled to submit the matter under sub-section (4).

In the absence of either, agreement by 'both' sides about the terms of reference, or an order of the Court under Section 20 (4) compelling a reference, the arbitrator is not vested with the necessary exclusive jurisdiction."

This observation of Supreme Court has been relied upon in the cases of the different High Courts in support of the pro-

position that where there is no joint reference of the disputes, the Arbitrator does not get jurisdiction to entertain the matter for adjudication.

In paragraph 18 of the decision of the Delhi High Court in AIR 1972 Delhi 263 (supra), the learned Judges quoted the aforesaid paragraph from the Supreme Court judgment and came to the conclusion thus:—

"18. The reference to arbitration having unilaterally been made by the exhibitors alone and no consent to the terms of the reference having been given by the other side the reference was not competent without recourse to the provisions of Section 20 (4) of the Arbitration Act for compelling the recalcitrant party to submit to the arbitration proceedings. The arbitrators appointed by the Motion Pictures Association had no jurisdiction to arbitrate on the dispute on a unilateral reference made by one of the parties.".

A Full Bench of the Delhi High Court in *P. C. Aggarwal's case* (ILR (1972) 1 Delhi 279 (FB)) referred to an earlier Punjab case reported in (1966) 2 DLT 123 (*Madhusudan Limited v. Ram Prakash*) and quoted the observations of the Supreme Court in *Thawardas's case* (AIR 1955 SC 468) and observed:—

"The law laid down by the Supreme Court is binding on all Courts. We are clearly of the opinion that the said quotation covers all references to arbitration and not merely a reference to arbitration only on a question of law".

The Division Bench of the Madhya Pradesh High Court in the case of *Dilip Construction Company* (supra) in paragraph 18 of its judgment quoted the same observations of the Supreme Court in *Thawardas's case* for its conclusion that the two sides have to join for making a reference of the disputes in order to give jurisdiction to the Arbitrator under the Act.

In *Thawardas's case*, the observation wherein seems to be the foundation for the judicial view on which the learned Additional Government Advocate places reliance in support of his proposition, the question for consideration was whether the Arbitrator had jurisdiction to finally decide the question of law. The Supreme Court found that unburnt pricks were not the subject matter of con-

tract. The arbitration clause contained in the contract, therefore, could not cover a dispute relating to unburnt bricks. In order that the Arbitrator may have jurisdiction to deal with a dispute relating to unburnt bricks as a proposition of law, it became necessary that such a question should have been referred by both the parties, otherwise it would have been outside the ambit of the arbitration clause and such a dispute could not be before the Arbitrator.

6. The question for consideration is whether the Supreme Court intended to say something of general application or made the observation in the setting of the case before it.

The Supreme Court nowhere indicated that they intended to say something of general application when they proceeded to make the observation which has been quoted from their judgment. Any observation of the Supreme Court which is intended to cover the field must be taken as a binding statement of the law and every High Court is bound to accept it as final in view of what have been said in Article 141 of the Constitution. In a hierarchical system of judicial administration it is necessary for each lower tier to accept loyally the decision of the higher tiers, as was rightly pointed out by the Lord Chancellor in *Broome v. Castle & Co.*, (1972) 1 All ER 801. The oft quoted dictum of Lord Halsbury in *Quinn v. Leatham*, 1901 AC 495 may be usefully recalled here :

"Every judgment must be read as applicable to the particular facts proved or assumed to be proved since the generality of expressions which may be found there are not intended to be expressions of the whole law but governed and qualified by the particular facts of the case in which such expressions are to be found. A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a form of reasoning assumes that the law is necessarily a logical code; whereas every lawyer must acknowledge that the law is not always logical at all."

In the case of *P. C. Aggarwal v. K. N. Khosla*, AIR 1975 Delhi 54, a Division Bench examined the selfsame question. After quoting the relevant paragraph from *Thawardas's* case [AIR 1955 SC

468], *Deshpande, J.*, who spoke for the Court indicated (at p. 60) :—

"With respect, it seems to us that the above observation of the Supreme Court has been wrongly understood in some decisions as laying down the wide proposition that there can be no reference to arbitration except through the Court under Section 20 unless both the parties join in it."

Reference was made to certain cases and it was observed (at p. 60) :—

"The observation of the Supreme Court does not mean that no reference to arbitration can be made except under S. 20 of the Act unless all the parties join in making the reference. Our reasons are as follows :—

(1) In the case of *Thawardas* itself the arbitration provision was invoked by the Government while the reference was proceeded with by the contractor alone. The Government and the contractor did not join in making a reference to arbitration. On the contrary, the reference was initiated by the contractor basing himself on the consent of the parties to the reference contained in the original arbitration agreement.

(2) The Supreme Court did not hold that the award was bad because the initial reference to the arbitration was itself bad being unilateral.

(3) On the contrary, the Supreme Court held that the award was bad because it disclosed an error of law apparent on the face of the record.

(4) The Court further expressed the view that the arbitrator would have been entitled to commit such an error of law apparent on the face of the record and the award would still have been binding between the parties if a specific question of law had been referred by the parties for the decision of the arbitrator. Such a specific question of law could not be expected to be referred to arbitration in the original arbitration agreement containing the reference inasmuch as the question would not be known to the parties unless and until the dispute actually arises. Such a question can be formulated only after the dispute arises. Since the question was not contained in the original reference, it has to be referred to arbitration by both the parties. It is in this context that the Supreme Court con-

dered the necessity of the making of such a reference by both the parties. Even if the general observation of the Supreme Court is construed to apply to all references and is not restricted to the reference of a specific question of law, still the said observation cannot mean that no reference to arbitration can be made except through Section 20 unless it is jointly made by the parties."

Deshpande, J., referred to a decision of the Supreme Court in the case of Bhusawal Borough Municipality v. Amalgamated Electricity Co. Ltd., AIR 1966 SC 1652. The second proviso to Cl. 5 of the Surcharge Order as appearing at page 1653 of the Reporter read thus:—

"Provided further that no War Costs Surcharge shall be effective upon the charges for the supply of energy under any contract entered into after the 1st May, 1942, unless such contract provides for the same charges for energy as have been contained in similar previous contracts for similar supply by the licensee or sanction holder concerned (as to which in the event of dispute by any party interested, the decision of the provincial Government shall be final) or unless and to such extent as such application may be expressly ordered by the Provincial Government".

At page 1654, the Supreme Court observed:—

"Then Mr. Pathak said that under the Surcharge Order itself the dispute had to be referred by both the parties and not by only one of them. This contention is, however, untenable in view of the clear language of the proviso which says:—

"In the event of dispute by any party interested, the decision of the Provincial Government shall be final."

Paragraph 3 of the first schedule to the Arbitration Act states:—

"The arbitrators shall make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow."

Referring to this clause, Desai, C. J., speaking for a Full Bench of the Allahabad High Court in the case of Mangal Prasad v. Lachhman Prasad, AIR 1964 All 108 (at p. 111) observed:—

"A party or the parties could itself or themselves, without intervention of the Court, call upon the arbitrator by notice in writing to make an award, vide Cl. 3 of the first schedule. But the remedy given by Section 20 (1) is an alternative to that provided by Chapter II, which means that Chapter II also applies to a case in which a difference arises after the agreement has been entered into. It cannot be disputed that the Act governs an arbitration agreement preceding a difference and if Chapter II does not exclusively deal with a difference preceding an agreement it cannot be said that Section 20 (1) exclusively deals with a difference arising after an agreement."

7. Deshpande, J., has referred to the historical background and the development of the law through a series of cases. Keeping the historical background in view and taking the statutory provisions into consideration, we are inclined to agree with the analysis made by the Delhi High Court in the case of P. C. Aggarwal v. K. N. Khosla, AIR 1975 Delhi 54 and we are also in agreement with the conclusion of the Delhi High Court that the Supreme Court in Thawardas's case never intended to say that for every matter of arbitration there must be a joint reference of the disputes, otherwise the Arbitrator would have no jurisdiction to entertain the disputes. We may point out that there are series of authorities of this Court following the principle in the case of Union of India v. D. P. Singh, AIR 1961 Pat 228, that the arbitration clause vesting power in the Chief Engineer to appoint an arbitrator makes the nomination of the Arbitrator by such agency on the basis of consent of both the parties.

The arbitration clause states that all disputes relating to the contract are to be referred to such Arbitrator, who, when appointed, must be deemed to be the appointed Arbitrator by consent of parties.

Once the Arbitrator is named, the forum is available for raising disputes. The claimant goes before the Arbitrator with a set of claims, and the other party either resists the claims by the filing a counter or advances counter claims, if there be any. This has been the age-old practice, and the learned Additional

Government Advocate has also conceded before us that this practice has been obtaining before all Arbitrators appointed under Cl. 23 of the F-2 agreement, though for some time the learned Additional Government Advocate has been trying to canvass relying upon the observations of the Supreme Court in Thawardas's case that a joint reference of the disputes is a condition precedent to the Arbitrator's action.

It is useful to take note of what was observed by a Division Bench of the Allahabad High Court in the case of Radha Kishan v. Sapattar Singh, AIR 1957 All 406:—

"In arbitration agreements the actual points of dispute are seldom stated. Generally, references are made to arbitration where disputes arise and the parties thereafter formulate, when necessary, their disputes before the arbitrators and seek their decision on those points of differences."

8. From the discussion which we have raised above, it must follow that there is no foundation for the submission that unless the two parties join in making a combined reference, the Arbitrator, though appointed by consent under the arbitration clause, would have no jurisdiction to entertain the dispute and enter upon the reference.

9. The writ application must accordingly fail and is dismissed with costs. Hearing fee is assessed at Rs. 250/- (Two hundred fifty).

N. K. DAS, J.:— I agree.

Application dismissed.

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N. K. DAS AND R. C. PATNAIK, JJ.
Godavaris Mahabidyalaya and another, Petitioners v. Director of Public Instruction (H. E.), Orissa, Opposite Party.

Orl. Jurn. Case No. 544 of 1981, D/- 14-12-1981.

(A) Orissa Education Act (15 of 1969), Section 7 — Orissa Education Code, Arts. 130 and 131 — Election of members to Governing Body — Prior approval of Director of Public Instruction not necessary.

Section 7 of the Act read with Art. 130 would show that the governing body

first constituted after the commencement of the Act is to be approved by the D. P. I. Any subsequent election is also to be reported to the D. P. I. Section 7 of the Act and Art. 130 should be read together and there should be harmonious construction of the same. The wordings are clear. There is no ambiguity so as to add something to it in order to find out the intention of the legislature. These provisions do not show that the approval of the governing body is a precondition for the members to be taken into the governing body. In absence of any provision as to prior approval, it is to be held that once the matter of election is reported to the D. P. I., the provisions of Art. 130 of the Orissa Education Code are complied with. (Para 7)

(B) Orissa Education Act (15 of 1969), S. 11 — Supersession of governing body — Person invited for discussion without prior approval of authority — It cannot be ground for supersession.

For superseding a governing body, according to Section 11 it must be shown that the governing body has neglected or failed to perform any of the duties imposed by or under the Act or the Rules made thereunder. Reasonable opportunity should be given for showing cause against the proposed action and after considering the cause, shown if any, the D. P. I., can supersede the governing body. Where the governing body invites a person for some discussion that cannot be said to be a mismanagement or acting against any provision of the Act and the Rules, There is no bar for the governing body to invite a person for discussion if it is in the interest of the institution.

(Paras 9, 10)

(C) Orissa Education Act (15 of 1969), Sections 11 and 3 (g) — Orissa Education Code, Art. 130 — Supersession of governing body — Notice — Rules of natural justice. (Constitution of India, Art. 226).

In the instant case, the D. P. I., was aware of the elections made from 1979, till the date of notice to show cause. The elections of the governing body had already been reported to the D. P. I., and he never expressed his disapproval to the same. There was election of the President of the governing body which has also not been disapproved. There has been no correspondence with the

governing body through the Secretary. Therefore, it cannot be said that there has been proper notice to the governing body to show cause and the governing body has been deprived of the reasonable opportunity to show cause. The rules of natural justice, therefore, have been violated. The order of supersession cannot be sustained. (Para 11)

Cases Referred : Chronological Paras

AIR 1981 SC 136	11
AIR 1981 Orssa 112	11
AIR 1977 Delhi 240	11
AIR 1974 SC 1863	11
(1974) 2 Cut WR 995	12
AIR 1965 SC 107	13

G. Rath; N. C. Panigrahi and B. K. Nayak, for Petitioners; Addl. Govt. Advocate, for Opposite Party.

DAS, J.:— Petitioner No. 2 is the Member and Secretary of petitioner No. 1 which is an aided college. This writ petition has been filed by the petitioners challenging the jurisdiction of the opposite party, the Director of Public Instruction (H. E.), Orissa superseding the governing body of petitioner No.1.

The case of the petitioner is that the governing body of the college was reconstituted on 26-7-1979, under Annexure-1. The governing body was managing the affairs of the college properly. Under political pressure, some disturbances were created through some teachers of the institution. On 19-2-81 opp. party No. 1 issued a notice under S. 11 (1) of the Orissa Education Act, 1969 framing charges against the governing body and asking to show cause why the governing body should not superseded. Eleven members of the governing body showed cause, but in spite of that the opposite party superseded the governing body. It is stated that the order superseding the governing body as well as the action of the opposite party are illegal, mala fide and without jurisdiction and the order has been issued under political pressure exercised by some local politicians. It is further asserted that the charges framed against the governing body are not covered by the provisions of Section 11 of the Orissa Education Act and, as such, the order of supersession is illegal.

2. In the return filed on behalf of opposite party it is contended that the action of the opposite party was accord-

ing to the provisions of S. 11 of the Orissa Education Act and the Rules thereunder. The governing body mismanaged the affairs of the institution and, therefore, charges were framed and explanations were called for. Eleven members out of fourteen showed causes which were considered and found to be not satisfactory and, as such, the opposite party, in exercise of powers under S. 11 of the Act, has superseded the governing body. The action of the opposite party is neither mala fide nor illegal and there was no political pressure. The charges framed against the governing body were valid charges. The explanations were considered and after that the impugned order was passed.

In the rejoinder filed by the petitioners, it is stated that there has been no proper notice to show cause to the governing body and some persons who have already ceased to be members of the governing body have been noticed. Even though the governing body has intimated the opp. party relating to election of new members of the governing body, the opp. party remained silent and there has been no disapproval of the same.

3. By Annexure-1 dated 26-7-1979, Government has reconstituted the governing body with thirteen members of whom one Dr. S. N. Patra has been described as "V. C. S. Nominee". One Shri C. M. Mishra has been nominated as President of the governing body. It is stated that Capt. S. S. Satrusalya (No. 12 in Annexure-1) has resigned. It is not disputed that from the middle of 1978, proposal for reconstitution of the governing body has been sent to the opp. party and in pursuance to that the order under Annexure-1 was passed.

4. It is further not disputed that one member was nominated for three years whose term was continuing by the time the proposal was sent by the governing body, but had already expired by the time the order under Annexure-1 was passed.

5. Annexure-2 is the notice sent to fourteen persons. It is stated by the petitioners that there has been no notice at all to the governing body as such. Notice has been issued to individuals only. Undoubtedly, there is no mention as to who is the President or who is the Secretary of the managing com-

mittee. It is contended by the learned Additional Government Advocate that notice to all these persons substantially amounts to notice to the governing body, because it has been mentioned in Annexure-2 that the governing body of the college failed to perform its duties and being called upon to show cause why the governing body should not be superseded, eleven persons submitted show cause as per Annexure-3,

6. From Annexure-1, it appears that Government has reconstituted the governing body by order dated 12-9-1979. It is asserted that the President did not attend any meeting and Capt. S. S. Satrusalya resigned. These facts are not denied. It is further asserted by the petitioners that some of the members did not attend meeting consecutively and they were disqualified as per the rules of business of the college which has been accepted by necessary implication by letter dated 15-9-78. The stand taken by the opp. party is that whenever any change was made in the governing body it should have been approved by the Director of Public Instruction. As approval has not been obtained, the action of the governing body should be deemed to be illegal or irregular. In the rejoinder, it has been asserted that all the changes and election of members have been intimated to the Director of Public Instruction in due course and in due time, and there was never any disapproval by the Director. These facts have not been denied.

7. Section 7 of the Orissa Education Act provides that every private educational institution will have a governing body in case of a college constituted in accordance with the rules made in that behalf, failing which the recognition granted to the institution may be withdrawn by the State Government. The governing body constituted after the commencement of this Act in respect of any aided educational institution shall, before it starts functioning as such, obtain the approval of the prescribed authority in the prescribed manner. Certain provisions of the Orissa Education Code have been notified to be accepted rules under the Act. The opp. party also takes the stand that the governing body has not acted according to Art. 130 of the Orissa Education Code.

Article 130 of the said Act (Code?) provides as follows:—

"Every aided college must be governed by a body whose constitution has been approved by Government. The duly appointed Secretary to this body will be the corresponding agent of the college recognised by Government. Every change of Secretary must be notified to the Director under the signature of the new Secretary and the Chairman of the Governing Body. Every new election to the Governing Body must be reported to the Director."

According to the aforesaid provisions, any new election to the governing body is to be reported to the Director. Such reporting has already been made and that has not been disapproved. Therefore, the governing body has acted according to the provisions of the rules. Article 131 of the Orissa Education Code also provides that the rules of business of the governing body must be submitted to the Director for approval. The rules of business have already been sent and it has been asserted that the said rules of business have been impliedly accepted by the Director. This fact is not specifically denied. According to the rules of business of the governing body, if a member does not attend three consecutive meetings, he will cease to be a member of the governing body (See Annexure-3). It is, therefore, clear that the stand taken by the opp. party is not correct. Section 7 of Act read with Art. 130 of the Orissa Education Code would show that the governing body first constituted after the commencement of the Act is to be approved by the D. P. I. Any subsequent election is also to be reported to the D. P. I. Section 7 of the Act and Art. 130 of the Orissa Education Code should be read together and there should be harmonious construction of the same. The wordings are clear. This is no ambiguity so as to add something to it in order to find out the intention of the legislature. In case there is any ambiguity in the aforesaid provision, then the Court can look to the intention of the legislature. If the aforesaid provisions of the Act and the Code are read together, the intention of the legislature is clear and nothing is left to be sought for so as to find out the intention of the legislature. Both the aforesaid provisions should be har-

moniously constructed to make the same workable and the Court cannot import anything to it to find out something else when the wordings are clear. These provisions do not show that the approval of the governing body is a pre-condition for the members to be taken into the governing body. In absence of any provision as to prior approval, it is to be held that once the matter of election is reported to the D. P. I., the provisions of Art. 130 of the Orissa Education Code are complied with. Therefore, the stand taken by the opposite party that in each case of election to the governing body there should have been prior approval, has no basis. Most of the charges relate to this question. We, therefore, hold that the opposite party has erred in framing charges as there has been no irregularity or illegality in the action of the governing body in not obtaining prior approval in case of election of members in place of persons who had already ceased to be members. The considerations which weighed with the opposite party in this respect are irrelevant and not germane to the question and are against the provisions of the Act and the Rules thereunder.

8. Admittedly, Shri B. B. Harichandan was a member of the governing body. When he was elected as a member of the Legislative Assembly, and became a minister, he intimated to the governing body that in his place one Shri K. Bhimaraj Patra would act as his representative. As such, Sri Patra was taken as a member of the governing body. This was the intimation sent by the Education Minister himself. The allegation against the governing body is that it described Shri Patra as a minister's nominee. This has no basis at all, nor does it come under the provisions of S. 11 of the Act.

9. The other allegation is that one Shri Arakhita Patra was invited to attend the meeting of the governing body without prior approval of the competent authority. Shri Arakhita Patra was not a member, but it was the governing body which invited him for some discussion. That cannot be said to be a mismanagement or acting against any provision of the Act and the Rules. There is no bar for the governing body to invite a person for discussion if it is in the interest of the institution.

10. For superseding a governing body, according to Section 11 of the Act, it must be shown that the governing body has neglected or failed to perform any of the duties imposed by or under the Act or the Rules made thereunder. Reasonable opportunity should be given for showing cause against the proposed action and after considering the cause, shown if any, the D. P. I. can supersede the governing body. We have already pointed out that the action of the governing body does not amount to any negligence on its part and is not against the provisions of the Act or the Rules made thereunder. Therefore, the action of the opposite party under Section 11 of the Act is not supported by the provisions of the said section.

11. The next contention of the learned counsel for the petitioner is that there has been no proper notice according to the provisions of the Act and the Rules thereunder, which amounts to absence of reasonable opportunity and, as such, rules of natural justice have been violated. Notices were sent admittedly to individual members of the governing body who were nominated by Government in the year 1979. By the time notice to show cause was sent, some had ceased to be members by not attending the meetings or had resigned or had failed to attend the meetings. Four persons had already been elected in their places, but no notice has been sent to these four persons. On the other hand, notices were sent to persons who had already ceased to be members or the President of the governing body. Further, the governing body as such has not been asked to show cause. Each individual constituting the governing body in the year 1979 was noticed. Any reply by an individual member cannot amount to a reply by the governing body itself. Correspondence of the institution is to be made through the Secretary. Article 130 of the Orissa Service (Education?) Code clearly provides this. It is contended by the learned Additional Government Advocate that notice to individual members of the governing body amounts to notice to the governing body and there has been substantial compliance of the notice. He further contends that as the governing body has shown cause, it will amount to substantial compliance. He relies on the definition of "governing body" in S. 3 (g)

of the Orissa Education Act, which provides that "governing body" means any body of individuals, by whatever name designated, in which the management of a college vests. True it is that notice has been given to the individual members. But there are some persons who, as we have pointed out above, have not at all been noticed. Further, notice has been sent to some who have already ceased to be members or office bearers of the governing body. Moreover, correspondence with the governing body is to be made through the Secretary, which has not been done.

In *Gandhi Harijan Ucchar Madhymik Vidyalaya v. Director of Education, Delhi Administration*, AIR 1977 Delhi 240, it has been held that there is the legal right of the management to conduct the affairs of the institution. There are the claims of the staff, the security of their tenure and proper conditions of works. There is the interest of the students. In a system governed by the Rule of Law every executive action, to be valid must not only conform to the constitutional or statutory constraints but also be bona fide, just and fair. The case of *State of Mysore v. Allum Karibasappa*, AIR 1974 SC 1863, is under the Co-operative Societies Act relating to supersession of the board of management. In para-13 of the judgment in that case it has been mentioned that reasonable opportunity should be given to the management to state its objections, if any before removing the committee or appointing a new committee because the existing committee is deprived of the right of managing the affairs of the society and if action is taken without giving proper opportunity, the action becomes arbitrary and amounts to utter defiance of the powers under the statute. Relating to supersession of the committee of a municipality, the Supreme Court in *S. L. Kapoor v. Jagmohan*, AIR 1981 SC 136, has held that the requirements of natural justice are met only if opportunity to represent is given in view of proposed action. The demands of natural justice are not met even if the very person proceeded against has furnished the information on which the action is based, if it is furnished in a casual way or for some other purpose. The person proceeded against must know that he is being required to

meet the allegations which might lead to a certain action being taken against him. If there was any correspondence between the municipal committee and any other authority about the subject matter or any of the allegations, if information was given and gathered, it was for entirely different purposes. These principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. This Court in *K. S. Co-op. Society v. Deputy Registrar, Co-op. Societies*, AIR 1981 Orissa 112, was considering a case of amendment of bye-laws of society and in connection with it had to deal with the question of reasonable opportunity before registering the amendment by the Registrar of Co-operative Societies. It was held that as the statute requires the society to be given a reasonable opportunity of being heard, the rule cannot confine the right of hearing to the committee of management, a body different from the society.

As regards management and administration of companies, it has been held that in order that a notice to the company may be effectual, either it must be given to the company itself through its proper officers, or it must be received by the company in the course of the transaction of its business. Casual knowledge acquired by the Secretary, as an individual and not whilst he is engaged in transacting business of the company, cannot be deemed notice to the company (See *Ghosh on Company Law*, 1979 Edition, page 516 para 809).

For the aforesaid reasons, we hold that there has not been proper notice to the governing body as such. The D. P. I. was aware of the elections made from 1979 till the date of notice to show cause. The elections of the governing body have already been reported to the D. P. I. and he has never expressed his disapproval to the same. There was election of the President of the governing body which has also not been disapproved. There has been no correspondence with the governing body through the Secretary. Therefore, it cannot be said that there has been proper notice to the governing body to show

cause and the governing body has been deprived of the reasonable opportunity to show cause. The rules of natural justice, therefore, have been violated. The order of supersession cannot be sustained.

12. Further, there is no finding by the D. P. I. that the charges have been established. We have already held that the charges as framed are also not substantial. Charges 1, 2, 4 and 5 relate to violation of Art. 130 of the Orissa Education Code. We have already held that there has been no violation of Article 130 of the Code. Charge 3 relates to mentioning "Minister's Nominee". If this charge 3 is read carefully, it does not amount to a charge at all. It is further contended that Shri Arakhita Patra has been taken in as a member on 30-9-1979 and although this fact has been intimated to the D. P. I., there has been no disapproval. Even if approval is not taken, that does not amount to violation of any rule nor does it come under the provisions of Section 11 of the Act. Reliance has been placed by the learned Additional Government Advocate on *Adwaita Charan Jena v. State of Orissa*, (1974) 2 Cut WR 995. This was a case where the governing body was in existence prior to the enforcement of the Act, and, therefore, there was necessity of approval after the commencement of the Act. But in the instant case, governing body has come into existence after the enforcement of the Act and, as such, no fresh approval, or prior approval was necessary. The governing body has to act only according to Article 130 of the Orissa Education Code.

13. As we have discussed above, relevant factors arising out of the facts and circumstances of the case have not been taken into consideration. On the other hand, irrelevant factors have been taken into consideration in basing the order of supersession. It has been held in *Shree Rama Vilas Service (P) Ltd. v. C. Chandrasekharan*, AIR 1965 SC 107, that where the decision is based on irrelevant considerations which are invalid in law, it would justify the issue of a writ under the well-recognised principles laid down by judicial decisions in that behalf. For the aforesaid reasons, we hold that no reasonable opportunity was given to show cause and the rules of natural justice have been

violated thereby. The charges levelled against the governing body do not warrant any action under S. 11 of the Orissa Education Act or any of the Rules thereunder.

14. In the result, the writ petition is allowed. Annexure-4, the order of the D. P. I., dated 13-3-1981, is quashed. In the circumstances of the case, there will be no order as to costs.

B. C. PATNAIK, J.:— I agree.

Petition allowed.

AIR 1982 ORISSA 106

R. N. MISRA, C. J. AND

B. K. BEHERA, J.

Biswanath Misra, Petitioner v. Director of Medical Education and Training and others, Opposite Parties.

O. J. C. No. 2240 of 1981, D/- 5-12-1981.

Constitution of India, Art. 226 — Medical education — Admission to post-graduate course — Prospectus not mentioning that admissions open only to fresh candidates — Authorities estopped from refusing admission to "in service" candidate on ground of change in Government policy — (Evidence Act (1872), S. 115). (Education — Admission to Post-Graduate Course in Medical College; Administrative law — Government policy — Change in).

Where there was nothing in the prospectus for admission to post-graduate study course that only fresh candidates were to be admitted, an 'in service' candidate could not be refused admission on this count. In the instant case, an 'in service' candidate applied for admission to post-graduate study course. He had mentioned in the application that he is 'in service' candidate. He was allowed to undergo the process of selection and following selection was directed to take admission.

Held that the authorities would be estopped from refusing admission on ground that the Government has taken decision not to admit "in service" candidates for the course when such decision was not disclosed to the public. Dealings of the State Government with its citizens must be on clear-cut basis. Citizens look up to the State for appro-

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appropriate guide-line and to mould their conduct according to the prescriptions by the State. The State is expected to formulate its policies, particularly in respect of matters where citizens are involved in an open manner, publicise its decisions in an appropriate way so that citizens are aware of them.

The court observed that it was surprising that every year a new method is being adopted in the matter of selection for the Post-Graduate study and thereby, instead of clear-cut dealings between the public officers and the citizens, unnecessary confusion is being created. (Para 3)

Samareswar Mohanty, for Petitioner; Govt. Advocate, for Opposite Parties.

B. N. MISRA, C. J.:—The petitioner, a Medical Graduate in the employment of the State as an Assistant Surgeon with effect from Apr. 1977, is before us asking for a direction to the opposite parties to admit him to the Resident House Staff course in General Medicine for the 1981-82 session. When the prospectus for the 1981-82 session was issued, the petitioner obtained an application form and the prospectus on 4-8-81 and applied to undertake the said course in General Medicine on the same day. His application was duly considered and he was allowed to sit for the selection examination held on 21-8-1981. He was also duly selected for joining the aforesaid course as would be evident from the intimation received by him under Annexure 2. Under that document he was directed to report personally to the Principal on any date between 21-9-1981 and 25-9-1981 during the specified hours for taking admission. In terms of Annexure 2, the petitioner reported to opposite party No. 3, Principal of the college where he was to be admitted, on 21-9-1981 and filled up the memorandum to the effect that he was so reporting. Opposite party No. 3 instead of admitting the petitioner chose to issue a clarificatory letter under Annexure 5 to the Governor of the Post-Graduate Selection Committee, opposite party No. 2, where he stated:—

"I am to inform you that Dr. Biswanath Misra, Index No. 8E/71 (petitioner), an in-service Doctor now working as Asst. Bacteriologist and Pathologist to Government of Orissa, Cuttack, reported today for admission to R. H. S. in

General Medicine. In this connection, instruction is requested if in-service Doctors can be admitted to the R. H. S. seats".

The petitioner thereupon came before this Court on 23-9-1981 apprehensive that if there was delay he may not be in a position to take admission. On 24-9-1981, a rule was issued and the Court passed an order saying that the petitioner would be adequately protected in case his application succeeded.

2. A counter affidavit has been filed by the Deputy Secretary to Government in the Health & Family Welfare Department, where the basic facts are not disputed. In paras 3, 4 and 5 of the return it has been pleaded:—

"The total number of R. H. S. seats during 1981-82 is 112. The entire seats are meant for the direct candidates. There was no indication in the prospectus that in-service Medical Officers are eligible for admission. The petitioner being an in-service Medical Officer applied for admission to the R.H.S. course during 1981-82 and he was issued index card, admit card and also allowed to appear at the entrance examination basing on the information furnished by the petitioner in the application form. But when it was found out that the petitioner is an in-service Medical Officer, he was denied admission. But it is not a fact that the petitioner has been debarred of the opportunity to undergo Post-Graduate study. He is at liberty to seek for admission to 2-year Post-Graduate course after completion of 5 years of service.

4. In the previous year, P. G. seats were limited for the in-service Medical Officers. So, in order to give equal opportunity to the in-service Medical Officers, 113 seats out of 226 total seats were reserved for the in-service Medical Officers. Post-Graduate course is three years, out of which the first year is R. H. S. One year of R. H. S. is equal to five years of service under the State Government. So, opposite party No. 1 decided to allow in-service Medical Officer with five years of service under the State Government to go for P. G. Studies for two years.

5. The contention of the petitioner that he was selected for admission to R. H. S. course is true. But he was

otherwise not eligible as he was an in-service candidate. Besides, this selection was subject to verification of records at the time of admission. On verification it was revealed that the petitioner is an in-service Medical Officer. So he was denied admission as R. H. S. seats are meant for direct candidates."

3. It is conceded at the hearing that in the prospectus there was no indication that the R. H. S. seats were intended for direct candidates and in-service candidates would not be entitled to the R. H. S. course. It is not the case of the opposite parties that the petitioner had made any wrong representation in his application. Since the petitioner made a clear disclosure of actual facts, in case there was any Government decision from before it was open to the opposite parties to reject his application outright saying that he was not qualified to join the R. H. S. course. The Government decision referred to in the paragraphs extracted above from the counter affidavit were not disclosed to the public and the petitioner was allowed to make an application, undergo the process of selection, and following selection was directed to take admission. By their conduct, opposite parties were estopped from contending at the stage when the petitioner was reporting for admission that he was not qualified for admission. Dealings of the State Government with its citizens must be on clear-cut basis. Citizens look up to the State for appropriate guide-line and to mould their conduct according to the prescriptions by the State. The State is expected to formulate its policies, particularly in respect of matters where citizens are involved in an open manner, publicise its decisions in an appropriate way so that citizens are aware of them. We are surprised that every year a new method is being adopted in the matter of selection for the Post-Graduate study and thereby, instead of clear-cut dealings between the public officers and the citizens, unnecessary confusion is being created. If it had been indicated in the prospectus that all the seats were meant for direct candidates, the petitioner would not have at all applied. The opposite parties have not placed appropriate records to show when the decision relied upon by them was taken. Keeping these facts in view, we are in-

clined to think that the opposite parties must be treated as estopped from pleading the defence which they have advanced in their counter affidavit and the petitioner must be permitted to join the R. H. S. course. There is no clear rule to indicate that 5 years of service would be taken as one year of R. H. S. and the plea of estoppel cannot be kept away on the basis of a doubtful administrative decision.

4. We accordingly allow this writ application, direct the opposite parties to admit the petitioner into the Post-Graduate course in terms of Annexure 2. It will be for the petitioner to obtain appropriate exemption from the University as there appears to have been some delay by now for taking admission, but we hope, the University authorities would take into account the special circumstances for extending the period. In case admission is complete and there is no vacancy left in the speciality for which the petitioner applied, the State Government must create one more seat to accommodate the petitioner as the situation now created is relatable to the fault of the opposite parties and the petitioner should not be prejudiced for it. We direct the petitioner to report for admission within one week from today.

There would be no order for costs.

BEHERA, J.:— I agree with my Lord, the Chief Justice.

Application allowed.

AIR 1982 ORISSA 108

R. N. MISRA, C. J. AND

R. C. PATNAIK, J.

Smt. Mani Kumari Dei, Petitioner v. State of Orissa and others, Opposite Parties.

Orl. Jurn. Case No. 1114 of 1976, D/- 5-12-1981.

Orissa Public Demands Recovery Act (1 of 1963), S. 37 (1) — Moveable property of certificate debtor attached in execution of distress warrant — Date fixed for sale — Whereabouts of moveables unknown — Notice for settling sale proclamation — Illegal.

In execution of distress warrant issued in the certificate proceeding against

AZ/BZ/A157/82/SMA/SSG/H.

certificate-debtor who had secured a loan under the Middle Income Group Housing Scheme moveables belonging to the certificate-debtor were attached and kept in custody of a jimadar. A date had been fixed for sale and the certificate-debtor persistently complained that so long as it was not found that the dues could not be satisfied by the sale proceeds of the moveables, it was not open to the Certificate Officer to take any coercive step against the certificate-debtor whether by way of arrest or issue of further distress warrant for realisation of certificate dues. The whereabouts of the moveables were unknown. But the case was taken up without notice to the certificate-debtor and behind her back and the order for settling the notice for sale proclamation was passed and notice was issued.

Held, it was not open to the Certificate Officer to brush off the said objection and side-tracking the same, issue coercive process. He was guilty of gross dereliction of duty. In such state of affairs the certificate must be quashed.

(Paras 5 and 6)

Certificate proceeding is a judicial proceeding and the Certificate Officer is a court. Orders passed by the Certificate Officer have impact on the rights and liabilities of the certificate-debtor and persons appearing before him. Orders may have far-reaching consequences. It is, therefore, proper that the matters should be dealt with in a fair and just manner.

(Para 4)

M/s. L. Rath, B. S. Misra, J. K. Rath, for Petitioner; Addl. Standing Counsel, for Opposite Parties.

R. C. PATNAIK, J.:— The petitioner who secured a loan of Rs. 10,000/- under the Middle Income Group Housing Scheme has sought shelter under the extraordinary jurisdiction of this Court for issue of a writ of certiorari quashing the proceedings in Certificate Case No. 11 (DIO) of 1970 (Certificate Case No. 69 of 1965-66) and certain orders of attachment and sale of the property in the said certificate proceeding.

2. A proceeding under the Orissa Public Demands Recovery Act, 1962 was started on a requisition sent by the

District Loans Officer, Cuttack. The certificate was drawn up and filed on 17-12-1966. Notice was issued to the certificate-debtor. Though there is some controversy regarding service of notice, that question is not relevant. Order dated 14-9-66 shows that in execution of distress warrant, moveables belonging to the petitioner were attached and sale of such articles was directed to be held on 10-10-66. The proceeding thereafter went through a chequered career. It is gathered from order dated 19-7-1972 that the petitioner complained before the Certificate Officer that valuable moveable properties belonging to her were attached in pursuance of the order passed in the Certificate Proceeding and kept in the custody of the jimadar and no warrant of arrest, therefore, should have been issued without a finding that the sale proceeds were not sufficient to cover the certificate dues. She complained, justifiably, that further coercive process could be resorted to if there was demand, still unsatisfied by the proceeds received from the sale. The Certificate Officer was put in a very awkward position because orders subsequent to 26-12-1968 till 11-12-1970 were missing from the record. The Certificate Officer observed as follows:—

"On perusal of the records it is seen that the Certificate Officer in his order dated 14-9-1966 has stated that moveables of the certificate-debtor have been attached and the Certificate Officer has also ordered for sale of the attached property. But the details of the property attached and the person with whom the property was kept in jima is not available in the record. The record is duly page marked and title page filled up before the case record was sent to the higher court to hear the appeal. There is no mention of the missing records in question in the title page. In absence of any record, it cannot be said with certainty that the property of the certificate debtor has actually been attached and kept with jimadar as contended by the learned advocate for the certificate debtor.

However, the matter requires investigation. Bench Clerk to find out if the relevant records are available with him. The name of the Bench Clerk who was in charge of the record during the relevant period may be ascertained....."

The case was adjourned for sometime pending investigation. On 27-4-1974 the case was taken up and the following order was passed:—

"Order dated 19-7-1972 has not been complied with. Bench Clerk to put up the petition stated to have been filed on 19-7-1972 as mentioned in the above order. If the certificate debtor's moveables had been attached, that would certainly have been mentioned in the records. Besides a copy of the attachment order also would have been available with the certificate debtor. In absence of any such record, the contention of the certificate debtor appears to be frivolous.....The Certificate debtor has not taken any steps to pay the certificate dues. Issue notice in Form 11 (notice for settling a sale proclamation) to the certificate debtor."

3. It is worthwhile to mention here that 27-4-1974 was not the date to which the case was posted. On 6-11-1973 the case was posted to 23-11-1973 and no date was fixed thereafter. The case was taken up 5 months later on 27-4-1974 without notice to the certificate-debtor and behind her back and the order for settling the notice for sale proclamation was passed and notice was issued.

4. Certificate proceeding is a judicial proceeding and the Certificate Officer is a court. It was incumbent on the Certificate Officer to deal with the grievance of the party appearing before him in a judicious manner. Orders passed by the Certificate Officer have impact on the rights and liabilities of the certificate-debtor and persons appearing before him. Orders may have far-reaching consequences. It is, therefore, meet and proper that the matters should be dealt with in a fair and just manner befitting a court of justice. Casualness is abhorrent to judicial process.

5. The Certificate-debtor had been persistently complaining that in execution of distress warrant issued in the certificate proceeding, moveable property belonging to her had been attached and kept in custody of a jimaradar. A date had been fixed for sale and so long as it was not found that the dues could not be satisfied by the sale proceeds of the

moveables, it was not open to the Certificate Officer to take any coercive step against the certificate-debtor whether by way of arrest or issue of further distress warrant for realisation of certificate dues. The objection raised was substantial and merited determination. It was not open to the Certificate Officer to brush off the said objection and side-tracking the same, issue coercive process because authority or power is vested in him under the Act. With the power went the duty of acting judiciously. The order dated 27-4-1974 displayed a lamentable lack of judicial approach in the Certificate Officer. The objection raised by the Certificate-debtor may have appeared to be inconvenient to him but the short-cut in answer was surely not issue of coercive process. Order dated 14-9-1966 reads:—

"The D. W. Returned after attachment of moveables as per the list enclosed to the D. W. Issue sale order fixing sale on 10-10-1966 returnable by 20-9-1966. A copy of the S. O. should be served on the C. Dr. Issue notice to the jimaradar to produce the articles on the date fixed".

After perusal of this order can there be any doubt that the moveables belonging to the certificate-debtor had not been attached and kept in the custody of a jimaradar as observed by the Certificate Officer? He, in my opinion, is guilty of gross dereliction of duty. Rights of citizens are not to be tinkered with.

6. The sorry state of affairs reflected in the record of the certificate proceeding constrained the counsel appearing for the State to fairly concede that the action of the Certificate Officer is unsupportable. It is not discernible from the records as to what happened between 26-12-68 and 11-12-70. Whereabouts of the moveables are unknown. In such state of affairs, we were inclined to quash the certificate and declare that the certificate-debtor was no longer liable in respect of any amount relating to the loan taken by her under the Middle Income Group Housing Scheme.

7. The counsel for the petitioner, however, submitted that his client was willing to pay Rs. 4,000/- towards the dues within a period of three months. Nothing could be a more fair offer from

the point of view of the State and the counsel for the State accepted this offer. So we direct that on the petitioner depositing Rs. 4,000/- in the certificate court within three months from today, the proceeding shall be quashed and the demand of the State under Bond No. 11 of 1960-61 under the Middle Income Group Housing Scheme shall be treated as fully satisfied. However, in the event of default of the petitioner, the certificate after due amendment, shall proceed for Rs. 4,000/- with interest accruing from today.

8. In the result, the writ application is allowed. No costs.

R. N. MISRA, C. J.:— I agree.

Petition allowed.

AIR 1982 ORISSA 111

N. K. DAS AND R. C. PATNAIK, JJ.

Rajendra Singh Bhatia, Petitioner v. State of Orissa and others, Opposite Parties.

Orl. Jurn. Case No. 678 of 1977, D/- 28-10-1981.

Constitution of India, Article 299 (1) — Government contract — Provisions contained in Art. 299 (1) are mandatory. — Agreement as contemplated by Article 299 (1) not executed between parties. — No rights accrue in favour of one party nor liability is incurred by the other.

The provisions contained in Article 299 (1) are mandatory and in the absence of a contract as contemplated by Article 299 (1) no rights accrue in favour of one party nor liability is incurred by the other. AIR 1967 SC 203; AIR 1968 SC 1218, Rel. on.

(Paras 4, 6)

Where in an auction of forest produce, the bid of an auction purchaser was accepted by the Forest Officer being highest, but agreement as contemplated by Art. 299 (1) was not executed between the parties and the D. F. O. on refusal of the auction purchaser to deposit the consideration money held re-auction, the proceedings against the auction purchaser to recover the deficiency of

money in re-auction would be invalid in the absence of agreement as contemplated by Art. 299 (1). (Paras 3, 5, 6) Cases Referred : Chronological Paras AIR 1968 SC 1218 : 1968 All LJ 745

AIR 1967 SC 203

G. Rath, R. K. Rath and N. C. Panigrahi, for Petitioner; Addl. Standing Counsel, for Opposite Parties.

PATNAIK, J.:— This writ application has been filed for quashing certain Certificate proceedings started against the petitioner by the Certificate Officer, Panchpir, Karanja in Certificate Case Nos. 5/77, 6/77, 7/77, 9/77 and 10/77.

2. The petitioner alleges that he is a Forest Contractor and in pursuance of a sale notice, for sale of forest produce, he participated in the auction relating to sale of "Departmentally worked (stacked) timbers" and his bid amount being the highest, his bid was accepted. As per the General Conditions of Sale contained in Part-III of the sale notice, the contractor,

"whose bid is conditionally accepted by the Divisional Forest Officer, subject to the approval of the competent authority and the latter authority to approve it".

may be granted the right to take the contract for exploiting the forest produce. No sale is binding or complete until approval where necessary, has been obtained and communicated to the bidder and the formal agreement is executed by the parties to the contract. The clause being :

"No sale shall be binding on the Government until such approval has been obtained and communicated to the bidder and the formal agreement is executed on behalf of the Government."

Further, Cl. 10 (d) in the said part provides:—

"On payment of security deposit as demanded by the Divisional Forest Officer the bidder shall sign the necessary agreement. This signing of the agreement by the bidder will not confer any right to the Forest produce unless the sale is ratified by the competent authority and ratification order is communicated to him".

Clause 10 (e) reads:—

"No sale of any lot will be considered valid or complete unless the above conditions have been complied with....."

According to the petitioner, it is clear from the aforesaid that ratification, wherever necessary, and execution of agreement are the most essential prerequisites for the bid maturing into a contract.

3. The petitioner alleges that his bid for several lots being the highest was provisionally accepted and he was called upon to deposit 10 per cent of the total sale value as security deposit. In due course orders ratifying the bid were communicated and the petitioner was called upon to pay the consideration by 15-11-1975. Thereafter the petitioner requested the Divisional Forest Officer, Karanjia, to take steps for execution of the agreement. However, no effective step was taken for execution of the agreement by the petitioner and the Government and the petitioner alleges that the Divisional Forest Officer on the contrary asked him to deposit the consideration money. The petitioner, however, was apprehensive and did not part with money without the agreement having been executed. It is said, the Divisional Forest Officer nullified the auction and put the lots of timber to re-auction. At the re-auction there was a short fall of about Rs. 51,000/-. Steps having been taken by the Divisional Forest Officer for realisation of the deficiency, the petitioner has filed this writ application to quash the Certificate cases.

4. Sri G. Rath, learned counsel for the petitioner, contends that the provisions contained in Article 299 (1) of the Constitution of India are mandatory and in the absence of a contract as contemplated by the said provision, no rights accrued in favour of one party nor liability incurred by the other. He relies on two well known cases of the Supreme Court in *K. P. Chowdhry v. State of Madhya Pradesh* (AIR 1967 SC 203) and in *Mulamchand v. State of Madhya Pradesh* (AIR 1968 SC 1218).

5. It is an admitted case that no agreement as contemplated by Article 299 (1) of the Constitution of India has been executed by the parties. In the counter affidavit, the opposite parties, however, take the stand that it is a case of waiver and the petitioner having proceeded some way, it is not open to him to say that there was no duly executed agree-

ment. The signing of the agreement was a mere formality.

In *K. P. Chowdhry's case* (AIR 1967 SC 203) (supra), the Supreme Court expressed itself as follows (at p. 206):—

"In view of Article 299 (1) of the Constitution, there can be no implied contract between the Government and any other person, the reason being that, if such an implied contract between Government and any other person were allowed, that would in effect make article 299 (1) useless, for then a person who had a contract with Government which was not executed at all in the manner provided in Article 299 (1) could get away by saying that an implied contract may be inferred by the facts and circumstances of a particular case. Further if the contract between the Government and another person is not in compliance with Article 299 (1), it would be no contract at all and could not be enforced either by the Government or by the other person as a contract".

In *Mulamchand's case* (AIR 1968 SC 1218) (supra) the view was reiterated in the following words (at p. 1222):—

".....the provisions of Art. 299 (1) of the Constitution, are mandatory in character and the contravention of these provisions nullifies the contracts and makes them void. There is no question of estoppel or ratification in such a case These provisions have not been enacted for the sake of mere form but they have been enacted for safeguarding the Government, against unauthorised contracts. They are based on the ground of public policy, on the ground of protection of general public, and these formalities cannot be waived or dispensed with. If the plea of estoppel or ratification is admitted that would mean in effect the repeal of an important constitutional provision intended for the protection of the general public.

6. The contention of Sri Rath, being unanswerable, we allow the writ petition, quash the certificate cases, No costs.

DAS, J.:— I agree.

Petition allowed.

AIR 1982 ORISSA: 113

R. N. MISRA, C. J.

Chintamani Bhanja (deceased, by L.R.),
Petitioner v. Gokula Chandra Bhanja and
others, Opposite Parties.

Civil Revn. No. 195 of 1979, D/- 27-2-1981.*

(A) Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act (21 of 1972), S. 4 (4) — Abatement of suit under — Suit for declaration of title and permanent injunction — Suit would not abate as relief of permanent injunction is not possible to be granted by Consolidation Authorities. AIR 1980 Ori 33, Dissented from.

A suit for permanent injunction would not abate in view of the fact that such a relief is not possible to be granted by the Consolidation Authorities. It may be that while dealing with a claim for interim injunction, the question of title as also possession would be ancillary gone into. That, however, does not give rise to a situation where the logic, that declaration of title is within the ambit of the Consolidation Authorities' authority, would operate so as to make a suit for permanent injunction not maintainable in the Civil Court. AIR 1980 Ori 33, Dissented from, Civil Revn. No. 277 of 1974, D/- 15-6-1976 (Orissa); (1979) 47 Cut LT 494 and AIR 1979 Orissa 159, Rel. on. (Para 3)

(B) Precedent — Single Judge inclining to differ from another single Judge of same High Court — Matter should be referred to a larger bench. (Para 4)

Cases Referred: Chronological Paras

AIR 1980 Orissa 33 4

AIR 1979 Orissa 159: 48 Cut LT 93 3

(1979) 47 Cut LT 494: (1979) 1 Cut WR 48 3

(1976) Civil Reven. No. 277 of 1974, D/- 15-6-1976 (Orissa) 3

G. S. Sahoo and K. C. Satapathy, for
Petitioner; S. Misra No. 2, B. Das and S.
Mantry, for Opposite Parties.

ORDER:— This application by defendant No. 1 in a suit for permanent injunction calls in question the order dated 12-2-79 passed by the Munsif, Banki, by which he has rejected an application of the defendant that the suit has abated in view of S. 4 (4) of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972.

From order of C. R. Kanungo, Munsif, Banki, D/- 12-2-1979.

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tion of Holdings and Prevention of Fragmentation of Land Act, 1972.

2. The plaintiff claimed a decree for permanent injunction against the defendants by claiming title in himself. Defendant No. 1 alone entered contest by filing a written statement on 13th April, 1979 wherein challenge to the title claimed by the appellant was raised. An application was made by defendant No. 1 that the suit has abated in view of the fact that the lands come within the village covered by the consolidation notification. The learned Munsif did not accept the assertion of defendant and held that the suit does not abate.

3. Section 4 (4) of the Act provides:—

"Every suit and proceedings for declaration of any right or interest in any land situate within the consolidation area in regard to which proceedings could be or ought to be started under this Act which is pending before any Civil Court, whether of the first instance of appeal, reference or revision, shall, on an order being passed in that behalf by the Court before which such suit or proceeding is pending, stand abated."

In Civil Revn. No. 277 of 1974 disposed of on 15th June, 1976 a single Judge of this Court held that injunction was not a matter within the purview of the powers of the Consolidation Officer and, therefore, S. 51 (2) of that Act had no application and a suit would not abate. That view was adopted by Mr. Justice P. K. Mohanti in Civil Revn. No. 374 of 1978: ((1979) 47 Cut LT 494) (Puni Bewa v. Ananta Sahoo) where the learned Judge observed:—

"..... The Consolidation Authorities have not been vested with power to give a declaration of status or to set aside a decree or order of a competent Court. They have also no power to grant the relief of permanent injunction. The Civil Court's jurisdiction to grant such reliefs is not expressly or impliedly barred under the provisions of the Act."

Another learned single Judge in Civil Revn. No. 65 of 1978: ((1979) 48 Cut LT 93): (AIR 1979 Orissa 159) (Adhikari Gopinath Das v. Nirmal Chandra Mohanty) while agreeing with the position that the Consolidation Authorities had no right to grant injunction took the view that the Civil Court would be in a position to deal with prayers for interim injunction. The ratio of the decision supports the two single Judge view earlier

indicated and there is no warrant for the position that the jurisdiction of the Civil Court would be unaffected so far as interim injunction is concerned and there would be no scope for granting permanent injunction.

4. Notwithstanding these three single Judge decisions holding the field, Mr. Justice P. K. Mohanti changed his view in the case of Bhagaban Prasad Das v. Narayan Prasad Das (AIR 1980 Orissa 33) unfortunately without referring to any of the reported decisions including his own. A learned single Judge is not entitled to take a different view from reported decisions of the court even though they may be single Judges, and in case he is inclined to have a view of the legal position it is open to him to refer the matter to a larger Bench. In view of the fact that the situation had been completely answered by three earlier decisions, I am not inclined to follow the principle indicated in AIR 1980 Orissa 33 (supra) and would choose to prefer the learned Judge's earlier view which is in accord with the decisions of the two other single Judges. The position, therefore, would be, a suit for permanent injunction would not abate in view of the fact that such a relief is not possible to be granted by the Consolidation Authorities. It may be, as has been pointed out occasionally, that while dealing with a claim for interim injunction, the question of title as also possession would be ancillary gone into. That, however, does not give rise to a situation where the logic, that declaration of title is within the ambit of the Consolidation Authorities' authority, would operate so as to make a suit for permanent injunction not maintainable in the Civil Court.

5. The Civil Revision is dismissed. No costs.

Revision dismissed.

AIR 1982 ORISSA 114

P. K. MOHANTI AND J. K. MOHANTY,
JJ.

Krushna Chandra Sahu and another,
Appellants v. Pradipta Das and others,
Respondents.

First Appeal No. 155 of 1981, D/- 9-2-1982.*

(A) Hindu Adoptions and Maintenance Act (78 of 1956), Ss. 11 (iv) and 16 —

*From decision of S. K. Satpathy, Sub-J.,
Bhubaneswar, D/- 6-1-1981.

BZ/CZ/A768/82/KJK/SSG-H

Hindu Law — Adoption — Onus of proof — Essential condition of a valid adoption — Transfer of adoptive child by ceremony of giving and taking is essential. (Evidence Act (1872), S. 101).

The burden of establishing that there was a valid adoption which deflected the ordinary course of succession is on the party who pleads the case of adoption. Both the factum of adoption and validity and legality of adoption are based upon the fact of giving and taking.

(Para 4)

A document (executed not by natural father but by adoptive father) acknowledging adoption or containing recitals regarding giving and taking in adoption is not by itself sufficient to constitute legal adoption in the absence of evidence about actual giving and taking of the child, more so when the natural father is not a party to the document. Therefore, no presumption can be drawn under S. 16 of the Act as regards giving in adoption by the natural father.

(Para 5)

(B) Hindu Adoptions and Maintenance Act (78 of 1956), Ss. 6, 7 — Valid adoption — Necessary requisites.

Section 6 of the Act provides that no adoption shall be valid unless it be made in accordance with the other conditions mentioned in the Chapter. According to the proviso to S. 7 of the Act if the person taking the son in adoption has a wife living, he shall not adopt except with the consent of his wife unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind. In the instant case, it is nobody's case that the wife has renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind. Thus, even if there was an adoption it was invalid due to non-compliance with the requirements of the proviso to S. 7.

(Para 5)

(C) Limitation Act (9 of 1908), Arts. 64, 65 — Adverse possession — What is?

As regards the plea of adverse possession, it was contended that some shop rooms were constructed by the defendant No. 1 on a piece of Government land and he has been possessing the same for more than thirty years. According to prosecution witness the shop rooms stood on the lands purchased by her from original owner. Defendant No. 1 has not adduced any evidence in support of his contention

that the shop rooms stood on Government land. It was not disputed before the trial court that owner respondent was in possession of the entire suit lands including the shop rooms till he left for some other place. The suit having been instituted nearly after five years, it cannot be said that defendant No. 1 has perfected his title to the same by adverse possession.

(Para 7)

Cases Referred: Chronological Paras
AIR 1961 SC 1378 4

Ashok Mukherjee; A. E. Mishra, S. C. Das and Miss Mira Ghosh for Appellants; B. L. N. Swamy and Miss N. R. Agarwal, for Respondents.

P. K. MOHANTI, J.:— This appeal, by defendants 1 and 2, arises out of a suit for declaration of title to and recovery of possession of the suit lands and also for mesne profits.

2. The plaintiff's case runs thus:

The suit lands originally belonged to one R. K. Chakrabarty, who transferred the same in favour of Gitarani Kundu, widow of late Debendranath Kundu by a registered sale deed dated 24-8-48 (Ext. 2). The plaintiff purchased the same from Gitarani Kundu and her daughter Pusparani Kundu by a sale deed dated 12-2-80 (Ext. 1) for a sum of Rs. 25,000. Defendant No. 1 Krushna Chandra Sahu was engaged as a servant by Debendranath Kundu, the deceased husband of Gitarani, in the year 1960. Debendranath Kundu became addicted to drinking and began to ill-treat Gitarani for which she left for Calcutta in the year 1962 and lived there with her daughter. During her absence, Debendranath became mentally unbalanced and fully dependent upon the help of defendant No. 1. Taking advantage of his ill-health and mental condition defendant No. 1 fraudulently obtained on 23-1-75 a document purporting to be a deed acknowledging adoption of defendant No. 2 as a son. It was alleged that defendant No. 2 is the natural born son of defendant No. 1 and he was never adopted by Debendranath Kundu as a son. The document dated 23-1-75 (Ext. C-1) was obtained from Debendranath by misrepresentation that he was executing a power-of-attorney in favour of defendant No. 1 authorising him to look after the settlement proceedings which were then in operation. It was further alleged that the contents of Ext. C-1 are written in Oriya and Debendranath Kundu did not know how to read and write Oriya language. The contents were

never read over and explained to him nor had he any independent advice to execute the deed. Two to three months after execution of the deed, defendant No. 1 began to misbehave with Debendranath and induced the tenants not to pay the monthly rent of the suit houses to Debendranath. He ultimately drove out Debendranath from his house. In April, 1976 Debendranath went to his daughter's house at Calcutta and lived there with Gitarani and told her that a power-of-attorney had been taken from him by defendant No. 1. Coming to know about this, Gitarani and her daughter came down to Bhubaneswar and learnt that defendant No. 1 had fraudulently obtained the document Ext. C-1 on several false recitals that the suit lands were purchased by Debendranath from R. K. Chakrabarty benami in the name of his wife Gitarani; that Pusparani was an illegitimate child of Gitarani; that defendant No. 1 had provided funds for construction of the house on the suit lands; and that defendant No. 2 was the adopted son of Debendranath. It was alleged that Debendranath was oilman by caste and he could not have adopted defendant No. 2 who is khandait by caste and is the son of a servant of the family. It was further alleged that the consent of Gitarani was never obtained for such adoption. On coming to know the real position, Debendranath filed a suit in the court of the Subordinate Judge, Bhubaneswar seeking a declaration that defendant No. 2 was not his adopted son and that the document (Ext. C-1) was obtained from him by fraud and misrepresentation. After filing the suit, Debendranath fell seriously ill and could not take steps in the suit for which it was dismissed for non-prosecution. Defendant No. 1 was occupying two pucca rooms standing on the suit premises. He also inducted several tenants on the suit premises and misappropriated the rent realised from them. Defendants 3 to 20 were the tenants in occupation of the suit premises by the date of the suit. The plaintiff served a notice on the defendant No. 1 requesting him to give up vacant possession of the suit lands in his favour and to pay damages to the tune of rents realised by him from the tenants after 12-2-1980. Defendant No. 1 sent a reply claiming title to the suit lands for himself and defendant No. 2. Hence, the plaintiff filed the suit for the aforesaid reliefs.

3. Defendant No. 1 filed written statement denying the plaint allegation. His

contention was that the suit lands were purchased by Debendranath Kundu benami in the name of his wife Gitarani and they lived together for some time in the suit house. But subsequently Gitarani left for Calcutta and lived with another man as his wife. Debendranath was issueless and he treated defendant No. 1 as a "Snehaputra". He got defendant No. 1 married. Defendant No. 1 sold away his ancestral property and spent the consideration money in constructing some houses on the suit lands. He used to look after the suit lands on behalf of Debendranath. Since Gitarani was not traced and subsequently it was learnt that she was living with another man and had begotten children through him Debendranath decided to adopt defendant No. 2 as a son. So after observing all religious rites he adopted defendant No. 2 and subsequently executed Ext. C-1 acknowledging the adoption. Since Gitarani had deserted Debendranath and was treated to be dead, the question of obtaining her consent for the adoption did not arise. The allegations of fraud and misrepresentation were denied and it was contended that Debendranath executed the document Ext. C-1 out of his own free-will being fully aware of the contents thereof. The plaintiff's sale deed was challenged as nominal and devoid of consideration. The allegation that defendant No. 1 realised house rent from the tenants and appropriated the same was also denied. It was alleged that the suit lands were full of jungles and defendant No. 1 reclaimed the same and while so doing he occupied about Ac. 0.040 of Government land and amalgamated the same with the lands purchased by Debendranath. Constructions on the purchased land and the Government land were raised mostly with the funds provided by defendant No. 1. It was also alleged that Gitarani and Pusparani were never in possession of the suit lands and that defendant No. 2 Jogendranath being the adopted son of Debendranath has been in possession of the suit lands in his own right. It was alternatively pleaded that defendants 1 and 2 have acquired title to the suit lands by adverse possession.

4. The burden of establishing that there was a valid adoption which deflected the ordinary course of succession is on the party who pleads the case of adoption. It was, therefore, imperative for the defendants to prove that defendant No. 2 was in fact adopted by Debendranath and that the adoption was valid and legal.

Both the factum of adoption and validity and legality of adoption are based upon the fact of giving and taking. S. 11 (vi) of the Hindu Adoptions and Maintenance Act provides as follows:

"(vi) The child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth, or in the case of an abandoned child or a child whose parentage is not known, from the place or family where it has been brought up to the family of its adoption."

The Supreme Court in the case of Lakshman Singh Kothari v. Smt. Rup Kanwar, AIR 1961 SC 1378 laid down as follows (at p. 1381):—

".....Under the Hindu Law, whether among the regenerate caste or among Sudras, there cannot be a valid adoption unless the adoptive boy is transferred from one family to another and that can be done only by the ceremony of giving and taking. The object of the corporeal giving and receiving in adoption is obviously to secure due publicity. To achieve this object it is essential to have a formal ceremony. No particular form is prescribed for the ceremony, but the law requires that the natural parent shall hand over the adoptive boy and the adoptive parent shall receive him. The nature of the ceremony may vary depending upon the circumstances of each case. But a ceremony there shall be, and giving and taking shall be part of it....."

5. In the present case, there is absolutely no evidence to show that there was giving and taking. Defendant No. 1 who is the natural father of defendant No. 2 has been examined in the case as D.W. 1. In his deposition he has not uttered a word about the giving and taking. There is no other evidence also to prove the actual delivery of the child by the natural father and actual taking of the child by the adoptive father. Reliance was placed on the document Ext. C-1 executed by Debendranath Kundu acknowledging the adoption of defendant No. 2. But a document acknowledging adoption or containing recitals regarding giving and taking of adoption are not sufficient themselves to constitute legal adoption in the absence of evidence about actual giving and taking of the child. This document has been executed by Debendranath, but not by defendant No. 1. In fact he is not a party to the document.

Therefore, no presumption can be drawn under S. 16 of the Act as regards giving in adoption by the natural father. It, therefore, follows that the defendants have failed to establish their claim of adoption. Another staggering feature of the case is that admittedly no consent of Gitarani, the wife of Debendranath was taken for the alleged adoption. S. 6 of the Act provides that no adoption shall be valid unless it be made in accordance with the other conditions mentioned in the Chapter. According to the proviso to S. 7 of the Act if the person taking the son in adoption has a wife living, he shall not adopt except with the consent of his wife unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind. In the instant case, it is nobody's case that Gitarani has renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind. Thus, even if there was an adoption it is invalid due to non-compliance with the requirements of the proviso to S. 7.

6. It was next contended on behalf of the appellants that Gitarani was not the real owner of the suit lands and that Debendranath purchased the same benami in the name of his wife. It is to be noted in this connection that Debendranath has died in the meantime and after his death his wife Gitarani and daughter Pusparani being natural heirs have succeeded to the properties left by him. So, even assuming that Debendranath was the real owner of the suit lands, Gitarani and Pusparani inherited the same after his death. The plaintiff's sale deed having been executed by both Gitarani and Pusparani, its validity is not open to attack.

7. As regards the plea of adverse possession, it was contended that some shop rooms were constructed by the defendant No. 1 on a piece of Government land and he has been possessing the same for more than thirty years. According to P.W. 2 the shop rooms stand on the lands purchased by her from R. K. Chakrabarty. Defendant No. 1 has not adduced any evidence in support of his contention that the shop rooms stand on Government land. It was not disputed before the trial Court that Debendranath Kundu was in possession of entire suit lands including the shop rooms till he left for Calcutta some time after 1975. The suit having been insti-

tuted in the year 1980, it cannot be said that defendant No. 1 has perfected his title to the same by adverse possession.

8. There is no iota of evidence to support the contention that Gitarani deserted her husband and lived with another man as wife and husband. According to the evidence of P.W. 2 Gitarani Kundu and P.W. 4 Chandramohan Bhowmik, who is a neighbour, Pusparani is the daughter of Debendranath Kundu. P.W. 3 Brajabandhu Das, a teacher, has proved the school admission register (Ext. 4) wherein Pusparani has been described as the daughter of Debendranath Kundu. As against this evidence, defendant No. 1 merely stated that he heard from Debendranath Kundu that he had no daughter and that Pusparani was never staying at Kundu Bhawan. On a review of the entire evidence on the record, we hold that Pusparani is the daughter of Debendranath Kundu. Gitarani gave evidence that she also with her daughter Pusparani had sold the suit lands to the plaintiff for a sum of Rs. 25,000 and received the consideration money by way of bank draft. Thus, the plaintiff has acquired good title to the suit lands, and he is entitled to possess the same and recover mesne profits as decreed by the trial Court.

9. All the contentions raised on behalf of the appellants having been negated, this appeal is bound to fail.

10. In the result, the appeal fails and is dismissed; but in the circumstances without any order as to costs.

11. The appellants filed a petition for admitting certain documents as additional evidence. In our opinion, the documents sought to be admitted as additional evidence will not serve any useful purpose. The petition is rejected.

J. K. MOHANTY, J.:— I agree.

Appeal dismissed.

AIR 1982 ORISSA 117

N. K. DAS AND

R. C. PATNAIK, JJ.

Sibaram Panda and others, Petitioners v. Collector, Cuttack and others, Opposite Parties.

Original Journ. Case No. 2965 of 1981, D/- 21-1-1982.

Constitution of India, Art. 226 — Educational matter — Natural justice — Transfer certificates issued to students by Prin-

BZ/CZ/A660/82/AAJ/SNV

Principal of the college compulsorily for alleged misconduct — No opportunity given to students to prove their innocence — Punitive action could not be sustained.

Where the Principal of the college issued transfer certificates to certain students contained a notice that the Managing Committee of the college decided to issue compulsory transfer certificates to the students in question for misconduct and indiscipline, the punitive action would not be sustainable being violative of rules of natural justice when no opportunity was given to the students before the punitive action was taken against them, to explain or to prove that they were innocent. (Case law discussed). (Para 5)

Cases Referred: Chronological Paras

AIR 1981 SC 760: 1981 Cri LJ 320 5

AIR 1981 Delhi 381 5

ILR (1971) Cut 433 4

AIR 1970 SC 150 4

AIR 1970 SC 2042: 1970 Lab IC 1632 4

(1969) 3 All ER 275: (1971) AC 297: (1969)

3 WLR 706 (HL), Wiseman v. Borneman 4

AIR 1967 SC 1269 4

(1963) 2 WLR 935: (1964) AC 40: (1963) 2

All ER 66 (HL), Ridge v. Baldwin 4

AIR 1959 SC 694 4

AIR 1959 Orissa 196 4

(1863) 14 CBNS 180: 8 LT 278: 143 ER

414, Cooper v. Wandsworth Board of Works 4

M/s. S. Misra (1); J. M. Mohanty; G. P. Mohapatra; S. K. Nayak (2) and S. B. Misra, for Petitioners; Addl. Standing Counsel, for Opposite Parties.

DAS, J.:— Petitioners are students of the Orissa School of Engineering, Cuttack. After completing Diploma Course in Engineering they were undergoing a Condensed Course for Diploma in Automobile, Mechanical, Instrumental and Control. In Sept. 1981 there was a tension in the school. It is said that the Principal managed to get an application from students making allegations against the petitioners. Some criminal cases were started. On 3-12-1981 transfer certificates issued to the petitioners by the Principal containing a notice that the Managing Committee decided to issue compulsory transfer certificates to the petitioners and others for misconduct and indiscipline. Petitioners contend that mere allegation has been treated as sufficient proof of and justification for such punitive action. It is, therefore, prayed to quash the transfer certificates issued by the Principal.

2. In the counter, it has been averred that the transfer certificates have been

issued in the best interest of the institution and to control law and order situation for the purpose of maintenance of discipline in the institution. Certain allegations were made by the members of the staff and students for highhanded action and misconduct of the petitioners. As the atmosphere of the institution was surcharged with rowdiness it was considered that issuing of show cause notice would frustrate the very purpose for which the action was proposed. The Principal made a report to the Managing Committee which, after considering the report, thought it proper to issue transfer certificates to the petitioners.

3. Mr. Mishra, the learned counsel for the petitioner contends that the transfer certificates issued by the Principal cannot be sustained inasmuch as no opportunity was given to the petitioners to show cause and rules of natural justice have been violated. No inquiry was held. The petitioners have been prejudiced thereby inasmuch as the actions are punitive in nature.

4. The only question for consideration is, whether the petitioners have been deprived of a reasonable opportunity to show cause and if the rules of natural justice have been violated. It is contended by the learned Additional Government Advocate that this is an action by the Principal or the Managing Committee to maintenance of discipline and it necessarily entails unfettered discretion in the Principal or the Managing Committee to take such action. It was the Principal who was to decide whether and under what circumstances the transfer of a student becomes necessary and, as such, there should be no question of any obligation to follow the rules of natural justice.

This Court in Ramesh Chandra Sahu v. N. Padhy, Principal, Khallikote College, Berhampur, AIR 1959 Orissa 196 has held that both the English and American authorities seem to be agreed that even in disciplinary matters the head of an educational institution has no absolute discretionary power and that he must act reasonably and the aggrieved student must get an opportunity of being heard and of establishing his innocence, if he so desires. In the instant case, no opportunity has been given to the petitioners to explain or to prove that they are innocent. In the case of M/s. Raman and Raman Ltd. v. State of Madras, AIR 1959 SC 694, it has been observed that the source of the power does not affect the

character of the things done in exercise of that power. Even if a power, as that of the Principal, had been conferred under a statute, that by itself would hardly have been conclusive on the question whether the act would be purely an administrative act precluding the application of rules of substantial justice; for, as is well settled, that would always remain dependent on the nature of the things that are to be done in course of the administrative act. It is observed in *Ridge v. Baldwin* (1963) 2 WLR 935 at 943 (HL) that although there may be no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the Legislature. Following the decision of the Supreme Court in *A. K. Kraipak v. Union of India*, AIR 1970 SC 150 held that the dividing line between an administrative power and a quasi-judicial power is thin and is being gradually obliterated and further that the principles of natural justice apply in exercise of administrative powers as well. In order to judge the nature of the administrative power exercised by the Principal emphasis must lie on the word "decide" and obviously there could be no obligation on the part of the student to withdraw from the institution unless the decision of the Principal is there. The Supreme Court also in *State of Orissa v. Dr. (Miss) Binapani Dei*, AIR 1967 SC 1269 observed that if there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power. If the essentials of justice be ignored and an order to the prejudice of a person is made, the order is a nullity. That is a basic concept of the rule of law and importance thereof transcends the significance of a decision in any particular case. Also in *Kraipak's* case the Supreme Court observed that the concept of rules of law would lose its vitality if the instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner. The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously. The procedures which are considered inherent in the exercise of a judicial power are merely those which facilitate if not ensure a just and fair decision. *Kraipak's* case has also been followed by the Supreme Court in *Chandra Bhawan Boarding and Lodging, Bangalore v. State of Mysore*, AIR 1970 SC 2042.

The Supreme Court observed that in recent years the concept of quasi-judicial power has been undergoing a radical change and what was considered as an administrative power some years back is now being considered as a quasi-judicial power. In determining whether a power or a quasi-judicial power, one has to look into the nature of the power conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised. This Court was considering a similar question in *Deba Prasanna Mishra v. Principal, S.C.B. Medical College*, ILR (1971) Cut 433. Relying on the aforesaid decisions, this Court held that if the students are prejudicially affected by any order of any authorities of the educational institution, then in these cases rules of natural justice should be followed and reasonable opportunity should be given to the persons punished otherwise the order becomes a nullity.

In *Wiseman v. Borneman*, (1969) 3 All ER 275 at page 278, Lord Morris stated:

"The conception of natural justice should at all stages guide those who discharge judicial function is not merely an acceptable but is an essential part of the philosophy of the law. We often speak of the rules of natural justice. But there is nothing rigid or mechanical about them. What they comprehend has been analysed and described in many authorities. But any analysis must bring into relief rather their spirit and their inspiration than any precision of definition or precision as to application. We do not search for prescriptions which will lay down exactly what must, in various divergent situations, be done. The principles and procedures are to be applied which, in any particular or set of circumstances, are right and just and fair. Natural justice, it has been said, is only 'fair play in action'. Nor do we wait for directions from Parliament. The common law have abundant riches: there may, we find what Byles, J., called 'the justice of the common law' (*Cooper v. Wandsworth Board of Works* (1863) 14 CBNS 180 at p. 194)."

In *Deba Prasanna's* case, it was contended that the relationship of the authority and of the student was a matter of contract and the power exercised by the authority in rustivating the students without holding any inquiry or without

giving reasonable opportunity does not amount to be arbitrary. This Court negated such a contention. This Court held that the authority should have to decide before taking any action prejudicial to the interest of the students. Various decisions of the Supreme Court were cited before this Court in Deba Prasanna's case (ILR 1977 Cut 433) and after full discussion thirteen principles have been laid down in that case. It appears that in the instant case those principles have not been followed.

5. The undisputed facts of this case disclose that no reasonable opportunity was given to the petitioners before the punitive action was taken against them. Reliance has been placed by the Opposite Parties on *Malak Singh v. State of Punjab and Haryana*, AIR 1981 SC 760. The facts and circumstances in that case were completely different. The question arose whether inclusion of name of a person under the Punjab Police Rules in the surveillance register amounted to a punishment. It was held that nobody would have any access to such register. History sheets and surveillance registers had to be and were confidential documents. The nature and character of the function involved in the making of an entry in the surveillance register was so utterly administrative and non-judicial, that it was difficult to conceive of the application of the rule of *audi alteram partem*. It would be contrary to the public interest to reveal the information in the history sheet particularly the source of information.

Reliance is also placed by the Opposite Parties on *Abhay Kumar Yadav v. K. Srinivasan*, AIR 1981 Delhi 381. This was a case of arbitration which was to be followed by hearing. A student was debarred from entering the premises of the institution and from attending the classes till the pendency of criminal case against him. It was held that it was a suspension order in the nature of a preventive action and was not a final order and, as such, prior notice was not necessary. Those two decisions are, therefore, distinguishable.

Judging the facts and circumstances of this case in the light of the decisions of the Supreme Court as well as of this Court, as discussed, we held that the orders and the issuance of certificates for transfer of the petitioners are hit by violation of rules of natural justice and are, therefore, not sustainable.

6. In the result, the writ petition is allowed and Annexure 3 series are hereby quashed. In the circumstances of the case, there will be no order as to costs.

R. C. PATNAIK, J.— I agree.

Petition allowed.

AIR 1982 ORISSA 120

R. N. MISRA, C. J. AND B. K. BEHERA, J.

Dr. Sanjukta Panda and others, Petitioners v. State of Orissa and others, Respondents.

O. J. Cs. Nos. 1876, 1877 and 1898 of 1981, D/- 16-12-1981.

(A) Constitution of India, Arts. 226, 14 — Admission to R. H. S. Course — Candidates required to complete Housemanship before specific date — Prospectus containing provision for admission of even those completing Housemanship after last date of applications — Candidates completing Housemanship after given date but before last date for applications — Rejection of their application is illegal.

A condition for making applications for admission to the Resident House Staff Course was that the candidate applying should have completed Rotating Housemanship before a specified date, which fell before the last date for submitting the applications. A certain provision in the prospectus of the R.H.S. Course also indicated that one who had not completed the necessary Housemanship till the last date for application could apply but was required to give a certificate indicating the likely date of completion of Housemanship. The applications of candidates who completed the Rotating Housemanship not before the given date but before the last date for application were however rejected:

Held that, the rejection of application was illegal. (Para 5)

If according to the prospectus, applications made by those who had not completed the Rotating Housemanship till the last date of applications were also maintainable, those who had by that date qualified certainly would be entitled to apply and their applications were bound to be entertained. (Para 5)

(B) Constitution of India, Arts. 226, 14 — Admission to Resident House Staff Course — Candidates required to complete

BZ/CZ/A664/82/AGM/MVJ

Housemanship before specified date to qualify for admission — Applications of certain candidates not fulfilling requirement accepted by mistake — Such applications ultimately rejected — Art. 14 is not infringed. (Para 3)

L. Rath, B. B. Rath and A. K. Misra, for Petitioners; Govt. Advocate, for Respondents.

R. N. MISRA, C.J.:— Each of these applications under Art. 223 of the Constitution is by a Medical Graduate who completed the Rotating Housemanship after 30-6-81 and whose application made for admission into the Resident House Staff Course (hereinafter referred to as 'R.H.S.') for the 1981-82 session has not been entertained. In each of the writ applications the prayer is for a direction to the authorities to entertain the application for admission and to permit the petitioner to sit at the entrance examination and for other consequential directions.

Each of the petitioners passed the M.B.B.S. examination in 1980 but completed the Rotating Housemanship after 30-6-81. The prospectus for the R.H.S. course for the 1981-82 session indicated that—

"The candidates are required to fulfil the requirements by 30-6-81."

One of the requirements in para 3 of the prospectus was to the following effect:—

"3 (ii). The candidate must have satisfactorily completed the compulsory Rotating Internship/Housemanship training in a hospital recognised for this purpose for a period of one year by 30-6-81 or before.

Those who have not completed the compulsory Internship/Housemanship at the time of submission of application are required to submit certificate indicating the likely date of completion of the same. Others should attach a copy of completion certificate.

(iii)"

It is not disputed that each of the petitioners satisfied the other requirements except that the Rotating Housemanship was not completed before 30th June, 1981. In terms of para 3 (ii) of the prospectus, each one should have completed the course before the appointed date, but on account of a prolonged strike of Rotating Internees there was delay and two of them had completed the year's course by end of July, 1981, while the petitioner in O.J.C. No. 1377/81 completed it by 24-9-81.

It is contended on behalf of the petitioners that fixing the date as 30-6-81 was wholly irrelevant inasmuch as the prospectus was published beyond that date. Applications for admission were required to be filed by 7-8-1981 and the date of the entrance examination was scheduled for 20th Aug., 1981. Reliance was placed on the second part of cl. (ii) of para 3 of the prospectus extracted above where cognizance was taken of the position that if one had not completed the Rotating Internship by the date of submission of the application, one was entitled to specify the likely date by which the same was to be completed. As a further ground it was contended that some candidates who had not completed the Rotating Internship by 30-6-1981 had also been called to the examination. This was cited as an instance of infringement of Art. 14 of the Constitution.

2. A counter-affidavit has been filed and there has been denial of the fact that Art. 14 of the Constitution has been infringed. Though it has been admitted that in a hurry some candidates who had not completed the Internship by 30-6-81 had been initially entertained, it has been pleaded that their applications have been ultimately rejected. It has next been contended that the requisite qualifications under para 3 of the prospectus had to be satisfied and since admittedly each of the petitioners did not satisfy the requirement, there was no scope to make grievance.

3. In the absence of any further material, we must hold that the plea of infringement of fundamental right enshrined in Art. 14 of the Constitution does not survive for support to the petitioners.

4. There is also no force behind the contention that 30-6-81 should not have been fixed as the date by which Rotating Internship should have been completed. As it appears, in the normal course those who passed the regular M.B.B.S examination of 1980 should have completed the compulsory Rotating Internship by 30-6-1981. This feature is admitted by two of the petitioners. The petitioners have come forward with an explanation as to why they could not complete the Internship before 30-6-81. We see no objection to the authorities fixing 30-6-81 as the appointed date.

5. The only question that remains for consideration is the effect of the second part of cl. (ii) of para 3 of the prospectus

where it has been provided that in case of candidates who have not completed the compulsory Rotating Internship/Housemanship by the time of submission of application, they are required to submit a certificate indicating the likely date of completion of the same. The last date for making of application was 7-8-81 as already taken note of. Incorporation of the second part of cl. (ii) of para 3 does indicate that one who had not qualified even by 7-8-81 could make the application but was required to give a certificate indicating the likely date of completion of the course. If an application made by 7-8-81 from one who was still continuing as an interneer was maintainable, those, who had by that date qualified, certainly would have been entitled to apply and their applications were bound to be entertained. There can be no logic in rejecting the application of the petitioner in O.J.C. No. 1876 of 1981 and also of the petitioner in O.J.C. No. 1898 of 1981 as in the first case the period was complete by 21-7-81 while in the second case it was complete on 3-7-81. We see no scope for discarding the argument advanced on behalf of these petitioners. The applications of these petitioners must be held to have been wrongly rejected.

6. So far as the petitioner in O.J.C. No. 1877 of 1981 is concerned, it is admitted in para 7 of the writ application that the Rotating Housemanship was to terminate on 24-9-81. Even if the petitioner could make the application for admission by relying upon the second part of cl. (ii) of para 3 of the prospectus, since the examination was being held on 20th Aug., 1981 and by then he was not qualified, his application could not be treated to be in order. On that ground, non-entertainment of his candidature is not open to dispute. O.J.C. No. 1877 of 1981 is, therefore, liable to be rejected.

7. Before we proceed further, it is appropriate that we take note of a very unusual feature which occurs as an annual event in the admission into both the M.B.B.S. course as also the Post-Graduate study in the various medical specialities. Every year the method of selection is being changed and a novel process is being introduced. Selection into these courses is an annual event and since this is a certain event which could be predicted from before and there was no necessity to introduce any urgency into the process, the procedure could be fixed in advance. In fact, a durable scheme could be adopted which would remain in force for several

years so that an element of certainty would prevail and candidates seeking admission would know their positions from before. There could be no justification to keep the scheme changing from year to year and detain the announcement of the scheme operative for the year till a couple of weeks before the last date fixed for making of the applications and then in utter hurry proceed to deal with the matter, commit mistakes, introduce chaos and allow every one to take uncertain, unpredictable and doubtful steps. Traditionally, dealings of Government have the characteristic element of certainty and where citizens are involved, nothing is done in a way which would prejudice or affect them. In the instant case, Government have conceded that out of confusion some applications, though the candidates were not qualified, had been initially entertained. If the prospectus was published in time, reasonable gap was allowed to make applications, sufficient time was left for processing of these applications and no element of hurry was introduced into the operation, these mistakes would not have occurred. Confusion is associated with hurry and when State action is hurriedly undertaken, confusion cannot be kept away. We hope, the State Government would formulate its policy in the related matter in a concrete way and in future years more of certainties would be introduced into its dealings in respect of these matters.

8. Now comes the question as to what relief should be given to the two petitioners whose applications we have found to have been wrongly rejected. Since the petitioners satisfied all the requirements and their applications have been rejected by mistake of the public authorities, we are inclined to agree that they should not be prejudiced. The examination is over. We do not know in certain terms whether there is any vacancy left in the specialities in which these two petitioners are interested to take admission. In case the petitioners choose to take the entrance examination and duly notify the appropriate authority, viz., the opposite party No. 2-Director, of their intention to take the examination within one week from now, the said Director is called upon to hold the entrance examination meant for selection of candidates for the R.H.S. course within two weeks thereafter. In case these two candidates are found fit for admission and there is no other impediment in their way including availability of seats and the restrictions pre-

scribed by the relevant University to the matter of admission, they be admitted in accordance with the rules in force.

9. We make no order for costs.

BEHERA, J.:— I agree with my Lord the Chief Justice.

Order accordingly.

AIR 1982 ORISSA 123

N. K. DAS, J.

Mahanta Srikrushna Chandra Das, Appellant v. Rajkishore Mohanty and others, Respondents.

Misc. Appeal No. 158 of 1979, D/- 10-12-1981.*

(A) Orissa Hindu Religious Endowments Act (2 of 1952), S. 35 — Maintainability of appeal — Writ petition dismissed at admission stage — Appeal is not barred. (Constitution of India, Art. 226).

If a writ petition is filed and it has been dismissed at the stage of admission without assigning any reason and without a speaking order, it cannot be said that it operates as a bar to the statutory appeal. In the instant case, the statutory appeal had already been filed and during the pendency of the statutory appeal, the writ petition was filed and the High Court also directed to dispose of the appeal expeditiously. This would rather indicate that the High Court was not inclined to interfere with the order of the Commissioner of Endowments while exercising its extraordinary jurisdiction as a statutory appeal was pending. In other words, when the appellant had already taken recourse to the alternative remedy available to him, the High Court did not interfere. It cannot be said that the writ petition was disposed of on merits. Therefore, the statutory appeal under S. 35 of the Act was maintainable. AIR 1968 SC 985; AIR 1978 SC 1283; AIR 1979 SC 1328 and AIR 1961 SC 1457, Foll. (Para 2)

(B) Orissa Hindu Religious Endowments Act (2 of 1952), S. 35 (3) — Civil P. C. (1908), S. 96 — Merger of order — Order of Commissioner of Endowment recommending to Govt. from approval to disqualify appellant for continuing as Mahant — Writ Petition filed against order dismissed at admission stage — Order of Commissioner does not merge in order

of High Court in petition — Appeal under S. 35 (3) is maintainable against order of Commissioner. AIR 1963 SC 1124; AIR 1970 SC 1; AIR 1974 SC 1380 and AIR 1961 SC 1457, Foll. (Para 3)

(C) Orissa Hindu Religious Endowments Act (2 of 1952), Ss. 35 and 19 — Disqualification to continue as Mahant — Mismanagement and laches must be grave.

Under S. 35 of the Act a hereditary trustee of a Math has to be declared disqualified if he has committed breach of trust in respect of any of the properties of the institution or if he persistently or wilfully defaults in discharging his duties or functions under the Act or any other law for the time being in force or in payment of contribution or other dues payable to endowment fund. In the instant case the appellant sold properties when he was permitted to lease out the same. He did not deposit the consideration money in bank, but spent a portion out of it in construction of temple; two items of property have been transferred by his Gumasta; and the excess demand made after due payments have not been paid. A careful consideration of the aforesaid facts would show that in respect of expenditure met for construction of the temple there was no misappropriation. Nowhere there was any allegation of misappropriation against the appellant, nor there is any material to show that he has utterly and consistently mismanaged the properties of the institution. Some stray cases have been found. In view of these circumstances, it must be held that whatever laches have been found on the part of the appellant, those cannot be said to be very grave and as such disqualification for five years does not seem to be appropriate. (Para 5)

Cases Referred: Chronological Paras
 AIR 1979 SC 1328 2
 AIR 1978 SC 1283: 1978 Lab IC 1111 2
 AIR 1974 SC 1380 3
 AIR 1970 SC 1 3
 AIR 1968 SC 985: 1968 Lab IC 1223 2
 AIR 1963 SC 1124 3
 AIR 1961 SC 1457 2, 3

S. Misra (1) and S. K. Nayak, for Appellant; P. C. Misra, S. P. Misra and D. Das, for Respondents.

JUDGMENT:— Appellant was the recognised Mahant of Khambakul Math, P.S. Balikuda in the District of Cuttack. The Commissioner of Endowments has recommended under S. 35 of the Orissa Hindu Religious Endowments Act to the Government for approval to disqualify

*From order of B. C. Kanungo, Commissioner of Endowments Orissa, Bhubaneswar, D/- 3-9-1979.

the appellant from continuing as Mahant for a period of five years. The appeal is directed against that order. The charges levelled against the appellant were that he sold away 7.08 acres of land though permission had been obtained by him to execute permanent lease-deeds in respect of the said lands; he spent money for construction of the temple without plan and estimate being sanctioned by the Commissioner, he alienated some land of the institution either by himself or by his authorised agent without permission; he also alienated some Anabadi land without permission in his own name; he wilfully and persistently defaulted in discharging his duties and also defaulted in payment of contributions. He was asked to show cause and after causes were shown, the learned Commissioner of Endowments has held that the appellant has committed breach of trust in respect of funds of the institution and there has been persistent and wilful default in payment of contribution and was thus disqualified to continue as Mahant under cls. (c) and (f) of S. 35 of the Orissa Hindu Religious and Endowments Act.

2. A preliminary objection was taken by the counsel for the respondents that this miscellaneous appeal is not maintainable. He contended that the present appellant had filed a writ petition vide O.J.C. No. 1546/79 which was dismissed on 27-11-79 and in that writ petition he had challenged the validity of the charges levelled against him as well as the order of the Commissioner recommending to Government to disqualify him. The following order was passed by this Court in the aforesaid writ petition:

"Heard Mr. Misra (1). Dismissed. Hearing of M.A. 158/79 be expedited. Prayer for leave to appeal u/Art. 134-A (b) of the Constitution is rejected."

The question that arises for consideration is whether the present appeal filed under S. 35 (3) of the Orissa Hindu Religious Endowments Act, 1951 is not maintainable in view of the aforesaid order in O.J.C. No. 1546/79. Apparently, the order is not a speaking one and no reason has been assigned for the order. It also does not appear that it is an order passed on merits. In *Daryao v. State of U.P.*, AIR 1961 SC 1457, the Supreme Court was considering a petition made under Art. 32 of the Constitution before the Supreme Court after dismissal of a petition under Art. 226 by the High Court. A Bench of five Judges

of the Supreme Court held that if a writ petition filed by a party under Art. 226 is considered on the merits as a contested matter and is dismissed the decision thus pronounced would continue to bind the parties unless it is otherwise modified or reversed by appeal or other appropriate proceedings. If the petition filed in the High Court under Art. 226 is dismissed not on the merits but because of the laches of the party applying for the writ or because it is held that the party had an alternative remedy available to it, then the dismissal of the writ petition would not constitute a bar to a subsequent petition under Article 32. If a writ petition is dismissed in limine and an order is pronounced in that behalf, whether or not the dismissal would constitute a bar would depend upon the nature of the order. If the order is on the merits it would be a bar; if the order shows that the dismissal was for the reason that the petitioner was guilty of laches or that he had an alternative remedy it would not be a bar. If the petition is dismissed in limine, without passing a speaking order then such dismissal cannot be treated as creating a bar of *res judicata*. In the absence of a speaking order it would not be easy to decide what factors weighed in the mind of the Court and that makes it difficult and unsafe to hold that such a summary dismissal is a dismissal on merits and as such constitutes a bar of *res judicata*. The same view has been reiterated by the Supreme Court in *P. D. Sharma v. State Bank of India*, AIR 1968 SC 985; *Workmen of Cochin Port Trust v. Board of Trustees of the Cochin Port Trust*, AIR 1978 SC 1283 and *Hoshnak Singh v. Union of India*, AIR 1979 SC 1328. It would thus appear that if a writ petition was filed and it has been dismissed at the stage of admission without assigning any reason and without a speaking order, it cannot be said that it operates as a bar to the statutory appeal. In the instant case, the statutory appeal had already been filed and during the pendency of the statutory appeal, the writ petition was filed and this Court also directed to depose of the appeal expeditiously. This would rather indicate that this Court was not inclined to interfere with the order of the Commissioner of Endowments while exercising its extraordinary jurisdiction as a statutory appeal was pending. In other words, when the appellant had already taken recourse to the alternative remedy available to him, this Court did not interfere. It can-

not be said that the writ petition was disposed of on merits.

3. Mr. Misra, the learned counsel for the respondents, has relied on *Collector of Customs v. East India Commercial Co. Ltd.*, Calcutta, AIR 1963 SC 1124; *Shankar Ramchandra Abhyankar v. Krishnaji Dattatraya Bapat*, AIR 1970 SC 1; and *Gojer Brothers (P.) Ltd. v. Ratan Lal Singh*, AIR 1974 SC 1387. Relying on these decisions, he contends that the order of the Commissioner of Endowments has already merged in the order of the High Court in the writ petition and there is no order available to be considered in the present appeal. In the aforesaid decisions, statutory appeals or statutory revisions had been filed and had been disposed of and the decisions were on merits. If an appeal or revision, as provided under law, is filed against a decision, and the appeal or revision is disposed of on merits, undoubtedly the decision appealed against or sought to be revised merges in the judgment or order of the higher forum. It has also been held in *Daryao's case* (AIR 1961 SC 1457 referred to above) that if the order appealed against merges in appeal, then that can operate as a *res judicata*. There cannot be any doubt about the well-settled proposition that the order of the lower forum merges in the decision in appeal or revision. But that principle is not applicable in the present case. In my opinion, the principles laid down by the Supreme Court in *Daryao's case* (*supra*) are squarely applicable to the present case. There has been no decision on merits in O.J.C. No. 1546 of 1979 and thus it cannot operate as a bar to the present appeal.

4. Under S. 19 of the Orissa Hindu Religious Endowments Act, there cannot be any sale, mortgage or exchange or lease for a term exceeding five years without sanction of the Commissioner of Endowments. In the instant case, the appellant admittedly had obtained permission for executing permanent leases, but instead of that he has executed sale deeds. Undisputedly, he had not obtained any permission to sell the lands. By selling the lands, according to the appellant, more money has come to the funds of the institution than what the institution would have got by executing lease-deeds. These facts may be true, but it was incumbent on the part of the appellant to obtain the sanction for executing sale deeds. The next charge relates to spending money on construction work without

approval of plan and estimate by the Commissioner. It is not disputed that while sanctioning execution of lease deeds as aforesaid, the Commissioner had put a rider that the money so obtained would be deposited in the bank and would be spent subsequently. But the appellant has not done so. After obtaining the money he spent a major part thereof in construction of temple and placing orders for materials for such construction. It is contended by the learned counsel for the appellant that the appellant has not misappropriated any money, but has spent in construction of temple. There is no provision for obtaining prior approval of the plan and estimate by the Commissioner for such construction. The appellant had shown this matter in the budget which has been approved by the Commissioner. He has undoubtedly spent the money in construction work and placing orders for materials for such construction. These may have been approved by the Commissioner in the budget. But the fact remains, the appellant did not keep the money in bank at the first instance to be spent subsequently with prior sanction of the Commissioner as directed by the Commissioner while sanctioning transfer of immovable properties. As regards charge of alienating nine plots of land, it has been found by the Commissioner that seven plots have not been sold and two plots have been sold by one Iswar Ch. Mohapatra who was a Gumasta in the institution during the time of the Guru of the appellant as well as during the time of the appellant. It appears that the Gumasta has transferred two items of property. As regards the charge of alienation of Anabadi lands, there is no proof at all. Relating to default in payment of contribution, it is not disputed and is evident from Ext. H series that the appellant had been paying the contribution regularly, but subsequently there was demand for excess amount on revision of the contributions and that amount has not been paid. This was very recent and the appellant also does not deny this fact and he wants to make the payment.

5. According to S. 35 of the Act, a hereditary trustee of a Math shall be declared disqualified, amongst other reasons if he has committed breach of trust in respect of any of the properties of the institution or if he persistently or wilfully defaults in discharging his duties or functions under the Act or any other law for the time being in force or in pay-

ment of contribution or other dues payable to endowment fund. From the discussions made above, it would appear that the appellant has sold properties when he was permitted to lease out the same. He did not deposit the consideration money in bank, but spent a portion out of it in construction of temple; two items of property have been transferred by his Gumasta; and the excess demand made after due payments have not been paid. A careful consideration of the aforesaid facts would show that in respect of expenditure met for construction of the temple there was no misappropriation. Nowhere there was any allegation of misappropriation against the appellant, nor there is any material to show that he has utterly and consistently mismanaged the properties of the institution. Some stray cases have been found. P.W. 1 who has been examined in this case does not say how he is interested in the Math and also does not say that he is a disciple of the Mahant. In view of these circumstances, I hold that whatever laches have been found on the part of the appellant, those cannot be said to be very grave and as such disqualification for five years does not seem to be appropriate. The appellant has already been out of office for more than two years. In view of such position, interests of justice will be properly served if he is not disqualified for any further period.

6. In the result, the appeal is allowed in part. The disqualification of the appellant is limited only up to this date, namely, the date of the judgment and it is held that he is not disqualified for further period. The management of the institution should be handed over to the appellant immediately. No costs.

Appeal partly allowed.

AIR 1982-ORISSA 126

B. N. MISRA, J.

Kangalu Padhan and another, Appellants v. Dhaneswar Mishra and others, Respondents.

Second Appeal No. 84 of 1977, D/- 24-12-1981.*

Civil P. C. (5 of 1908), S. 96 and O. 41, R. 33 — Suit by Vendee for declaration of title over suit land — Suit decreed — Appeal against, by representatives of

*From decision of B. N. Gouda, Sub-J., Sonepur, D/- 8-3-1977.

AZ/BZ/A328/82/AGM/MVJ

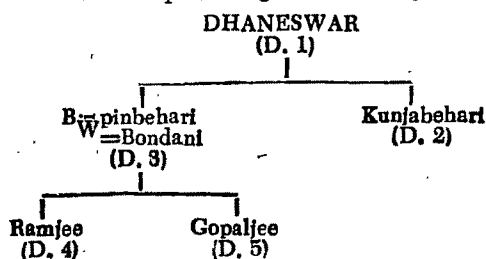
Vendor — Plea of absence of legal necessity for sale raised for first time in appeal — Question being one of fact, cannot be raised in appeal.

The question of legal necessity is a pure question of fact. Where specific grounds affecting validity of a sale have been pleaded at the stage of trial but the absence of legal necessity has not been pleaded, it is not open for the parties to raise a stand on the question of legal necessity for the first time in appeal. The appellate Court cannot allow such a plea to be raised before it for the first time without the same having been advanced in the pleadings. AIR 1936 Pat 275, AIR 1950 Mad 560, AIR 1969 Orissa 134 and AIR 1977 SC 2262, Rel. on. (Para 8)

Cases Referred:	Chronological Paras
AIR 1977 SC 2262	8
AIR 1974 SC 708	8
AIR 1969 Orissa 134	8
AIR 1966 SC 1861	8
AIR 1950 Mad 560	8
AIR 1936 Pat 275	8
AIR 1930 PC 57 (1)	8

S. Mohanti and A. S. Naidu, for Appellants; P. K. Misra, for Respondents.

JUDGMENT:— The plaintiffs are the appellants. They filed Title Suit No. 13 of 1969 in the Court of the Munsif, Sonepur for declaration of their title over the suit lands and for perpetual injunction against the defendants. The following genealogy described in the plaint shows the relationship of the defendants.



According to the plaintiffs, since a long time there was partition between the late Bipin (husband of defendant No. 3) and Kunja (defendant No. 2), the two sons of Dhaneswar (defendant No. 1). Since then they have been separate in mess and property. The suit lands had fallen to the share of Bipin at the partition and he was possessing the same as his separate property in his own right, title and interest. Bipin was the Karta of the joint family consisting of himself and defendants 3, 4 and 5. They were governed by Hindu Mitakshara Law. On 11-9-1962 the said Bipin as manager of the

family sold the suit lands in favour of the plaintiffs for a consideration of Rs. 800 and executed a registered deed of sale and delivered possession of the suit lands to the plaintiffs. Since then the plaintiffs have been in possession of the suit lands. The defendants have no manner of right, title and interest in the said lands. On 6-12-1968 the defendants unlawfully removed paddy crops from the suit lands on account of which the plaintiffs went to the police for help. However as the police did not help the plaintiffs they came to the Court and prayed for declaration of title and perpetual injunction.

2. Defendants 1 to 4 and 6 filed a joint written statement. According to the defendants, the suit lands belong to the late Madanmohan Chaini who died in the year 1957. Thereafter the suit lands devolved upon Sribatsa Misra and defendant No. 6, the two sons of Madanmohan. The plaintiff genealogy is admitted. It is denied that the suit lands had fallen to the share of Bipin and were his separate property. The suit lands are claimed to be the joint property of Sribatsa and defendant No. 6. It is denied that Bipin was acting as manager of the family. It is stated that the sale was a benami transaction, no consideration had passed under the sale deed and the suit lands had not been delivered to the plaintiffs. At the instance of the ex-Sarpanch Bipin was influenced to execute a fictitious sale deed in favour of the plaintiffs. It is denied that the plaintiffs are the owners in possession of the suit lands. It is again stated that defendant No. 6 and Sribatsa are the owners in possession of the suit lands. The Guardian ad litem appointed by the Court on behalf of minor defendant No. 5 separately filed a written statement adopting the written statement filed by the other defendants.

3. The main findings of the learned Munsif are:—

(1) that the suit lands had not fallen to the share of Madan Chaini but to the share of Dhaneswar (defendant No. 1), that in the partition between defendant No. 1 and his two sons, the late Bipin and defendant No. 2, the suit lands had fallen exclusively to the share of the late Bipin and that defendant No. 6 and his brother Sribatsa never succeeded to the suit lands on the death of their father;

(2) that the sale deed Ext. 1 executed by the late Bipin in favour of the plaintiffs is not fraudulent or benami, that the consideration amount was fully paid by the plaintiffs to the vendor and that the

plaintiffs are bona fide purchasers for value; and

(3) that the plaintiffs are in possession of the suit lands and they have acquired right, title and interest over the same.

The plaintiffs' suit was accordingly decreed on contest against the defendants with costs.

4. The defendants filed Title Appeal No. 1/8 of 1973/74 in the Court of the Subordinate Judge, Sonapur. In his judgment the learned lower appellate Court agreed with the trial Court that there was partition amongst Madan Chaini and his brothers since a long time, that the suit lands had fallen to the share of Dhaneswar (defendant No. 1) and that in the partition between defendant No. 1 and his two sons, the late Bipin and defendant No. 2, the suit lands had fallen exclusively to the share of the late Bipin. As regards the sale deed Ext. 1, the learned lower appellate Court held that it was invalid and not binding on defendants 3, 4 and 5 as the plaintiffs had failed to prove the legal necessity for the sale. The appeal filed by the defendants was accordingly allowed and the judgment and decree of the trial Court were set aside.

5. Being aggrieved by the judgment and decree of the learned lower appellate Court the plaintiffs have come up in appeal to this Court. This appeal was admitted for hearing on the substantial questions of law noted in Grounds Nos. 8 and 9 of the memorandum of appeal. The said grounds are extracted hereunder:—

"8. For that in view of the admission by the vendor, who is now dead, in Ext. 1 about the necessity for the sale was for payment of his debts and other legal necessities of the family which is admissible under Section 32, sub-sections (3) and (7) of the Evidence Act the learned lower appellate Court has acted illegally in not holding that the onus to prove that there was no prior debt of the vendor and there was no legal necessities, was on defendants 4 and 5 who alone were interested in the suit lands in view of the concurrent findings of the Courts below.

9. For that an alienation by a manager of a joint family made without legal necessity being not void but voidable at the option of other coparceners, the learned lower appellate Court has acted illegally in not holding that the plaintiffs were entitled to the reliefs claimed by them until defendants 4 and 5 get the sale deed

Ext. 1 set aside either in whole or in part."

6. Both the Courts below have found that at the earlier partition the suit lands had fallen to the share of defendant No. 1 and that in the partition between defendant No. 1 and his two sons Bipin and defendant No. 2, the suit lands had fallen to the exclusive share of Bipin. These concurrent findings of fact are accepted.

7. At present the main dispute between the parties revolves round the sale deed Ex. 1. Admittedly this sale deed was executed by Bipin in favour of the plaintiffs. In their written statement, the defendants alleged that the sale deed was fraudulent, fictitious and benami and that no consideration had been paid under the said sale deed. On the basis of the pleadings of the parties, the learned Munsif had framed the following issue:—

"Whether the sale deed executed by Bipin Mishra in favour of plaintiff(s) is fraudulent or benami and without consideration?"

After fully discussing the evidence adduced by both sides on this issue, the learned Munsif found that the sale deed Ext. 1 was not fraudulent or benami and that full consideration money had been paid by the plaintiffs to Bipin. The learned lower appellate Court has not disturbed nor differed from the aforesaid finding of the learned Munsif. It appears that learned counsel for the defendants for the first time raised the question of legal necessity before the lower appellate Court. In their pleadings both parties had not whispered a word about the presence or absence of legal necessity in respect of the sale. The learned Munsif had not framed any issue as regards legal necessity. It is seen that the defendants had elicited during the cross-examination of P.W. 1, a witness to the sale deed Ext. 1, that at the time of execution Bipin had said that with the purchase-money he would buy a bullock and pay off his debts. Plaintiff No. 1 stated in his evidence that Bipin had incurred loans from some persons (two of them were named by him) and that Bipin had repaid the said loans on the day following the sale. This statement has also been elicited by the defendants during cross-examination of plaintiff No. 1. On the question of legal necessity there is no evidence on the side of the defendants. The learned lower appellate Court without referring to or discussing the evidence of P.W. 1 and plaintiff No. 1 simply rejected the same as worthless.

8. Law is settled that the question of legal necessity is a pure question of fact (See AIR 1936 Pat 275, Darbar Saheb v. Bare Lal Kandarp Nath Sah Deo, AIR 1950 Mad 560, Pethu Reddiar v. Kandaswami Pillai and AIR 1969 Orissa 134, Binod Naik v. Chandrasekhar Padhi). Presence or absence of legal necessity having not been pleaded by the parties, the learned lower appellate Court should not have allowed the plea of absence of legal necessity to be raised for the first time before it in appeal. In AIR 1977 SC 2262 (Smt. Chander Kali Bail v. Jagdish Singh Thakur) it was held (at p. 2263):—

"..... In Siddik Mahomed Shah v. Mt. Saran, AIR 1930 PC 57 (1) it has been pointed out that where a claim has never been made in the defence presented no amount of evidence can be looked into upon a plea which was never put forward. If it could be so even at the trial stage, undoubtedly, such a new question of fact could not be entertained at any appellate stage. This decision has been followed by this Court in Bhagat Singh v. Jaswant Singh, AIR, 1966 SC 1861. To the same effect is the view expressed in another decision of this Court in Bachan Singh v. Dhian Dass, AIR 1974 SC 708. Hegde, J. pointed out in paragraph 6 of the judgment that a contention involving determination of questions of fact ought not to have been allowed to be raised for the first time in the second appeal in the High Court....."

In the present case parties have not stated a word about presence or absence of legal necessity in their pleadings. The defendants have challenged the sale deed on the grounds that it was fraudulent, benami, fictitious and that no consideration had been paid. Having pleaded specific grounds affecting validity of the sale and not having pleaded absence of legal necessity, it was not open to the defendants to take a stand on the question of legal necessity for the first time in appeal. Counsel's contention as to absence of legal necessity involving determination of questions of fact should not have been allowed to be raised for the first time at the appellate stage. The learned lower Appellate Court clearly fell into error in allowing the defendants to raise this plea for the first time at the appellate stage without the same having been advanced in the pleadings. In this view of the matter, it is not necessary to consider the other decisions cited at the

Bar on the questions — whether the appellate Court was wrong in putting the onus on the plaintiffs to prove presence of legal necessity when as per the evidence and recitals in the sale deed, the sale was by a father to pay off his antecedent debts and in not taking into consideration the recitals in the sale deed as to the existence of antecedent debts which were admissible under S. 13 of the Evidence Act. The finding of the learned Munsif that the sale deed was not fraudulent or benami and that full consideration money was paid by the plaintiffs to Bipin has not been disturbed by the learned lower appellate Court and is confirmed.

9. For the reasons stated above, this appeal is allowed. The judgment and decree of the learned lower appellate Court are set aside, and those of the learned Munsif are confirmed. In the facts and circumstances of this case, parties will bear their own costs throughout. Appeal allowed.

AIR 1982 ORISSA 129

R. C. PATNAIK, J.

Sadasiba Ratha and others, Appellants
v. Bimala Dibya and others, Respondents.

Second Appeal No. 280 of 1977, D/- 22-12-1981.*

(A) Limitation Act (36 of 1963), Art. 57 — Suit for partition — Relief of declaration that certain adoption never took place, also sought — Main relief sought being partition, Art. 57 does not apply.

A declaration regarding adoption is not necessary to decree a suit for partition though it may be necessary to decide the question. Art. 57 applies only to suits where a bare declaration that an adoption is invalid or never took place is asked for; it does not apply to a suit for possession of property even though it may be necessary to find that a given adoption is invalid. (1886) ILR 8 All 644, (1895) ILR 17 All 167, AIR 1923 All 25, (1900) ILR 27 Cal 242, AIR 1925 Mad 497, AIR 1924 PC 137, AIR 1931 PC 84, AIR 1951 Madh Bha 40 and AIR 1958 Bom 270, Rel. on. (Paras 4, 5)

(B) Limitation Act (36 of 1963), Art. 57 — Suit seeking relief of declaration re-

*From order of J. Das, Addl. Dist. J., Puri, D/- 9-5-1977.

AZ/BZ/A330/82/AGM/MVJ

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garding adoption — Date of knowledge of alleged adoption not established — Bar of limitation under Art. 57 cannot apply.

A suit for partition, also seeking a relief of declaration that a certain adoption never took place was sought to be dismissed as being barred by limitation under Art. 57. The only material produced in support of the contention was the record of rights.

Held, that the date of final publication appearing on the record of rights cannot be held to be the date of knowledge of the plaintiff of the alleged adoption. The requirement of Art. 57 is a factual requirement and the burden is on the defendants to either allege and prove the date of knowledge or rely on some material on record for the applicability of Art. 57. In the absence of any evidence to show on what date the plaintiff first came across the record of rights and if at all had knowledge of the alleged adoption therefrom, Art. 57 has no application. (Paras 6, 7)

Cases Referred : Chronological Paras

AIR 1958 Bom 270	5
AIR 1951 Madh Bha 40	5
AIR 1931 PC 84	5
AIR 1925 Mad 497 : ILR 48 Mad 1	4
AIR 1924 PC 137 : 22 All LJ 508	5
AIR 1923 All 25 : ILR 45 All 1 : 20 All LJ 814	4
(1900) ILR 27 Cal 242 : 4 Cal WN 405	4
(1895) ILR 17 All 167 : 1895 All WN 36	4
(1886) ILR 8 All 644 : 1886 All WN 232	4
R. K. Kar, Mrs. Mira Das and R. Mohanty, for Appellants; N. C. Mohanty (for No. 2), B. Patnaik (for No. 3) and R. K. Mohapatra and A. N. Misra (for No. 1), for Respondents.	

JUDGMENT :— Defendants 1, 2 and 3 are the appellants. The courts below have concurrently decreed plaintiffs' suit for partition of her 1/3 share declaring that the defendant No. 3 is not the adopted son of the plaintiff and her late husband and the entry in the record-of-rights describing defendant No. 3 as the son of Rajkisore is erroneous and the entries recording the names of defendants 6 and 8 as occupancy raiyats are wrong and directing correction of the entries in the record-of-rights showing defendants 2 to 6 and 8 as occupancy raiyats.

2. The late husband of the plaintiff and defendants 1 and 2 are brothers. The plaintiff alleges that she is entitled to 1/3 share in the joint family properties.

The suit property being estates vested in the State Government and were settled under Ss. 6 and 7 of the Orissa Estates Abolition Act with the plaintiff and defendants 1 and 2. Her earlier suit for partition in O. S. No. 15/28 of 1952-1951-I in respect of the properties which had not vested was disposed of on compromise and the present suit for partition is in respect of the properties which had vested and have been settled. She further alleges that defendants 4 to 8 got their names fraudulently recorded taking advantage of her absence and defendant No. 3 has never been adopted either by her husband or her. The contesting defendants have controverted the plaintiff's allegations and have urged that the defendant No. 3 is the adopted son of the plaintiff and the defendant No. 5 being in possession for more than 30 years has acquired occupancy right.

3. The courts below, having negated the plea of the defendants that defendant No. 3 is the adopted son of plaintiff have decreed the suit. The said finding is not challenged in this appeal. The only question that has been urged is whether in the facts and circumstances of the case the suit is barred by limitation. The defendants contend that the record-of-rights Ext. B was finally published on 9-12-1966 and the suit filed on 23-12-69 was beyond the period of 3 years prescribed by Art. 57 of the Limitation Act. The relevant provision is as follows:—

“57. To obtain a declaration that an alleged adoption is invalid or never, in fact, took place.	Three years.	When the alleged adoption becomes known to the plaintiff.
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4. The present suit filed by the plaintiff is essentially one for partition. The relief of declaration that defendant No. 3 is not the adopted son, is redundant and a surplusage. A declaration regarding adoption is not necessary to decree the suit for partition though it may be necessary to decide the said question. The consensus of the High Courts is that the Article applies only to suits where a bare declaration that an adoption is invalid or never, in fact, took place is asked for; it does not apply to a suit for possession of property even though it may be necessary to find that a given adoption is invalid (see *Basdeo v. Gopal*, ((1886) ILR 8 All 644); *Natthu Singh v. Gulab Singh*, ((1895) ILR 17 All 167); *Radha Dulaiya v. Rashiklal*, (1923) ILR 45 All 1); (*AIR 1923 All 25*); *Rama*

Chandra v. Ranjit, ((1900) ILR 27 Cal 242) and *Maharaja v. S. Sundaram*, ((1925) ILR 48 Mad 1); (*AIR 1925 Mad 497*).

5. The Privy Council accepted this view in the case of *Kalyandappa v. Chanbasappa* (*AIR 1924 PC 137*) and *Padmalav Achariya v. Fakira Debya*, (*AIR 1931 PC 84*).

It is not the form of the relief claimed which determines the real character of the suit for the purpose of ascertaining under which Article of the Limitation Act the suit falls. The plaint as a whole is to be examined to see whether it is a declaration properly so-called or whether it is an unnecessary claim and a mere surplusage and the suit is really suit for partition. (See *AIR 1951 Madh Bha 40*).

The burden is not on the plaintiff to disprove the fact or the validity of the alleged adoption, at all events it is not necessary to obtain a declaration from the Court that the alleged adoption is invalid in law or that it never took place in fact. It would be enough for him to establish his own case by brushing the adoption aside.

However, if it is a suit in substance for a declaration that an adoption is invalid, the mere fact that he ignores the adoption and bases his right on some other act consequential on the adoption will not enable him to escape the period of limitation, for the adoption would be in the way of his getting consequential relief (see *Vithoba's case*, *AIR 1958 Bom 270*).

6. Moreover, the defendants have not specifically alleged when the plaintiff had knowledge of the alleged adoption. They have relied on Ext. B, the record-of-rights, and said that the plaintiff must have knowledge from the date of final publication of the record-of-rights. The contention does not appear to be sound. There is no evidence to show on what date the plaintiff first came across the record-of-rights and if at all had knowledge of alleged adoption therefrom. The requirement of Art. 57 is a factual requirement and the burden was on the defendants to either allege and prove the date of knowledge or rely on some material on record for the applicability of Art. 57 (assuming that the said Article applies). There is no pleading and no issue has been framed and reliance on the only material, the date of publication appearing on the record-of-rights, furnished statutorily, is of little efficacy. The date of final publication has rel-

evance mainly for the purpose of Orissa Survey and Settlement Act. This is not decisive of knowledge of a party without convincing materials otherwise.

7. I am of the opinion that Art. 57 has no application and 9-12-1966, the date of final publication of record-of-rights, cannot be held to be the date of knowledge of the plaintiff of the alleged adoption. In the result, the appeal has no merit and is dismissed. No costs.

Appeal dismissed.

AIR 1982 ORISSA 131

R. N. MISRA, C. J. AND

B. K. BEHERA, J.

Nandipalli Appalaraju, Appellant v. G. Pannalal Sowcar and others, Respondents.

A.H.Os. Nos. 48 and 49 of 1975, D/- 2-11-1981.*

(A) Benami — Burden of proof — Eviden to prove benami character of transaction is heavy on person who pleads benami — Merely because both parties have led evidence question as to on whom burden lay does not lose importance. First Appeals Nos. 65 and 66 of 1967, D/- 16-6-1975 (Orissa), Reversed. (Evidence Act (1872), Ss. 101-104). (Paras 7, 8, 9)

(B) Benami — There is a distinction between 'Sham' and 'Benami' transactions — Court auction of property — Consideration money deposited in Court and appropriated for meeting public demand — Transaction cannot be sham. First Appeals Nos. 65 and 66 of 1967, D/- 13-6-1975 (Orissa), Reversed. (Para 7)

(C) Benami — Question whether transaction is benami or not — Source of consideration is almost the deciding feature. First Appeals Nos. 65 and 66 of 1967, D/- 16-6-1975 (Orissa), Reversed.

In order to determine whether a transaction is benami or not, the source of consideration is almost the deciding feature. (1972) 38 Cut LT 1323; AIR 1974 SC 171 and AIR 1980 SC 727, Rel. on.

(Para 9)

In the instant case, during the execution of a decree in a title suit the disputed properties were attached. One of the defendants in the title suit claimed that properties had been purchased by him in an auction sale by Court for realisation of arrears of sales tax dues against

judgment-debtors. The claim was allowed by the executing Court. The decreeholder then instituted a suit impleading the claimant auction-purchaser along with judgment-debtors for declaration that the property was liable to be proceeded against for satisfaction of decree, and alleged that the auction sale was a benami transaction. There was no document to support the plea that the judgment-debtors advanced the consideration money. The judgment-debtors were in heavy debts and there were several creditors. The property was put to sale in the certificate proceeding only when the judgment-debtors were not in a position to pay the instalments. There was no evidence worthy of acceptance that the judgment-debtors were in a position to advance the auction price. None of the judgment-debtors came forward to say that they were the real owners of the properties and not the claimant-auction-purchaser. Held that the consideration money did not come from the judgment-debtors and hence, the auction sale could not be said to be a benami transaction. First Appeals Nos. 65 and 66 of 1967, D/- 16-6-1975 (Orissa), Reversed. (Para 9)

Cases Referred: Chronological Paras
 AIR 1980 SC 727: (1980) 3 SCC 72 7
 AIR 1974 SC 171: (1974) 1 SCC 3 7
 (1972) 38 Cut LT 1323: (1972) 2 Cut WR 1842 7
 AIR 1957 SC 49 7

Y. S. N. Murty, for Appellants; B. R. Rao, B. L. N. Swamy and N. V. Ramdas, for Respondents.

R. N. MISRA, C. J.:— The appellant in both these appeals seeks to challenge the affirming common judgment of a learned single Judge of this Court in First Appeals Nos. 65 and 66 of 1977. The said First Appeals were directed against a common judgment in Title Suits Nos. 71 and 72 of 1964. First Appeal No. 65 of 1967 arose out of Title Suit No. 72 of 1964 while First Appeal No. 66 of 1967 was out of Title Suit No. 71 of 1964.

2. The short facts are the following:

One Pannalal Sowcar carried on business in the name and style of "Baugmal Pannalal Sowcar". He obtained a money decree against defendants 2 to 13 of Title Suit No. 71 of 1964 and levied execution of the said decree in E. P. No. 4 of 1958 in the court of the Subordinate Judge, Jeypore. In execution, he brought the disputed properties of Title Suit No. 71 of 1964 under attachment by contending that these properties belonged to the judgment-debtors. One Lakshmanrao,

*Against judgment of B. K. Ray, J. in First Appeals Nos. 65 and 66 of 1967, D/- 16-6-1975.

plaintiff in Title Suit No. 72 of 1964, also obtained a money decree against defendants 1 to 8 of that suit and raised execution in E. P. No. 1 of 1968 against the judgment-debtors. The decree-holder brought the disputed properties of Title Suit No. 72 of 1964 under attachment. While these execution cases were pending and attachment of properties had been effected, Appalaraju, defendant No. 1 in Title Suit No. 71 of 1964 and defendant No. 9 in Title Suit No. 72 of 1964, preferred two claim petitions in the corresponding execution cases on the footing that the properties had been purchased by him in a sale held under the Madras Revenue Recovery Act for realisation of arrears of sales tax dues outstanding against the judgment-debtors who were defendants 2 to 13 in Title Suit No. 71 of 1964, some of whom were also defendants 1 to 8 in Title Suit No. 72 of 1964. The auction-purchaser maintained that the sale in his favour had been duly confirmed; the sale certificate had been issued and possession had been made over through court and he was in possession and enjoyment of the properties as absolute owner thereof; and, therefore, attachment of such properties which did not belong to the defendant-judgment-debtors for satisfying the decrees was not valid. The executing court allowed both the claims. Therefore, the two separate plaintiffs instituted these two Title Suits by impleading the claimant along with the other defendants for a declaration that the properties were liable to be proceeded against for satisfaction of the respective decrees.

3. The short facts relevant for appreciating the contentions advanced are these:—

The plaintiffs claimed that Appalaraju was the brother-in-law of Satyanarayana, the 3rd defendant in Title Suit No. 71 of 1964, who was also the 2nd defendant in the connected suit. The auction-purchaser was not a resident of Koraput district. The property belonged to the family of the judgment-debtors and when for satisfying the demand of arrears of sales tax the certificate sale was held, Appalaraju was set up by the certificate-debtors to bid in the auction sale. The auction money was paid not by Appalaraju but was advanced by the certificate-debtors. This device was adopted to defeat the creditors of the certificate-debtors. The true owners of the property thus were the certificate-debtors who later became the judgment-debtors in the two suits. The

right, title and interest in the properties thus continued to be with the family of the judgment-debtors and were liable to be attached. The claims should not have been allowed and the properties should have been found liable for attachment and to be proceeded against for satisfaction of the decrees.

Appalaraju, the auction-purchaser, took the stand that the family of the certificate-debtors was heavily indebted and all their properties which formed the subject-matter of the two suits were under attachment in the earlier cases including the certificate case under the Madras Revenue Recovery Act. There were several bidders when in the certificate case the property was put to sale, and he was the highest bidder in the sale held on 15-5-58. The sale was duly confirmed on 6-8-60 and possession was delivered on 12-8-61. The sale became final and absolute title was acquired in the purchased property by the auction-purchaser.

4. The judgment-debtors remained *ex parte* in both the suits.

5. The trial Court, on the basis of the evidence led before it, came to hold that the sale in favour of Appalaraju in the certificate proceedings was sham and the consideration money paid therein came from the judgment-debtors' family; the sale certificate in favour of the auction-purchaser did not confer any title on him and the delivery of possession in favour of the auction-purchaser was a mere paper transaction; the members of the family of the judgment-debtors continued to be in possession of the property and Appalaraju was a mere name-lender or Benamdar. The trial Court further found that the suits were maintainable and were not barred by limitation. On the findings that the judgment-debtors had subsisting interest, the properties were liable to attachment and sale for satisfaction of the decrees against the judgment-debtors.

6. In First Appeals, the auction-purchaser's counsel contended that heavy burden lay on the decree-holder of both the suits to establish that the auction sale was a Benami one and did not confer title on the auction-purchaser; there was no evidence worthy of credence to discharge that heavy burden and to enable the court to hold that the transactions were either Benami or sham and that title had not vested in the auction-purchaser.

The learned single Judge analysed the evidence led on both sides and came to hold:—

"11. On the evidence as led by the parties, the following facts are found to have been established; the suit lands together with the mill belonging to the judgment-debtors were under attachment in a certificate case initiated for recovery of arrears of sales tax dues. The judgment-debtors were taking time to pay up the certificate dues, were paying by instalments and were getting the sale of the attached properties adjourned from time to time. After payment of some instalments, they defaulted and at their instance the suit lands were put up for sale. K. Rama Rao, their clerk, was all along taking steps for the judgment-debtors in the certificate case. The sale of the suit properties was once fixed to 25-3-1958 and the order sheet of the case reveals that due to non-availability of the officer concerned, the sale was adjourned to 12-5-58. N. Appalaraju is the brother-in-law of S. Satyanarayana, one of the judgment-debtors (defendant No. 3 in Title Suit No. 71 of 1964), and N. Appalaraju's daughter has been staying since her childhood with S. Satyanarayana who has no issue. N. Appalaraju belongs to Vizianagaram and has no residence or property either at Jeypore or within the district of Koraput at the time of auction-purchase. N. Appalaraju authorised K. Rama Rao, clerk of the judgment-debtors, who was taking all steps in the certificate case for the judgment-debtors in writing to offer bid for him (N. Appalaraju). Although N. Appalaraju says that he was present at the auction sale and was instructing K. Rama Rao, he cannot be believed, because if he was really present, he himself should have signed the bid sheet and not K. Rama Rao. The written authority appears to have been in possession of the judgment-debtors on 25-3-58 to which date the sale had been fixed originally, because the written authority shows that it originally bore the date 25-3-58 which was changed to 12-5-1958, a date three days prior to the date when the auction sale actually took place. The assertion of N. Appalaraju that he was actually present at the place of auction is ought to be established through D.W. 1 who is alleged to be another bidder taking part in the auction. A reading of his evidence does not inspire confidence. That apart, D.W. 7, one of the judgment-debtors, who supports the case of N. Appalaraju admits that he joined Bijoy Traders as the Manager in 1958 and that D.W. 1, the bidder referred to above, was a partner of Bijoy Traders. Thus, the

evidence of D.W. 1 cannot be said to be independent in nature. No other bidder has been examined. Absence of any reliable evidence to prove that N. Appalaraju was present at the time of auction coupled with the fact that the date of written authority has been changed from 25-3-58 to 12-5-58 and that N. Appalaraju has not signed the bid sheet conclusively establish that N. Appalaraju was not actually present; that to oblige the judgment-debtors he had given a written authority to their clerk K. Rama Rao on 25-3-58 which date was subsequently changed to 12-5-58 and that K. Rama Rao was alone participating in the auction. The documents further reveal that K. Rama Rao deposited Rs. 250 on the date of sale and the balance subsequently. He also took delivery of possession in the absence of N. Appalaraju. The records further show that one of the judgment-debtors figured as a witness to the writ of delivery of possession. The story given by N. Appalaraju that he was ready with the full sale price on the date of sale; that after depositing Rs. 250 on that day he left for his own place with the balance money and that two days thereafter he again sent money through his son is very difficult to believe. On the question of possession, the evidence led by N. Appalaraju is very unsatisfactory. None of the tenants examined by him who says that he is in possession as a tenant under N. Appalaraju, has produced either the lease deed or any rent receipts showing payment of rent. Even N. Appalaraju does not name all the lessees who have been examined on his side. The evidence of D.W. 4 that every year after harvest he writes to N. Appalaraju to come and take delivery of paddy has been contradicted by N. Appalaraju himself. K. Rama Rao who is admittedly the clerk of the judgment-debtors is a very material witness. Evidence has been led on the side of the plaintiffs that dusti summons was taken to this witness who refused to accept the same saying that he had been instructed by the judgment-debtors not to appear in court. This evidence is not challenged. When K. Rama Rao is admittedly the clerk of the judgment-debtors and figured as an agent of N. Appalaraju, it is for N. Appalaraju to examine him to prove his case. An adverse inference must therefore be drawn against N. Appalaraju for non-examination of this witness. In these circumstances, there can be no escape from the conclusion that the purchase of the suit properties in the name of N. Appalaraju is a sham transaction.

and is a device by the judgment-debtors to save their properties from the hands of their other creditors. On the aforesaid analysis of the evidence, therefore, I confirm the finding of the trial court on this point."

7. We agree with Mr. Murty, the learned counsel for the appellants, that both the trial Judge as also the learned single Judge lost sight of the distinction between a sham transaction and a Benami transaction. The distinction was very cogently drawn in the celebrated decision of the Supreme Court in the case of *Sree Meenakshi Mills Ltd. v. Commr. of Income-tax, Madras*, AIR 1957 SC 49 (at p. 66), Venkatarama Ayyar, J., speaking for the Court, stated:—

"..... In this connection, it is necessary to note that the word 'Benami' is used to denote two classes of transactions which differ from each other in their legal character and incidents. In one sense, it signifies a transaction which is real, as for example, when A sells properties to B but the sale deed mentions X as the purchaser. Here the sale itself is genuine, but the real purchaser is B, X being his benamidar. This is the class of transactions which is usually termed as benami. But the word 'benami' is also occasionally used, perhaps not quite accurately, to refer to a sham transaction, as for example, when A purports to sell his property to B without intending that his title should cease or pass to B. The fundamental difference between these two classes of transactions is that whereas in the former there is an operative transfer resulting in the vesting of title in the transferee, in the latter there is none such, the transferor continuing to retain the title notwithstanding the execution of the transfer deed. It is only in the former class of cases that it would be necessary, when a dispute arises as to whether the person named in the deed is the real transferee or B, to enquire into the question as to who paid the consideration for the transfer, X or B. But in the latter class of cases, when the question is whether the transfer is genuine or sham, the point for decision would be, not who paid the consideration but whether any consideration was paid.
x x x x x"

In the present case, it was not the contention of any party that the purchase was sham. In fact, no such contention could be advanced inasmuch as the money had really been collected in the certificate proceeding and the public demand had been satisfied. That being so, the real

point of contest was whether the purchases were Benami, i.e. Appalaraju was not the real owner but the judgment-debtors, who were also the certificate-debtors, had purchased the property and had obtained title to the same in the auction purchase only in the name of Appalaraju.

Undoubtedly, the burden to establish 'Benami' character of the transaction is heavy on the person who pleads 'Benami' as law presumes the apparent to be the real state of affairs. Mr. Murty placed reliance on a single Judge decision of this Court in the case of *Madan Mohan Das Babaji v. Brundaban Pal*, (1972) 38 Cut LT 1323, where one of us dealing with the tests of 'Benami' indicated in paragraph 10 of the judgment thus:—

"10. In dealing with a case of benami, the Court takes into consideration the following facts and circumstances:—

(1) the source from which the purchase money was delivered;

(2) Possession of the property—

(a) the party in possession of and not the nature and character of his possession;

(b) whether possession was taken after the purchase;

(3) the position of the parties and their relationship;

(4) the circumstances of the parties;

(5) the motive for resorting to the benami transaction;

(6) custody and production of the title deeds; and

(7) previous and subsequent conduct of the parties.

While ordinarily these are the features which enter into the arena of consideration in deciding whether a transaction is benami or not, right conclusion can only be reached by adopting a cumulative appreciation of the entire evidence. A combination of some or all of them and a proper weighing and appreciation of their value may in a given case go a great way towards indicating as to where the real title lies."

We may also refer to two recent decisions of the Supreme Court on this question. In the case of *Jaydayal Poddar v. Bibi Hazra*, (1974) 1 SCC 3: (AIR 1974 SC 171), a Division Court pointed out:—

"6. It is well settled that the burden of proving that a particular sale is benami and the apparent purchaser is not the real owner, always rests on the person asserting it to be so. This burden has to be strictly discharged by adducing legal evidence of a definite character which would

either directly prove the fact of benami or establish circumstances unerringly and reasonably raising an inference of that fact. The essence of a benami is the intention of the party or parties concerned; and not unoften, such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him; nor justify the acceptance of mere conjectures or surmises, as a substitute for proof. The reason is that a deed is a solemn document prepared and executed after considerable deliberation, and the person expressly shown as the purchaser or transferee in the deed starts with the initial presumption in his favour that the apparent state of affairs is the real state of affairs. Though the question, whether a particular sale is benami or not, is largely one of fact, and for determining this question, no absolute formulae or acid test, uniformly applicable in all situations, can be laid down; yet in weighing the probabilities and for gathering the relevant indicia, the Courts are usually guided by these circumstances (1) the source from which the purchase money came; (2) the nature and possession of the property, after the purchase; (3) motive, if any, for giving the transaction a benami colour; (4) the position of the parties and the relationship, if any, between the claimant and the alleged benamidar; (5) the custody of the title deeds after the sale and (6) the conduct of the parties concerned in dealing with the property after the sale.

7. The above indicia are not an exhaustive and their efficacy varies according to the facts of each case. Nevertheless No. 1, viz., the source whence the purchase money came, is by far the most important test for determining whether the sale standing in the name of one person, is in reality for the benefit of another."

In the case of *Bhim Singh v. Kan Singh*, (1980) 3 SCC 72: (AIR 1980 SC 727), the same question again came up for consideration before a Division Court. In paragraph 18 of the judgment it was stated:—

"18. The principle governing the determination of the question whether a transfer is a benami transaction or not may be summed up thus; (1) the burden of showing that a transfer is a benami transaction lies on the person who asserts that it is such a transaction; (2) if it is proved that

the purchase money came from a person other than the person in whose favour the property is transferred, the purchase is prima facie assumed to be for the benefit of the person who supplied the purchase money, unless there is evidence to the contrary; (3) the true character of the transaction is governed by the intention of the person who has contributed the purchase money and (4) the question as to what his intention was has to be decided on the basis of the surrounding circumstances, the relationship of the parties, the motives governing their action in bringing about the transaction and their subsequent conduct, etc."

8. The tests are thus very clear and there is no scope for the proposition that as both the parties have led evidence the question as to on whom burden lay loses importance.

9. Appalaraju admittedly obtained the sale certificate and possession was taken in the proceeding through the Revenue Court. It is not disputed that Appalaraju was the brother-in-law of Satyanarayana, one of the judgment-debtors. It is also not disputed that Appalaraju was a man of a different area and did not have property in the vicinity of the disputed property. These are, however, not very material considerations. It is quite possible that when the family was losing the property, they wanted these items which were being put to auction sale in the certificate proceeding to be purchased by a near relation. It is also possible that Appalaraju in his own way and independent of the judgment-debtors wanted to buy the property with a view to having an asset at his brother-in-law's place. As has been appropriately indicated by the Supreme Court in the reported decisions, the source of the consideration is almost the deciding feature. In the instant case, there is no document to support the plea that the judgment-debtors advanced the consideration money. Admittedly, the judgment-debtors were in heavy debts and there were several creditors. The property was put to sale in the certificate proceeding only when the judgment-debtors were not in a position to pay the instalments. There is no evidence worthy of acceptance that the judgment-debtors were in a position to advance the auction price. The only evidence on which strong reliance has been placed is the oral statement of one of the judgment-debtors. Admittedly, Appalaraju was a relation of the family being the brother-in-law of Satyanarayana. If

the property had been attempted to be saved from the clutches of the creditors by the Benami process, it is not known as to why one of the judgment-debtors would come forward to say that not Appalaraju but the judgment-debtors were the real owners of the properties so that the properties could be followed by the decree-holder for satisfying his decree at the peril of the judgment-debtors' interest. There is an admission of one of the judgment-debtors in his cross-examination that his relationship with Satyanarayana had become strained. Therefore, he seems to have come to court to support the decree-holder. This aspect has been completely lost sight of both by the learned Subordinate Judge as also the learned single Judge. The trial court as also the learned single Judge here should have found that in case the transaction was intended to be a Benami one, in view of the fact that Appalaraju was virtually an outsider though related as brother-in-law to one of the members, some documents should have been taken at least in evidence of the fact that the consideration money had come from the family of the judgment-debtors. No such document is in existence. Ordinarily, when such a substantial amount was being advanced for purchasing the property in the certificate case, the judgment-debtors would certainly have made an attempt to secure their interest in obtaining an admission from Appalaraju that not he but the judgment-debtors were the real owners of the property.

Mr. Rao for the respondents could not point out any other evidence in support of the plea of source of the money except the evidence of another witness (PW 5) who only said that he had heard from one of the judgment-debtors, who has not been examined, that the consideration had been paid by the judgment-debtors' family. It is not known why the defendant No. 5 who is said to have been the source of the information has not been examined.

3 or 4 aspects on which the learned single Judge came to hold that it was a Benami transaction may now be considered. Appalaraju admittedly was a man from a distance. Even if he had taken assistance of the clerk of the judgment-debtors, that itself was not a deciding factor. It was reasonable for Appalaraju to look for some local man's assistance. Ramarao, who was in the employment of the judgment-debtors, might have been introduced to him by Satya-

narayana, and taking of his assistance, therefore, could not be a feature to lead to any conclusion. The fact that an authority had been given by Appalaraju does not necessarily establish that he was not present. Very often, people do not want to appear before the court at the time of auction sale and bid and they appoint agents for the purpose. Ramarao seems to have been used to the court work as he was taking steps on behalf of the judgment-debtors in the several litigations. In these circumstances, picking up Ramarao could not be a feature on which any conclusive reliance should have been placed. Adverse inference should not have been drawn in our view for non-examination of Ramarao. Ramarao admittedly continued to be the clerk of the judgment-debtors and there is some evidence to show that the judgment-debtors did not want Ramarao to appear as a witness to support Appalaraju. There is no material to discard the explanation of Appalaraju for non-examination of Ramarao.

In our view, the learned single Judge went wrong in proceeding on the footing that since both parties had led evidence the question of burden of proving Benami character lost importance. This obviously was an approach contrary to the decisions indicated above, and if the burden lay on the decree-holder to establish the Benami character, the manner in which criticism has been advanced by the learned single Judge for Appalaraju not examining witnesses and his leading evidence to disprove the claim of the plaintiffs cannot be sustained in law. The affirming finding of the learned single Judge that the consideration money came from the judgment-debtors must, therefore, be set aside.

The subsequent conduct is that Appalaraju has got the land recorded in his name in the Record-of-Rights (Ext. B). There are certain registered lease deeds showing that portions of the disputed property have been tenanted out. Subsequent conduct is a material feature. The record has its own presumptive value. Registered lease deeds are evidence of exercise of title as also evidence of possession. There is oral evidence also to show possession. In these circumstances, it is difficult to agree with the affirming finding of the learned single Judge that the transaction was Benami. Once we come to the conclusion that the plaintiffs have failed to establish the Benami char-

acter of the property, it must follow that absolute title had vested in the auction-purchaser and that property was not available to be proceeded against for satisfying the decree obtained by the plaintiffs.

10. Mr. Murty had raised two other contentions, namely (i) the suit under O. 21, R. 63, C. P. C. was not maintainable without obtaining relief of setting aside of the auction sale; and (ii) the suit not having been framed under S. 53 of the Transfer of Property Act for the benefit of all the creditors was not maintainable.

Once we have come to the conclusion that the sale is not Berami and the auction purchaser had title to the property, these aspects are wholly unnecessary for examination. We, therefore, do not propose to go into these aspects.

11. Both the appeals are allowed and the judgment and decree of the trial court which have been affirmed in appeal by the learned single Judge in the two cases are set aside. The suits are dismissed and the order of the executing court under O. 21, R. 58, C. P. C. holding that the properties are not liable to attachment for satisfaction of the decree against the judgment-debtors must stand restored. Ordinarily, costs should have followed the result, but as we find, the decree-holder in each suit has been anxious to satisfy his own decree and certain circumstances existed which prompted him to dispute the order of the executing court. Keeping those in view, we direct parties to bear their costs throughout.

BEHERA, J.:— I agree with my Lord the Chief Justice.

Appeals allowed.

AIR 1982 ORISSA 137

R. N. MISRA, C. J.

Bhuban Mahanandia and another, Petitioners v. Parameswar Sa, Opposite Party.

Civil Revn. No. 276 of 1979, D/- 8-12-1981.*

Contract Act (9 of 1872), S. 65 — Right to restitution could not be wiped out retrospectively unless the statute expressly provided for it — Amendment of S. 23 (4), Orissa Land Reforms Act did not affect the pending suit for refund of sale price. (i) Orissa Land Reforms Act (16

of 1960), S. 23 (4) (as amended in 1976) — (ii) Interpretation of Statutes).

The right of a person for restitution under the general law, i.e. under S. 65, Contract Act could not be taken away retrospectively unless it be by an express provision of law. In this case the transfer of land was declared void as being opposed to S. 22 of the Orissa Land Reforms Act and the vendors forcibly resumed possession of the land with the crop thereon. The purchaser then sued for the return of sale consideration and for costs. While the suit was pending but before it was decreed the Act was amended and the new provision under S. 23 (4) of the Orissa Act barred the purchaser from recovering the money paid for the sale in the event of the sale being declared invalid.....or any person in possession of the land being evicted therefrom. The amendment was not retrospective in operation. It was held that the amendment did not affect the pending suit and the decree which was passed. It was also observed that in this case the decree was allowed to become final by some of the defendants not appealing therefrom and the appellants not impleading such non-appealing defendants in the appeal so that there was a possibility of conflicting decisions coming into existence. AIR 1969 SC 778, AIR 1965 SC 171 and AIR 1981 Orissa 196, Foll. (Paras 3, 4)

Cases Referred : Chronological Paras

AIR 1981 Orissa 196	4
AIR 1969 SC 778	4
AIR 1968 SC 1489	4
AIR 1965 SC 171	4

H. Patel, for Petitioners; H. B. Swain and S. S. Swain, for Opposite Party.

ORDER:— Two of the judgment-debtors are petitioners in this application under S. 115 of the Civil P. C. which is directed against rejection of an objection under S. 47 of the Code in an execution case instituted to execute the decree obtained in Money Suit No. 68 of 1974 from the Subordinate Judge of Sundergarh.

2. The said suit was filed by the opposite party to recover the consideration money, registration expenses and costs of improvement to the lands totalling Rupees 5,600/-. On 18-10-1968, the four defendants of the suit had sold 1.30 acres of land for a consideration of Rs. 5,000/- by a registered sale deed. In Miscellaneous Case No. 81 of 1972 before the Sub-Divisional Officer, Sundergarh, under the Orissa Land Reforms Act, the transfer was declared as void as it was in contravention of S. 22 of that Act and

*From Order of S. S. Panda, Sub. J., Sundergarh, D/- 28-3-1979.

restoration of possession was ordered by the Sub-Divisional Officer. On 11-11-1973, the defendants forcibly took away possession of the property along with the standing crop. That led to the suit.

The defendants entered contest and claimed that the suit was not maintainable in view of the fact that the alienation was contrary to law and against public policy.

The learned Subordinate Judge, however, decreed the suit in full by judgment dated 19-11-1977. A decree followed.

The plaintiff instituted execution case No. 8 of 1978 to recover the decretal dues. Therein, an application was filed under S. 47 of the Code to the effect that the decree was a nullity and the amount was not recoverable in view of the provision in S. 23 (4) of the Orissa Land Reforms Act which came into the statute book by Amending Act 44 of 1976 with effect from 25th Oct. 1976. That objection has been overruled by the executing court. That is why two of the judgment-debtors have carried this revision application. The other two judgment-debtors have not been impleaded in the proceeding.

3. It must first be pointed out that the impugned order of the executing court has become final against defendants 2 and 3 who were also judgment-debtors in the execution proceeding in the absence of any challenge by them. They have also not been impleaded as opposite parties in this application. Reversal of the decision of the executing court would bring about contradictory orders.

4. Apart from this technical aspect, I am inclined to agree with the decree-holder's counsel that in the absence of retrospective application of the amending provision, a decree already obtained could not be wiped out. The new provision runs thus:—

"23 (4). Where any transfer is declared under this section to be invalid and the transferee or any other person in possession of the property has been evicted therefrom, the transferee shall not be entitled to the refund of any amount paid by him to the transferor by way of consideration for the transfer." As already indicated, this must be taken to have come into force from 25th Oct., 1976, when after receiving assent of the President, the provision was first published in the Orissa Gazette. The transaction was of 1968. It was annulled in a proceeding of 1972 and possession was

taken over in Nov. 1973, but the suit was decreed on 19-11-1977. By that time the amended provision was in the statute book. The defendants did not challenge the decree by preferring an appeal on the ground that under S. 23 (4) of the Orissa Land Reforms Act, a decree for refund was not maintainable and they allowed the decree to become final.

The key words in the new provision are "where any transfer is declared under this section to be invalid.....or any other person in possession of the property has been evicted therefrom....." This declaration was prior to the amendment and eviction was also prior to the incorporation of the provision into the statute. Plaintiff had already filed the suit before the provision came into the statute book. There is nothing in the provision to say that it would apply to declarations or evictions before it came into force. Legislature must be taken to have been aware of the fact that as the provision was being introduced by way of amendment on a later date claims for refund of consideration might be already pending. No provision was made in regard to pending actions. In these circumstances, it would be wholly inequitable to hold that pending actions were affected by the new provision.

The legal position is settled beyond doubt that when citizens rights are interfered with by a statute, unless the statute is expressly or by necessary intendment retrospective, it would not have retrospective operation. Under the law as was existing, for instance, the Contract Act, the consideration money in a case of this type is refundable. Plaintiff's action had been based upon such provision of law. The right under the ordinary law, therefore, could not be wiped out or affected in a retrospective way unless the legislature wanted the amendment to have retrospective effect, (See AIR 1968 SC 1489 (T. K. Lakshmana Iyer v. State of Madras); AIR 1969 SC 778 (J. P. Jani, Income-tax Officer, Circle IV, Ward-G, Ahmedabad v. Induprasad Devshanker Bhatt); AIR 1965 SC 171 (S. S. Gadgil v. Messrs. Lal & Co.)) To the same effect is the recent decision of a Division Bench of this Court in the case of Parikhit Meher v. Manasingh Dharua, AIR 1981 Ori 196.

5. The civil revision has, therefore, no merit and is bound to be dismissed. Keeping the facts of the case in view, I direct parties to bear their own costs

in the miscellaneous proceeding as well as this revision.

Petition dismissed.

AIR 1982 ORISSA 139

R. N. MISRA, C. J. AND
B. K. BEHERA, J.

Dr. Trailokyanath Kanungo and etc. etc., Petitioners v. Dr. A. K. Acharya and others, Opposite Parties.

O. J. Cs. Nos 1990, 2947 and 2094 of 1981, D/- 16-12-1981.

Constitution of India, Arts. 14, 15 226 — Admission to Post-Graduate Courses in Medical College — Prospectus reserving 50% of seats for in-service candidates — Applications by in-service candidates entertained — Administrative decision subsequent to publication of prospectus disqualifying them — Held, not justified.

Where in the prospectus for admission to Post-Graduate courses in Medical College, fifty per cent of the seats were reserved for in-service candidates and the petitioners were possessing the requisite qualification to seek admission as in-service candidates, once their applications were entertained and Index Cards were issued, there could be no justification to disqualify them by a subsequent administrative decision that in-service candidates would not be allowed to compete at the entrance examination. The terms of the prospectus could not be retrospectively altered so as to affect candidates who had already made applications. The rejection of petitioners applications was thus wholly unjustified.

(Para 1)

Merely because there may be several other similarly situated candidates whose claim for admission would not be considered, it could not be said that giving directions for consideration of the claim of petitioners would work out discrimination, when it was not the case where anybody who has taken admission was being prejudiced.

(Para 2)

R. K. Mohapatra, A. N. Misra, K. C. Panda and B. Rautray, L. Rath, A. K. Misra and B. S. Misra, for Petitioners; Govt. Advocate, for Opposite Parties.

R. N. MISRA, C. J.:— Each of these 3 applications under Art. 226 of the Constitution is by a doctor with M. B. B. S. qualification who is in the employment of the State Government and had applied for admission into the Resident House Staff course (hereinafter referred to as

'R. H. S.') for the 1981-82 session. It has been asserted that each of the petitioners had the requisite qualification indicated in the relevant prospectus, yet admission has been refused on the ground that 113 seats in the different specialities of Post-Graduate study for which applications had been invited were reserved for direct candidates, and in-service candidates were not entitled to join the course. Each of these applications is for a direction to the opposite party-authorities to consider the claim of the petitioner for admission into the R. H. S. course. There is no dispute that each of the petitioners possesses the qualification prescribed in paragraph 3 of the prospectus. Paragraph 5 of the counter affidavit in O. J. C. No. 1990 of 1981 categorically admits this position. It has been explained that Government decided to have 226 seats for Post-Graduate study in different subjects and out of these, 113 seats being 50 per cent were reserved for in-service candidates and the remaining seats were intended to be available to the direct candidates. Since each of the petitioners wanted admission in respect of the seats intended for direct candidates, the application has been rejected. It is admitted at the hearing by the learned Government Advocate that in the prospectus there was no indication that in-service candidates should not be entitled to consideration in respect of the 113 seats. The decision not to permit in-service candidates for the 113 seats appears to have been taken administratively subsequent to the publication of the prospectus. The petitioners made the applications and had received Index Cards but were not permitted to take the entrance examination. Since there was no bar to in-service candidates appearing at the entrance examination in terms of the prospectus and since each of the petitioners possessed the minimum qualification prescribed, once their applications had been entertained and Index Cards had been issued, there could be no justification to disqualify them by a subsequent administrative decision that in-service candidates would not be allowed to compete at the entrance examination. It is not disputed by either side that the petitioners have not put in 5 years of service which is a necessary qualification to seek admission as in-service candidates. Inasmuch as each of the petitioners possessed the requisite qualification and though he/she was not entitled to selection as an in-service candidate and there was no

bar for considering in-service candidates for the 113 seats for which the prospectus had been published, we are inclined to agree with the counsel for the petitioners that the rejection of their applications was wholly unjustified. The terms of the prospectus should not have been retrospectively altered so as to affect candidates who had already made applications. In fact, if there was such a restriction, it was open to any of the petitioners to resign from Government service and seek admission for the Post-Graduate study. Since the restriction had not been indicated and the petitioners had made applications which had been entertained at the initial stage, we are of the view that for the year the applications should be entertained even from in-service candidates like the petitioners. It is open to Government to notify in advance for future years that the seats which would be for the non-service quota would not be available for the in-service candidates.

2. The learned Government Advocate had confessed before us that to entertain the applications at this stage and give directions for consideration of the claim of the petitioners would work out discrimination inasmuch as there may be several others similarly situated whose claim for admission would not be considered. We do not find any force in this contention. We are concerned with those who have pressed their claim. It is not a case where anybody who has taken admission is being prejudiced. It is already quite late in the session and the entire thing cannot be redone at this point of time. By an interim order in two of these cases, a seat has been reserved for the petitioner in the event of success. If the petitioners' claims are not considered, these seats would go unfilled and the possibility of some Doctors getting more qualified to be useful to society would be ruled out. In such circumstances, to go by the technical rule, even if there be any force in the contention of the learned Government Advocate, would not be in the larger interest of the State. We are, therefore, not impressed by the contention placed by the learned Government Advocate before us.

3. In O. J. C. No. 2094 of 1981 no seat was reserved but a direction had been given that in case the petitioner succeeded appropriate orders would be made. We think, the proper order to be made in O. J. C. No. 1990 of 1981 and O. J. C. No. 2947 of 1981 where a seat has been

reserved would be to require the two petitioners to appear before such Board for being examined as the Director, opposite party No. 2, may fix up, and in case they are found qualified, they should be admitted as against the reserved seats. If they are found disqualified, no admission should be given. So far as the petitioner in O. J. C. No. 2094 of 1981 is concerned, in case he passes the entrance examination and a seat is available in either of the two specialities for which he had opted, he may be given admission. In case there is no accommodation in either of the specialities for which option had been exercised, he would not be entitled to accommodation. At this belated stage we do not propose to direct Government to enhance any seat. In case the petitioner in O. J. C. No. 2094 of 1981 cannot be accommodated for want of seat, it would be open to Government to consider whether on the basis of the arrangement made in respect of candidates of the last year, the petitioners' claim may not be taken as that of carried over candidates of the previous year when admission for the next session takes place.

4. Our direction shall be subject to the restrictions indicated in the University Regulations regarding taking of admission.

5. There would be no order for costs.
BEHERA, J.:— I agree with my Lord the Chief Justice.

Order accordingly.

AIR 1982 ORISSA 140

B. K. BEHERA AND R. C. PATNAIK, JJ.
Banshidhar Mohanty, Appellant v.
Gourgopal Das and others, Respondents.
A.H.O. No. 67 of 1976, D/- 3-3-1982.*

Orissa Money Lenders Act (3 of 1939), S. 15 (1) (2) — Execution of decree — Executing Court directing sale of Part B of property considering it to be sufficient to satisfy decree — Direction becoming final — Executing Court cannot direct dropping of execution proceeding against item B and permit decree-holder to proceed against remaining items i.e. Parts A and C of properties.

Where the Executing Court exercised its power under S. 15 (1) while directing sale of Part B of the property on the

*Against judgment of R. N. Misra, J., reported in (1976) 1 Cut WR 273.

DZ/DZ/B565/82/PGS/SNV

view that it would be sufficient to satisfy the decretal dues and that order had become final in absence of appeal against it, under execution but accepted later on the memorandum of the decree-holder and directed sale of Parts A and C of the properties, the later direction would amount to variation of previous order under S. 15 (1) which had become final and would be liable to be set aside. Being an Act to regulate money-lending transactions and to grant relief to the debtors, the provisions made therein should be construed keeping in mind the legislative intent. Once valuation is settled, there is a statutory mandate that the property should not be sold at a lesser price than indicated in the proclamation. Liberty has been given to decree-holder to have the property sold at a lesser value provided he consents in writing to forgo so much of the amount of the decree as was equal to the difference between the highest bid and the sale proclamation. Therefore, it would not be open to the decree-holder to obtain a variation of the type directed by the Executing Court. (1976) 1 Cut WE 273, Affirmed. (Para 8)

Cases Referred: Chronological Paras

AIR 1977 SC 2279	6
AIR 1976 SC 133: 1976 Cri LJ 184	6
AIR 1975 SC 2260: 1975 Tax LR 2129	6
AIR 1965 SC 1839	6
(1956) 352 US 128: 1 Law ed 2d 189, Massachusetts S. & Insurance Co. v. U. S.	6

M. Patra and B. Dagara, for Appellant; N. Mukherjee, S. S. Das and B. P. Mohapatra, for Respondent No. 1.

BEHERA, J.:— The decree-holder in Execution Case No. 97 of 1968 of the court of the First Additional Subordinate Judge, Cuttack, who figured as the respondent No. 1 in Miscellaneous Appeal No. 214 of 1974 of this Court decided by the learned single Judge Honourable R. N. Misra, J. (as his Lordship then was), is an appeal against the reversing judgment of the learned Judge allowing the appeal preferred by the respondent No. 1 herein against the order dated Aug. 26, 1974, passed by the First Additional Subordinate Judge, Cuttack, in the aforesaid Execution Case directing sale of lots A and C properties for satisfaction of the decree under execution.

2. The appellant obtained a mortgage decree for Rs. 41,211.31 paise which, by the time of execution, amounted to over

Rs. 49,000. The security for the mortgage was a house located in the city of Cuttack. Steps were taken under S. 14 of the Orissa Money Lenders Act (hereinafter referred to as the 'Act') to estimate the value of the property which was done by an Engineer-Commissioner who divided the house into three parts and valued as under:

Part A—	Rs. 32,900/-
Part B—	Rs. 79,000/-
Part C—	Rs. 15,500/-

3. On March 15, 1973, the valuation was accepted by the executing court and a direction was given for the sale of Part B property which, according to the court, would be sufficient to satisfy the decree. This order could be but had not been appealed against under S. 14 (2) of the Act. Sale was held on 5-11-1973 and the appellant was the highest bidder of Rs. 18,200. On January 25, 1974, the appellant applied for revaluation of the security on the ground that the valuation made was too high and this was objected to by the respondent No. 1. The prayer for revaluation was rejected by the executing court on April 12, 1974. On August 26, 1974, the executing court, overruling the objection raised by the respondent No. 1 to the memorandum filed by the appellant on April 18, 1974, to proceed against Parts A and C properties, allowed the prayer by holding that there was no legal bar for the appellant to proceed against the other two Parts of the properties. This order was challenged in Miscellaneous Appeal No. 214 of 1974. The appellant raised a preliminary objection in the Appeal to the effect that no appeal lay and for the reasons recorded in paragraph 2 of the impugned judgment, this objection was overruled and it was held that an appeal did lie against the impugned order of the executing court under sub-sec. (2) of S. 15 of the Act. In this appeal, neither in the memorandum of appeal nor at the stage of hearing, such a contention raised before the learned single Judge has been raised before us.

4. The learned single Judge examined the question raised in the appeal as to whether the executing court had jurisdiction to direct the sale of Parts A and C properties and found as follows:—

"3. According to the judgment-debtor, sub-sec. (1) of S. 15 required that the Part-B property should not be sold at a price lower than Rs. 79,000/-. The second proviso to S. 15 of the Act runs thus:—

"Provided further that if the highest amount bid for the property included in the sale proclamation is less than the price specified for such property in the proclamation, the Court may sell the property for such highest amount, if the decree-holder consents in writing to forgo so much of the amount decreed as is equal to the difference between the highest amount bid and the price specified for such property in the sale proclamation."

The Act is a piece of beneficial legislation containing a clearly indicated legislative policy of affording protection to the debtors. In order to protect debtors, it has been statutorily provided that the judgment-debtor's property should first be valued by the court and once valuation is settled instead of selling away the entire property, such part of the property which is considered adequate to bring in satisfaction of the decree is required to be sold. Again, there is a statutory mandate that property should not be sold at a lesser price than indicated in the proclamation. Liberty has been given to the decree-holder to have the property sold at a lesser value provided the decree-holder consented in writing to forgo so much of the amount decreed as was equal to the difference between the highest amount bid and the price specified for such property in the sale proclamation. All these provisions read together certainly support the contention raised by the judgment-debtor that it is not open to the decree-holder to obtain a variation of the type as directed by the executing court in this case.

(4) I would accordingly hold that as the valuation fixed for the Part-B property was much more than the decretal dues under execution and the said property could not have been sold for a price lesser than what was indicated in the sale proclamation, it was not open to the decree-holder to drop the execution proceeding against item B and seek to proceed against the remaining two items, namely Parts A and C. The executing court went wrong in accepting the decree-holder's prayer."

5. Section 15 of the Act reads:—

"(1) Notwithstanding anything to the contrary contained in any other law or in anything having the force of law, the proclamation of the intended sale of property in execution of a decree passed in respect of a loan or the interest on a loan shall include only so much of the property of the judgment-debtor, the

proceeds of the sale of which the Court considers will be sufficient to satisfy the decree, and such property shall not be sold at a price lower than the price specified in the said proclamation.

(2) Any person aggrieved by an order passed under sub-sec. (1) may appeal to the Court to which appeals from the Court executing the decree ordinarily lie :

Provided that if the property to be sold is immoveable property and the decree-holder specifies which portion of such property should be sold, the Court shall order that such portion or so much or such portion as may seem necessary to satisfy the decree shall be sold :

Provided further that if the highest amount bid for the property included in the sale proclamation is less than the price specified for such property in the proclamation, the Court may sell the property for such highest amount, if the decree-holder consents in writing to forgo so much of the amount decreed as equal to the difference between the highest amount bid and the price specified for such property in the sale proclamation."

6. The learned counsel for the appellant has urged before us that to allow the impugned order to stand by setting at naught the order passed by the executing court to proceed against Parts-A and C properties would amount to a denial of the rights which have accrued to the appellant by virtue of the decree affirmed by the Supreme Court. We are, however, not impressed with this submission. As rightly submitted on behalf of the respondent No. 1, the areas of operation of the laws conferring the rights on the appellant to have a decree passed in his favour and the laws relating to the execution proceedings which, it has not been disputed before us are to be controlled by the Act and the provisions made therein, are distinct and different and if, for the legal limitations provided in the Act, a decree-holder is denied to have full fruits of his decree the position cannot be helped. The special law, as rightly observed by the learned single Judge, is a piece of beneficial legislation containing clearly the legislative policy of affording protection to the debtors. The learned counsel for the appellant has submitted, on the principles laid down in the case of *Carew and Company Ltd. v. Union of India*, AIR 1975 SC 2260, that when two interpretations are feasible, that which ad-

vances the remedy and suppresses the evil as the legislature envisaged must find favour with the Court. Hon'ble Krishna Iyer, J. observed (at p. 2269):—

"The law is not 'a brooding omnipotence in the sky' but a pragmatic instrument of social order. It is an operational art controlling economic life, and interpretative effort must be imbued with the statutory purpose. No doubt, grammar is a good guide to meaning but a bad master to dictate, notwithstanding the traditional view that grammatical construction is the golden rule."

Justice Frankfurter used words of practical wisdom when he observed (*Massachusetts S. & Insurance Co. v. U. S.* (1956) 352 US 128 at p. 138).

"There is no surer way to misread a document than to read it literally."

Our attention has also been invited to the following observations made in the case of *Dilip Kumar Sharma v. State of Madhya Pradesh*, AIR 1976 SC 133 (at p. 138):

"If two constructions are possible upon the language of the statute, the Court must choose the one which is consistent with good sense and fairness, and eschew the other which makes its operation unduly oppressive, unjust or unreasonable, or which would lead to strange inconsistent results or otherwise introduce an element of bewildering uncertainty and practical inconvenience in the working of the statute."

Certainty of the law is the safety of the citizen, as observed in the case of *R. S. Joshi v. Ajit Mills Ltd.*, AIR 1977 SC 2279. Often enough, in interpreting a statutory provision, it becomes necessary to have regard to the subject-matter of the statute and the object which it is intended to achieve. That is why in deciding the true scope and effect of the relevant words in any statutory provision, the context in which the words occur, the object of the statute in which the provision is included, and the policy underlying the statute assumes relevance and becomes material. (See AIR 1965 SC 1839, *Sheikh Gulfan v. Sanat Kumar Ganguli*).

7. We have kept in mind the aforesaid observations of the Supreme Court while construing the provisions of the Act and in particular, S. 15 thereof. But we cannot be oblivious of the purpose and intent of the Legislature in enacting the law. We are at one with the learned single Judge that it is a beneficial legisla-

tion affording protection to the debtors and we may add, to foster social justice.

8. The learned counsel for the appellant has submitted that it was open to the decree-holder to proceed against Parts A and C properties, as directed by the learned First Additional Subordinate Judge, Cuttack. As held by the learned single Judge, the appellant chose not to prefer an appeal u/s. 14 (2) of the Act against the order passed by the executing court directing the sale of Part B property and therefore, that order became final and consequently sale was held on 5-11-1973 in which the highest bid was of Rs. 18,200/- by the appellant himself. The executing Court exercised its power under sub-sec. (1) of S. 15 of the Act while directing that Part B property was to be put to sale. Later, however, the executing court, accepting the memorandum of the appellant, directed the sale of Parts A and C properties which undoubtedly would amount to a variation of the previous order under sub-sec. (1) of S. 15 of the Act which had become final in the absence of any appeal by the appellant under sub-section (2) of S. 15 of the Act. Being an Act to regulate money-lending transactions and to grant relief to the debtors, the provisions made therein should be construed keeping in mind the legislative intent. Once valuation is settled, there is a statutory mandate that the property should not be sold at a lesser price than indicated in the proclamation. Liberty has been given to the decree-holder to have the property sold at a lesser value provided he consents in writing to forgo so much of the amount of the decree as was equal to the difference between the highest bid and the price specified for such property in the sale proclamation.

As has rightly been concluded by the learned single Judge, the provisions of S. 15 of the Act read as a whole would support the contention raised by the respondent No. 1 that it would not be open to the appellant to obtain a variation of the type directed by the executing court. It was, therefore, not open to the decree-holder to drop the execution proceeding against Part-B property and seek to proceed against Parts A and C properties. The executing court was legally wrong in accepting the appellant's memorandum and directing sale of Parts A and C properties.

9. We find no justifiable ground for any interference in this appeal against

the judgment passed by the learned single Judge.

10. We would accordingly dismiss the appeal and maintain the judgment of the learned single Judge leaving the parties to bear their own costs of this appeal.

PATNAIK, J.:— I agree.

Appeal dismissed.

AIR 1982 ORISSA 144

R. N. MISRA, C. J. AND

B. K. BEHERA, J.

M/s. Jeypore Sugar Company Limited, Petitioner v. Tahsildar-cum-Revenue Officer, Rayagada and others, Opposite Parties.

Original Jurn. Case No. 729 of 1977, D/- 12-2-1982.

Orissa Land Reforms Act (16 of 1960), S. 59 — Revisional jurisdiction — Does not extend to the order or part of order which has become final.

In the instant case the appellate authority had conceded ten acres of land and that order had become final as the State had not preferred any revision. However in the revision preferred by the landholder the revisional authority made an order directing deletion of ten acres conceded by the appellate order.

Held revisional order ought to be vacated. (Para 3)

In the absence of a revision by the aggrieved party every order must be taken to be final and it would not be open for an appellate or a revisional authority to make alterations in final orders while dealing with the appeal or revision of the adversary, AIR 1982 Orissa 83, Rel. on. (Para 3)

Cases Referred : Chronological Paras
AIR 1982 Orissa 83: (1982) 53 Cut LT 1 3

Y. S. N. Murty, for Petitioner; Addl. Standing Counsel, for Opposite Parties.

R. N. MISRA, C. J.:— This writ application calls in question the revisional order of the Revenue Divisional Commissioner rendered under S. 59 of the Orissa Land Reforms Act.

2. Petitioner is a Company incorporated under the Companies Act with its registered office at Jeypore in the district of Koraput. It has also a factory located there. Though known as Sugar Company, petitioner apart from manufacturing sugar has also switched over to other business including mining. When the ceiling proceeding came up for consid-

eration, petitioner laid claim to allotment of 631.15 acres of land to it by contending that the lands as per particulars below were necessary for it:—

(i) Land required for housing accommodation of employees ... Ac. 70.00

(ii) Land required for extension of factory premises and storage ... Ac. 41.00

(iii) Land required for sugar-cane research ... Ac. 70.00

(iv) Land required for dumping of slag materials ... Ac. 163.40

(v) Land for proposed Textile Mill ... Ac. 286.75

Total ... Ac. 631.15

It may be stated that the petitioner owned 789.66 acres (712 acres as stated by the Company) and out of it 110.14 acres were conceded and for the remaining lands as indicated above, the Company came forward with the claim. The Revenue Officer did not accept the excess claim on the five heads indicated above. In appeal, the appellate authority while upholding the direction of the Revenue Officer conceded ten standard acres of land to the petitioner holding that it was a person within the definition of Sec. 37-A of the Land Reforms Act. The order of the appellate authority conceding ten standard acres became final in the absence of any revision on behalf of the State.

3. Petitioner challenged the appellate order in a revision and reiterated its claims. The revisional authority to deal with the claims of the petitioner concentrated upon the provisions of S. 8 of the Land Reforms Act which require a raiyat not to put lands to non-agricultural use and make a raiyat liable for eviction in the event of such change in the use. That certainly was not a relevant consideration for examining the petitioner's claim. What was necessary for consideration was whether under the law, petitioner was entitled to retain these lands under different provisions of the statute. We do not find any consideration of this aspect by the Commissioner. Though the appellate order had become final in respect of concession of ten standard acres to the petitioner and there was no revision before the Commissioner, he directed deletion of the ten standard acres in terms of the appellate order. It has already been held by us in the case of *Bhanu-ganga Tribhuban Deb v. Tahasildar-cum-Revenue Officer, Sambalpur*, (1982) 53 Cut LT 1: (AIR 1982 Orissa 83) that the

scheme under the Act is such that in the absence of a revision by the aggrieved party, every order must be taken to be final and it would not be open for an appellate or a revisional authority to make alterations in final orders while dealing with the appeal or revision of the adversary.

4. We are of the view that the revisional order must be vacated and the entire revision must be remanded for a fresh disposal in accordance with law. We accordingly allow the writ application, vacate the revisional order and direct redisposal of the revision in accordance with law. We make no order as to costs.

BEHERA, J.:— I agree.

Petition allowed.

AIR 1982 ORISSA 145

Dr. B. N. MISRA, J.

B. N. Das and others, Petitioners v. Bijaya Ketan Mohanty, Respondent.

Civil Revn. No. 592 of 1981, D/- 2s-2-1982.*

Civil P. C. (5 of 1908), O. 6. R. 17, O. 1, R. 10 — Amendment of pleadings — Joining of necessary party sought at the stage of completion of hearing and when case is posted for judgment — Application maintainable.

Where a suit was filed for declaration that the elections to the Circle Executive Committee and the Zonal Executive Committee of the State Bank of India Officers' Association, Orissa were null and void and for permanent injunction against defendants in order to restrain them from proceeding further with the elections and after the hearing of the suit commenced and evidence was closed and arguments on both sides were concluded and the case was posted for judgment the plaintiff filed a petition under O. VI, R. 17 read with O. 1, R. 10 to implead the Association as a party and for consequential amendment of the plaint, the Association being a necessary party and as no effective decree could be passed in its absence and its presence being essential for a just decision of the suit, the plaintiff's petition could be allowed. The provisions of O. 6, R. 17 and C. 1, Rule 10 reveal that the expressions "at

any stage of the proceedings" and "at any stage of the suit" should cover the period between conclusion of hearing and pronouncement of judgment. AIR 1964 SC 993, Disting. AIR 1981 Madh Pra 228, Rel. on. (Para 4)

Cases Referred : Chronological Paras

AIR 1981 Madh Pra 228

3

AIR 1964 SC 993

3

P. C. Misra, S. P. Misra, S. K. Choudhury, S. Latif, D. Das and Miss M. Ghosh, for Petitioners; M. M. Sahu, for Respondent.

ORDER:— This revision is directed against the order dated 17-9-1981 passed by the learned Munsif, Dhenkanal, in T. S. No. 3 of 1980 allowing the opposite party's application under O. VI, R. 17 read with O. I, R. 10 of the Code of Civil Procedure (hereinafter referred to as the Code).

2. The opposite party is the plaintiff and the petitioners are the defendants in the Court below. The plaintiff's prayer is for declaration that the elections to the Circle Executive Committee and the Zonal Executive Committees of the State Bank of India Officers' Association, Orissa (hereinafter referred to as the Association), for the years 1980-82 are null and void and for permanent injunction against defendants 1, 2, 5 and 6 in order to restrain them from proceeding further with the elections. After the hearing of the suit commenced in the lower Court, evidence was closed on 13-8-1981, arguments on both sides were concluded on 24-8-1981 and the case was posted to 3-9-1981 for judgment. On 31-8-1981 the plaintiff filed a petition under O. VI, R. 17 read with O. I, R. 10 of the Code to implead the Association as a party and for consequential amendment of the plaint. The defendants filed objection on the grounds that they had pleaded right from the initial stage that the suit was bad for non-joinder of the Association as a party and, therefore, the plaintiff's petition should be dismissed as mala fide and that as the hearing had been concluded and the case already posted for judgment, the plaintiff's petition could not be entertained by the Court at that stage. After hearing both sides the learned Munsif held that the Association was a necessary party, that no effective decree could be passed in its absence and that its presence was essential for a just decision of the suit. The plaintiff's petition was accordingly allowed. This order

*From order of Smt. Madhuri Patraik, Munsif, Dhenkanal, D/- 17-9-1981.

of the learned Munsif is under challenge in the revision.

3. The impugned order is assailed mainly on the ground that after the hearing of the suit had been concluded and the case posted for judgment, it was not open to the Court to entertain an application under O. VI, R. 17 read with O. I, R. 10 of the Code. Support for this contention is claimed from the following observations of the Supreme Court in the case *Arjun Singh v. Mohindra Kumar* (AIR 1964 SC 993) (at p. 1004):—

".....Thus every contingency which is likely to happen in the trial vis-a-vis the non-appearance of the defendant at the hearing of a suit has been provided for and O. IX, R. 7 and O. IX, R. 13 between them exhaust the whole gamut of situations that might arise during the course of the trial. If, thus provision has been made for every contingency, it stands to reason that there is no scope for the invocation of the inherent powers of the Court to make an order necessary for the ends of justice. Mr. Pathak, however, strenuously contended that a case of the sort now on hand where a defendant appeared after the conclusion of the hearing but before the pronouncing of the judgment had not been provided for. We consider, that the suggestion that there is such a stage is, on the scheme of the Code, wholly unrealistic. In the present context when once the hearing starts, the Code contemplates only two stages in the trial of the suit: (1) where the hearing is adjourned or (2) where the hearing is completed. Where the hearing is completed the parties have no further rights or privileges in the matter and it is only for the convenience of the Court that O. XX, R. 1 permits judgment to be delivered after an interval after the hearing is completed. It would, therefore, follow that after the stage contemplated by O. IX, R. 7 is passed the next stage is only the passing of a decree which on the terms of O. IX, R. 6 the Court is competent to pass. And then follows the remedy of the party to have that decree set aside by application under O. IX, R. 13. There is thus no hiatus between the two stages of reservation of judgment and pronouncing the judgment so as to make it necessary for the Court to afford to the party the remedy of getting orders passed on the lines of O. IX, R. 7. We are, therefore, of the opinion that the Civil Judge was not competent to entertain the application dated May 31, 1958 purporting to be under O. IX, R. 7; and that consequent-

ly the reasons given in the order passed would not be *res judicata* to bar the hearing of the petition under O. IX, R. 13 filed by the appellant."

In view of the provisions contained in O. IX of the Code what was decided by the Supreme Court was that after the stage contemplated under O. IX, R. 7 was over, an application for relief could not be entertained by the Court during the period between conclusion of hearing and pronouncement of judgment; the aggrieved party must wait till a decree was passed and then make an application under O. IX, R. 13, C. P. C. It may be noted that the provisions of O. VI, R. 17 or O. I, R. 10 of the Code were not under consideration before the Supreme Court. It may be seen that under O. IX, R. 7 a defendant may appear and assign good cause for his previous non-appearance at or before the adjourned ex parte hearing. The implication of the expressions "at any stage of the suit" in O. I, R. 10 and "at any stage of the proceedings" in O. VI, R. 17 is very different from that of its expression "at or before such hearing" in O. IX, R. 7. The former two expressions are obviously much wider in their application. On consideration of the provisions of O. VI, R. 17 and O. I, R. 10 of the Code I am of the view that the expressions "at any stage of the proceedings" and "at any stage of the suit" should cover the period between conclusion of hearing and pronouncement of judgment. This view finds support in a recent decision of Madhya Pradesh High Court. In AIR 1981 Madh Pra 228 (*Badri Prasad Soni v. S. Kripal Singh*), cited by learned counsel for the opposite party, it was held (at p. 230):—

"The suit is commenced on the presentation of plaint as is obtainable from O. 4, R. 1, Civil P. C. instituted as "suit to be commenced by plaint" and is disposed of so far as the trial Court is concerned, on the pronouncement of judgment under O. 20, R. 3 of the Civil P. C. This being the position regarding the commencement of the suit and its termination in the trial Court, in the light of the discussion contained in the preceding paragraph of this order, the irresistible conclusion is that delivery of judgment by the trial Court is a stage in the proceeding. In this view of the matter, it can safely be held that because of the expression "at any stage of the proceedings" employed in O. 6, R. 17 of the Civil P. C., the Court is competent

to allow either party to alter or amend his pleading any time before the judgment is pronounced, as till then the Judge has the seisin over the case and is not functus officio....."

4. In the present case the learned Munsif has held that the Association is a necessary party and that its presence is essential for a just decision of the suit. In the facts of this case I find no reason to take a different view.

5. In the result, the civil revision fails and is dismissed. As the plaintiff has filed the application under O. VI, R. 17 read with O. I, R. 10 of the Code after the conclusion of the hearing and is responsible for the harassment to the defendants, he is directed to pay a consolidated cost of Rs. 240/- (Rs. two hundred and forty) to defendants 1 to 6 before further hearing of the suit failing which the aforesaid petition filed by the plaintiff and the suit would stand dismissed. Revision dismissed.

AIR 1982 ORISSA 147

R. N. MISRA, C. J.

State of Orissa and another, etc., Appellants v. M/s. B. K. Parida & Bros. and another, Respondents.

Misc. Appeals Nos. 249 and 257 of 1981, D/- 9-2-1982.*

Arbitration Act (10 of 1940), S. 2 (a) — Arbitration clause — Existence of — Government contract — Work executed on acceptance of tender — No written contract — Existence of arbitration clause can be spelt from correspondence and conduct of parties. (Constitution of India, Art. 299).

Tenders were invited by the State Government for sinking tube wells. The quotation of the plaintiff was accepted and accordingly he executed the work. As his claims were not settled, the plaintiff filed an application under Sec. 2) of the Arbitration Act. There was no written contract containing arbitration clause but the plaintiff pleaded that the tenders and quotations contained arbitration clause. The State Government and the Chief Engineer of Public Health who were defendants Nos. 1 and 2 pleaded "no comments" in their written statement in answer to plaintiff's specific allegation that the tenders contained arbitration

clause. The Lift Irrigation Corporation (deft. No. 3) which came into existence after the work was executed, pleaded in its written statement that no tender papers were forthcoming from its record. It also did not specifically plead that there was no tender paper.

Held that the existence of the arbitration clause could be spelt out from the correspondence and the conduct of the parties. In view of the non-denial of the plaintiff's assertion to the existence of arbitration clause in the tender, the defendants Nos. 3, 1 and 2 were precluded from raising the question of existence of arbitration clause, the plea raised by the defendant No. 3 at a subsequent stage could not also be entertained. (Para 6)

Cases Referred : Chronological Paras
AIR 1969 Orissa 274 : (1969) 35 Cut LT 592 4
AIR 1965 Cal 404 4, 6
AIR 1963 SC 1685 6
AIR 1955 SC 812 6

Addl. Govt. Advocate, Advocate General and G. Das, for Appellants; P. K. Mohanty, Y. Das and J. Das, for Respondents.

JUDGMENT:— Both these appeals under S. 39 (1) (iv) of the Arbitration Act of 1940 are against the common order of the learned Subordinate Judge of Bhubaneswar. M. A. No. 249 of 1981 is by the State of Orissa and the Chief Engineer of Public Health who were defendants 1 and 2 in the suit and the other appeal is by the Lift Irrigation Corporation Ltd. who was defendant No. 3 in the suit.

2. Plaintiff-respondent No. 1, a firm of plumbers, filed an application under S. 20 of the Arbitration Act before the learned trial Judge alleging that in response to invitation of tenders for sinking of tube wells for drinking water purposes, issued by the defendants, it had submitted quotations and its quotations being the lowest were accepted. Plaintiff alleged that in 1965 there was severe drought in the district of Sundergarh and decision was taken by the authorities to sink one hundred drinking water tube wells and it was taken up as a crash programme and the work had to be completed within three months ending with 31st of March, 1966. It was alleged that the quotations of the plaintiff were accepted and it was asked to execute the work with a view to completing the same within the target date. No formal agreement was executed. Plaintiff claims that it had sunk 83 tube wells and was en-

*From order of S. K. Satpathy, Sub. J., Bhubaneswar, D/- 20-7-1981.

titled to Rs. 3,77,347/- but was paid Rupees 1,45,478/-. After the tube wells were sunk they were transferred to the control of the Chief Engineer, Public Health, as also the Director of Lift Irrigation. These two establishments ultimately merged into a Corporation to be known as the Lift Irrigation Corporation Limited (defendant No. 3). Plaintiff asked for settlement of the claims but when no heed was paid to the demands, the learned Trial Judge was moved by an application under S. 20 of the Arbitration Act.

3. Defendants 1 and 2 filed a common written statement while the third defendant filed a separate one. In paragraph-5 of the State's written statement, it was admitted that the work had been entrusted to the plaintiff. In paragraph-6, it was pleaded:—

"That Codal provisions under paragraph 56 dealing with administrative approval, paragraphs 112-120 dealing with inviting tenders, paragraphs 223-225 dealing with recording of measurement of works done and paragraphs 124-125 dealing with executive contract etc. of the P.W.D. Code have not been followed. In the name of speedy execution of work, there has been a complete deviation from rules and procedure." In paragraph 8 of the application under S. 20, plaintiff had indicated that in the tenders and quotations, the following clause was included:—

"Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specification, drawings and instructions therein before-mentioned and as to the quality of workmanship or materials used in the work or as to any other question, claim, right, matter or thing whatsoever, in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of a Superintending Engineer of the State P.W.D. unconnected with the work at any stage nominated by the concerned Chief Engineer. If there be no such Superintending Engineer, it should be referred to the sole arbitration of the Chief Engineer concerned. It will be no objection to any such appointment that the arbitrator so appointed is a Government servant. The award of the arbitrator so appointed shall be final, conclusive

and binding on all parties to this contract."

With reference to the allegations in paragraph 8 of the application under S. 20, in paragraph 4 of the written statement of the State and the Chief Engineer, it was stated that the defendants had no comments.

The third defendant in its separate written statement in paragraph 10 pleaded:—

"That it is seen from the available records of the office of defendant No. 3 that no tenders were invited as the work was entrusted on an emergent basis. The contractors were selected on personal contact and they have been asked to take up the installation work. There is no evidence to establish that contracts have been signed for the necessary agreement. Hence the question of applying arbitration clause against this defendant for any settlement does not arise in this case."

4. Before the learned Trial Judge, the main dispute was as to whether there was any contract containing an arbitration clause which alone could justify an application under S. 20 of the Arbitration Act. The learned Trial Judge referred to a case of this Court reported in (1969) 35 Cut LT 592 : (AIR 1969 Orissa 274) (State of Orissa v. Gobind Choudhury & Sons) and the celebrated decision of the Supreme Court in the case of Union of India v. A. L. Rallia Ram, AIR 1963 SC 1685. He also came to hold that the plaintiff-firm had submitted tenders and the same had been accepted before the work was executed. He, therefore, spelt out the existence of an arbitration clause and allowed the application and directed the tender papers and quotations containing the arbitration clause to be filed. This direction is assailed in these appeals.

5. The judgment was delivered on 20th of July, 1981 and the trial court directed the tender papers and quotations to be filed. The order dated 7-8-1981 is relevant and is extracted:—

"The defendants had been directed to file the tender papers and the quotation submitted by the plaintiff as admittedly there was no agreement and the tender paper contains arbitration clause. The defendant No. 1 filed some papers which contained the quotation submitted by the plaintiff and a note submitted by Executive Engineer, Lift Irrigation, Sambalpur to the Director, Lift Irrigation, which also shows that tenders were in-

vited from local contractors for installation of tube wells. His note further shows that the work had been entrusted to Sri B. K. Parida and Brothers for installation of tube wells. The tender paper has not been filed either by defendant No. 1 or by defendant No. 3. Defendant No. 3 has filed a memo today that no tender papers are available with them. The tender papers are supposed to be in custody of either defendant No. 1 or defendant No. 3. When the same is not produced and a memo is filed that they are not traced adverse inference is to be drawn against the defendants that if the tender papers are filed, the same are likely to go against the interest of the defendants. Since the plaintiff has specifically pleaded that the tender papers contain the arbitration clause and the correspondence filed by the defendant No. 1 shows that the work had been entrusted to the plaintiff, the parties are directed to file a panel of names for appointment of Arbitrator....."

I have already pointed out that the plaintiff had specifically pleaded that there were tender papers containing the arbitration clause which has been extracted in the petition. Defendants 1 and 2 have specifically indicated in their written statement that they had nothing to comment about the plaintiff's averment. Admittedly, the third defendant was not in existence when the work was executed and the work had either been handled by the Chief Engineer (defendant No. 2) or the Director of Lift Irrigation before the Corporation was formed. The Corporation (defendant No. 3) has also not specifically pleaded that there was no tender paper. It has only taken the stand that no such papers are forthcoming from its records. In the absence of any denial by defendants 1 and 2, the learned Trial Judge was entitled to come to the conclusion that there were tender papers and the arbitration clause as pleaded by the plaintiff was a part of the same.

6. Admittedly no contract has been executed. The question for consideration, therefore, is whether from the correspondence and the conduct of the parties, the existence of an arbitration clause can be spelt out. The Supreme Court in the case of Jugal Kishore v. Mrs. Goolbai Honmusji, AIR 1955 SC 812 (at p. 815) held:—

".....it is settled law that to constitute an arbitration agreement in writing it is not necessary that it should be sign-

ed by the parties, and that it is sufficient if the terms are reduced to writing and the agreement of the parties thereto is established."

In the case of Union of India v. A. L. Rallia Ram, AIR 1963 SC 1685, the Court had two aspects to consider—

(i) Whether there was an arbitration agreement within the meaning of S. 2 (a) of the Arbitration Act; and

(ii) Whether the requirements of S. 175 (3) of the Government of India Act, 1935 (corresponding to Article 299 of the Constitution of India) had been satisfied. Dealing with these aspects, Shah, J., as the learned Judge then was, speaking for the Court observed (paras 10, 11):—

"The authority of an arbitrator depends upon the authority conferred by the parties by agreement to refer their differences to arbitration. By S. 2 (a) of the Arbitration Act, 1940 arbitration agreement means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. A writing incorporating a valid agreement to submit differences to arbitration is therefore requisite; it is however not a condition of an effective arbitration agreement that it must be incorporated in a formal agreement executed by both the parties thereto, nor is it required to be signed by the parties. There must be an agreement to submit present or future differences to arbitration, this agreement must be in writing, and must be accepted by the parties. Clause 13 in Form F. D. (M) 70 fulfils all these requirements. But the Dominion of India being a party to the arbitration agreement, to be binding the agreement had also to conform to the requirements of S. 175 (3) of the Government of India Act, 1935, for an arbitration agreement is a contract within the meaning of the Government of India Act and it must, to bind the Dominion of India, be made in the form prescribed by that section. The question which then falls to be determined is whether the letter accepting the tender of the respondent conformed to the requirements of S. 175 (3) of the Government of India Act.

Section 175 (3) does not in terms require that a formal document executed on behalf of the Dominion of India, and the other contracting party, alone is effective. In the absence of any direction by the Governor-General under S. 175 (3) of the Government of India Act pre-

scribing the manner, a valid contract may result from correspondence if the requisite conditions are fulfilled. The contracts for sale of war disposal goods were not directed by the Governor-General to be made by a formal document executed on behalf of the Governor-General as well as by the purchasing party. It is true that S. 175 (3) uses the expression executed but that does not by itself contemplate execution of a formal contract by the contracting parties. A tender for purchase of goods in pursuance of an invitation issued by or on behalf of the Governor-General of India and acceptance in writing which is expressed to be made in the name of the Governor-General and is executed on his behalf by a person authorised in that behalf would conform to the requirements of S. 175 (3)."

It is the plaintiff's case that the tender contained the arbitration clause, plaintiff gave quotations on the basis of the tender and the quotations were accepted and the plaintiff was asked to execute the work. The learned Trial Judge has also accepted this stand of the plaintiff.

A Division Bench of the Calcutta High Court in the case of Union of India v. Himco (India) Private Ltd., AIR 1965 Cal 404, on similar facts as here came to hold that the consensus of both the parties to the terms embodied in acceptance of tender in writing has been established and relying on the observations of Venkatarama Ayyar, J. in Jugal Kishore's case (AIR 1955 SC 812), held that an arbitration clause could be spelt out.

In view of the non-denial of the plaintiffs' assertion to the existence of arbitration clause in the tender, defendants 1 and 2 are precluded from raising this question. Plaintiff's plea with reference to existence of the arbitration clause was a plea of fact and when there was no denial, it must follow that there was no dispute which could be put as an issue for determination. As I have already pointed out, it is the admitted position that the third defendant was not in existence at the relevant time. Therefore, the competent parties to plead in denial were defendants 1 and 2. As they have not disputed the existence of the tender paper, the plea raised before the Trial Judge at a subsequent stage should not have been entertained.

7. No other question was canvassed at the hearing. Since I have repelled the contentions of learned Advocate-General appearing for the State with reference to

the point canvassed, these appeals must fail and are dismissed. Parties are directed to bear their own costs in this Court.
Appeals dismissed.

AIR 1982 ORISSA 150

P. K. MOHANTY, J.

Hadibandhu Mohapatra, Appellant v. Bhagaban Barik and others, Respondents.

Second Appeal No. 5 of 1978, D/- 2-2-1982.*

Civil P. C. (5 of 1908), Section 102 (as amended in 1976) — C. P. C. Amendment Act (1976), S. 97 (3) — Appeal filed after coming into force of amendment Act — Provisions of S. 102 as amended would apply. (General Clauses Act (1 of 1897), S. 6).

Sub-sec. (3) of S. 97 of Amendment Act expressly takes away the right of appeal. It clearly indicates that the Legislature was conscious of the principle that rights and causes of action vested prior to the coming into force of an amending enactment are saved unless taken away expressly or by necessary implication. To meet this situation, sub-sec. (3) of S. 97 has been enacted expressly taking away the vested right. The contention that S. 6 of the General Clauses Act still preserves the right of appeal is not acceptable. Since sub-sec. (3) of S. 97 of the Amendment Act indicates a different intention, S. 6 of the General Clauses Act cannot be pressed into service. Therefore, the provisions of S. 102, C. P. C., as amended in 1976, are retrospective. The second Appeal filed after the commencement of the Amendment Act of 1976 would not be maintainable when the amount involved in the appeal is below Rs. 3,000/-. (Para 10)

S. C. Mohapatra, for Appellant; R. K. Mohapatra and A. N. Misra, for Respondents.

JUDGMENT:— The second appeal is by the plaintiff against a reversing decree.

2. The plaintiff's case was that the defendants are members of a Hindu joint family and defendant No. 1 as karta thereof took a loan of Rs. 1,000/- from him on 12-6-1968 agreeing to repay the same on demand together with interest at the rate of 12 p.c.p.a. and executed a document (Ext. 1) acknowledging receipt of the amount. On 8-4-1971, defendant No. 1 paid Rs. 10/- towards interest of

*From decision of S. Patnaik, Addl. Sub. J., Puri, D/- 15-9-1977.

the loan and has not paid the balance despite repeated demands.

3. The defendants denied the loan and contended that they are barbers of the village and the villagers had ill-feeling against them as they did not serve them properly. There was party faction in the village resulting in some litigation and ultimately the defendants agreed to serve the villagers and their thumb marks and signatures were taken on some blank papers by way of security, and the suit document has been manufactured on one of such blank papers for the purpose of this case.

4. The learned Munsif held that the suit document (Ext. 1) is genuine and that defendant No. 1 as the karta of the joint family incurred a loan of Rs. 1,000/- from the plaintiff and that all the defendants are liable to repay the same. On appeal, the learned Additional Subordinate Judge set aside the trial court's decree and dismissed the plaintiff's suit. One of the grounds taken by the learned Additional Subordinate Judge in dismissing the suit is that the plaintiff has not complied with the mandatory provisions of S. 18-B of the Orissa Money Lenders' Act. Aggrieved by this decision, the plaintiff has preferred this second appeal.

5. Mr. R. K. Mohapatra, the learned counsel appearing on behalf of the defendants-respondents raised a preliminary objection based on S. 102, C. P. C. His contention is that as the claim involved in the suit does not exceed Rupees 3,000/- no second appeal lies.

6. S. 102, C. P. C., as amended by the Code of Civil Procedure (Amendment) Act, 1976, prohibits a second appeal in any suit of the nature cognizable by courts of small causes when the amount or value of the subject-matter of the original suit does not exceed Rs. 3,000/-. The limit of Rs. 3,000/- was introduced in S. 102 by the Amending Act of 1976 which came into operation on 1-2-1977. The suit out of which the second appeal arises was instituted on 6-4-1974. The appeal before the lower Appellate Court was preferred on 30-7-1976 and was disposed of on 15-9-1977. The second appeal was preferred on 2-1-1978. It is not disputed that the suit is of the nature cognizable by courts of small causes. The claim involved in the suit is Rs. 1668.

7. It is urged on behalf of the appellant that a right of appeal is a vested right which comes into existence at the very inception of the suit, and unless the amendment introduced by the Amend-

ment Act of 1976 in S. 102, C. P. C. is retrospective, the right to prefer the 2nd appeal, which became vested when the suit was filed, would not be affected.

8. The question for consideration is whether the amendment introduced by the aforesaid Act is retrospective in operation. In the absence of such retrospective operation the right of presenting a second appeal, which became vested at the date of institution of the suit, would not be affected by the limit being raised from Rs. 1,000/- to Rs. 3,000/-.

9. The provisions of law relevant to the preliminary objection are contained in S. 97 of the Amendment Act, 1976 which, for ready reference, are reproduced below :

"97. Repeal and savings,—

(1) Any amendment made, or any provision inserted in the Principal Act by a State Legislature or a High Court before the commencement of this Act shall, except in so far as such amendment or provision is consistent with the provisions of the Principal Act as amended by this Act, stand repealed.

(Sub-sec. (2) omitted as unnecessary).

(3) Save as otherwise provided in sub-sec. (2), the provisions of the Principal Act, as amended by this Act, shall apply to every suit, proceeding, appeal or application, pending at the commencement of this Act or instituted or filed after such commencement notwithstanding the fact that the right, or cause of action, in pursuance of which such suit, proceeding, appeal or application is instituted or filed, had been acquired or had accrued before such commencement."

10. Sub-sec. (3) of Sec. 97 makes it clear that save as otherwise provided in sub-sec. (2) the provisions of the Principal Act as amended in 1976, would be applicable to all suits, proceedings, appeals or applications pending at the commencement of the Act or instituted or filed thereafter notwithstanding the fact that the right or cause of action in pursuance of which such suit, proceeding, appeal or application is instituted or filed, had been acquired or had accrued before such commencement. This provision expressly takes away the right of appeal. It clearly indicates that the Legislature was conscious of the principle that rights and causes of action vested prior to the coming into force of an amending enactment are saved unless taken away expressly or by necessary implication. To meet this situation, sub-sec. (3) of S. 97 has been enacted expressly taking away

the vested right. The instant case is not covered by the specific savings made in sub-sec. (2) of S. 97. It is, therefore, not possible to accept the argument advanced on behalf of the appellant that S. 97 (3) does not affect the vested right of appeal. The contention that S. 6 of the General Clauses Act still preserves the right of appeal is not acceptable.

Section 6 of the General Clauses Act itself provides "unless a different intention appears, the repeal shall not affect any right, privilege or obligation or liability acquired or incurred under any enactment so repealed." Since sub-section (3) of S. 97 of the Amendment Act indicates a different intention, Sec. 6 of the General Clauses Act cannot be pressed into service. My conclusion, therefore is that the provisions of S. 102, C. P. C., as amended in 1976, are retrospective and the second appeal having been filed after the commencement of the Amendment Act of 1976 is not maintainable.

11. Mr. S. C. Mohapatra for the appellant has made an application that the second appeal may be converted into a revisional application under Sec. 115, C. P. C. if the second appeal is not maintainable. According to him, this is a case of illegal exercise of jurisdiction covered by cl. (c) of S. 115 (1), C. P. C. I am, therefore, inclined to permit the appellant to convert the proceedings into a civil revision under S. 115, C. P. C.

12. Let the second appeal be converted into a civil revision.

Order accordingly.

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R. N. MISRA, C. J. AND

B. K. BEHERA, J.

Sandeep Kumar Ghosh, Petitioner v. Utkal University and another, Opposite Parties.

Original Jurn. Case No. 2447 of 1981, D/- 14-1-1982.

Utkal University Regulations, Chap. II, Regn. 9 (2) read with Utkal University Hard Case Rules, R. 1 (a) — Reference to Board of Conducting Examiners under — M.B.B.S. Examination — Candidate failing in one subject or group only either in written paper or in aggregate of written-cum-oral paper entitled to pass — Petitioner failing both in written as well as in group of written-cum-oral papers — Case not governed by Rules — No reference is to be made to Board.

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The Rules provide that candidate failing in one subject or group only either in written paper or in the aggregate of written-cum-oral paper for 3 per cent of maximum marks or less shall be made to pass. The petitioner in the instant case challenged the decision that he failed at the M.B.B.S. examination. He had secured in Biochemistry 60 per cent in practical, 60 per cent in oral but fell short of 2 marks in the written and oral examinations taken together having secured two marks less than the minimum of 40 marks in the written paper.

Held that the petitioner's case would not be governed by the Rules and therefore, no reference to the Board of Conducting Examiners was to be made. Petitioner could not have been declared to be successful and his case could not come under the Rules as he failed both in the written paper as well as in the group of written-cum-oral papers taken together. It was not a case where the petitioner had failed in one subject or group only either in written paper or in the aggregate or written-cum-oral papers for 3 per cent.

(Para 4)

Dr. S. C. Dash and B. K. Patnaik, for Petitioner; S. C. Mohapatra, for Opposite Parties.

BEHERA, J.:— The petitioner, a candidate at the First M.B.B.S. Examination held in April, 1981, by the Utkal University, as a regular student of Shriram Chandra Bhanja Medical College, Cuttack, challenges the decision that he had failed at the examination although he had secured marks entitling him to pass under the Regulations of University read with the Rules of "Hard Cases" for the M.B.B.S. Examinations (hereinafter referred to as the 'Rules'). Regn. 9 (2) of Chapter XI dealing with M.B.B.S. Examination of the Utkal University:

"In order to pass the examination a candidate must obtain 50% (fifty per cent) of the maximum marks in the written and oral together, subject to a minimum of 40 per cent in each of these (written and oral) and 50 per cent in practical."

The petitioner had secured in Biochemistry 60 per cent in practical, 60 per cent in the oral, but fell short of 2 marks in the written and oral examinations taken together having secured two marks less than the minimum of 40 marks in the written paper. The Rules provide that candidates failing in one subject or group only either in written paper or in the aggregate of written-cum-oral paper for

3 per cent of maximum marks or less shall be made to pass. According to the petitioner, he failed only in Biochemistry and that, too, for 2 per cent in the written paper or in the written-cum-oral papers taken together for 1 per cent and it was, therefore, a fit case for reference to the Board of Conducting Examiners to apply the Hard Case Rules and declare the petitioner to be successful, but the University authorities did not refer the case of the petitioner to the Board and made him to fail. The petitioner represented his case to the Vice-Chancellor twice, but without any effect. The petitioner had been awarded the marks at the examination as per Annexures 1 and 3. Annexure 4 is the copy of a representation made by the petitioner to the Vice-Chancellor. Annexure 2 is a copy of the Scheme of Examination prescribed by the Medical Council of India.

2. The opposite party No. 1 has, in a counter affidavit, disputed the assertion made by the petitioner that his case would be governed by the Rules and that it should have been referred to the Board for declaring the petitioner successful at the examination. According to the opposite party No. 1, the petitioner's case would not come within the purview of the Rules in that he had failed both in the written paper as well as in the group of written and oral papers taken together. The recommendation of the Indian Medical Council, as per Annexure 2, as averred in the counter-affidavit, is not applicable to the University.

3. Dr. Dash appearing for the petitioner has submitted before us that as the petitioner had failed only in Biochemistry and that, too for obtaining 38 marks as against the minimum pass marks of 40 and the marks were short by 1 per cent in respect of both written and oral papers for Biochemistry, it was a fit case for reference to the Board of Conducting Examiners to apply the Rules.

4. The Rules in so far as are relevant for the present case provide:

"1. The Board of Conducting Examiners shall consider the following cases:

(a) Candidates failing in one subject or group only either in written papers or in the aggregate or written-cum-oral papers for 3 per cent of maximum marks or less.

N.B.: Only written papers are to be examined.

xx xx xx"
As rightly submitted by Mr. Mohapatra on behalf of the opposite party No. 1, the

petitioner had failed in Biochemistry having secured 38 marks in the written paper and 60 marks in oral and had thus secured 98 marks although he was required to secure 50 per cent of the maximum marks in the written and oral together and, as such, he could not have been declared to be successful and his case would not come under the Rules as he failed both in the written paper as well as in the group of written-cum-oral papers taken together. It was, therefore, not a case where the petitioner had failed in one subject or group only either in written paper or in the aggregate or written-cum-oral papers for 3 per cent of maximum marks or less. The petitioner had failed both in the written paper as well as in the group and, therefore, we would accept the submission made on behalf of the opposite party No. 1 that the petitioner's case would not be governed by the Rules and therefore, no reference to the Board of Conducting Examiners in the case of the petitioner was to be made.

5. We would, accordingly, dismiss the petition, but in the circumstances of the case, make no order as to costs.

Consequent upon this case being disposed of, the previous order passed by us not to publish the result of the supplementary examination in respect of the petitioner stands vacated.

R. N. MISRA, C. J.:— I agree.

Petition dismissed.

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R. N. MISRA, C. J. AND

B. K. BEHERA, J.

Dr. Niranjan Pradhan and etc., Petitioners v. State of Orissa and others, Opposite Parties.

O.J.Cs. Nos. 1962, 2010, 2115, 2214 and 2294 of 1981, D/- 16-12-1981.

(A) Constitution of India, Art. 15 — Orissa prospectus for admission to Post-Graduate Courses in Medicine for Session 1981-82. Cl. 5 (1) (b) — Weightage on basis of service in rural area — Not per se discriminatory — However, weightage of 15 per cent as envisaged, is on high side.

Weightage in Cl. 5 (1) (b) on basis of service in rural area per se is not discriminatory. However, when, as provided by Cl. 5 (1) (b), 3000 marks allotted in M.B.B.S. examination are telescoped as 100, addition of 15 marks by way of

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weightage is somewhat excessive. There may be instances where top-ranking students may have to be overlooked when full weightage of 15 marks is given on account of 5 years of service in rural area. For instance, a student who has secured more than 70 per cent marks in the M.B.B.S. examination will have to be bypassed to accommodate a Second Division student securing less than 60 per cent marks. Provision for weightage should be so made that while the social purpose of creating a bias for rural service works out, efficient and top-ranking students with a bright career should not be bypassed. Possibly, weightage between 5 per cent and 10 per cent should be worked out so that the competition for selection may be confined to at least First Division students and those securing less than 60 per cent marks may not come into the arena through the medium of weightage. The recommendation of the Medical Council in this behalf had clearly indicated that weightage should be available when other conditions are equal. This obviously means that when candidates are almost of the same excellence, weightage could be extended on the basis of service in rural area. This condition had been indicated so that by mere weightage merit may not be brushed aside and the process of selection may not fail to serve the social interest. However, the High Court did not interfere with the admissions made on basis of weightage as it could not indicate what exactly the weightage should be and had left the question to the State discretion.

(Paras 6, 7)

(B) Constitution of India, Art. 15 — Orissa prospectus for admission to Post-Graduate Courses in Medicine for Session 1981-82, Cl. 1 (ii) (a) — Reservation of seats for Scheduled Castes and Scheduled Tribes candidates — Not open to challenge on ground of absence of reservation in specialities where seats are less than 6 or 7.

(Para 6)

(C) Constitution of India, Art. 14 — Orissa prospectus for admission to Post-Graduate Courses in Medicine for Session 1981-82, Cl. 1 — Reservation of 2 seats for Medical Officers who have become unsuccessful in Post-Graduate examination outside the State — Not tenable — This is a premium on incompetency.

(Para 6)

Cases Referred: Chronological Paras AIR 1980 SC 820 5

L. Rath, S. C. Roy, A. K. Misra and B. S. Misra, for Petitioners, Govt. Advocate, for Opposite Parties.

R. N. MISRA, C. J.:— Each of these applications under Art. 226 of the Constitution is by a doctor in the employment of the State and challenge in each of these applications is to the weightage provided under Clause 5 (1) (b) of the Prospectus for admission into the Post-Graduate Courses at the three Medical Colleges of the State and outside the State for the Session 1981-82. As a common question has been raised in all these applications and counsel for both sides submitted common arguments at a combined hearing, we propose to dispose of all these five applications by a common judgment.

2. In all these cases except O.J.Cs. 1962 and 2294 of 1981, the facts pleaded are these. The petitioners are Medical Graduates in the employment of the State. While the petitioner of O.J.C. No. 2010 of 1981 is a member of the Scheduled Caste, the petitioner in each of the other two cases is not. Medical service under the State Government is divided into two broad categories: (a) teaching posts confined to the three Medical Colleges being the S.C.B. Medical College at Cuttack, the M.K.C.G. Medical College at Berhampur and the V.S.S. Medical College at Burla affiliated to the Utkal, Berhampur and Sambalpur Universities respectively and (b) service in the periphery which is the other category consisting of employment both in urban and semi-urban areas as also rural areas. Under the service rules, service was interchangeable between the two broad categories until some years back, but by rules made under the proviso to Art. 309 of the Constitution, such practice has been abandoned. Employment in the two categories, therefore, has now become separate and independent of each other. Each of these three petitioners applied for seats in the Post-Graduate Course in terms of the Prospectus for the 1981-82 session and none of them has been selected. In these three applications, challenge is mainly to the provision for weightage in the prospectus which according to the petitioners has been utilised to boost up claim of others in preference to theirs. The petitioner in O.J.C. 1962 of 1981 did not apply for admission, but simply challenges the Prospectus providing weightage. It is he who challenges the provision in Clause (ii) (c) of paragraph 1 of the Prospectus where two seats have been reserved for Medical Officers who have become unsuccessful in Post-Graduate examinations outside the State. The petitioner in O.J.C. No. 2010 of 1981 has raised an additional contention namely,

though 15 per cent of the seats are stipulated to be reserved for Scheduled Castes candidates, while implementing this policy, adequate reservation has not been made; and if subject-wise reservation had been made, the Scheduled Castes candidates would not have been prejudiced at all and they would have got their preferences in respect of the 15 per cent seats.

In O.J.C. No. 2294 of 1981, the petitioner, apart from being a Medical Graduate, possesses Post-Graduate M.S. Degree and is a Clinical Tutor in the Department of Neuro-Surgery in the S.C.B. Medical College, Cuttack. In 1981-82 provision for the first time was made for teaching facility in the super-speciality, i.e. M.Ch. in Neuro-Surgery. The petitioner applied for being selected for undergoing such course. He has alleged that he was a more meritorious student than the two who have been selected, but he was not selected mainly on account of the provision for weightage for service in rural area. He has, therefore, joined the other group of candidates who wanted admission into the Post-Graduate course challenging the provision for weightage. He has pleaded that the Professor of the Department as also the Director of Health have recommended that as against two seats in the super-speciality for which provision had been made, an additional seat be created and the petitioner be admitted as he is eminently suitable for getting the super-speciality degree.

3. In the counter-affidavits filed in these cases which are more or less on the same lines, it has been pleaded that provision for weightage in Cl. 5 (1) (b) of the Prospectus was necessary in view of the fact that majority of the posts of Medical Officers is in the rural areas. Doctors do not accept postings in rural areas and when transferred avoid to accept such posting. Under the rules, for promotion to different posts of specialists as also to posts of Sub-Divisional Medical Officers and Chief District Medical Officers, Post-Graduate qualification is necessary. Post-Graduate degree is also necessary for promotion to the rank of Class I in Medical Service under the Directorate. With a view to giving proper incentive and appropriate bias for acceptance of posting in rural areas and with a view to providing due promotional prospects and for increasing efficiency of the medical service in the rural areas and in keeping with the recommendation of the Indian

Medical Council, provision was made in Clause 5 (1) (b) of the Prospectus. Such weightage is not only reasonable and wholesome but is in keeping with the well-accepted policy of Government that the majority of the citizens of India who live in the rural areas should have adequate medical care. It has next been pleaded that the reservation of 15 per cent of the Post-Graduate seats for members of the Scheduled Castes and 5 per cent thereof for members of the Scheduled Tribes is a reasonable reservation and since such reservation is in keeping with the constitutional mandate, there can be no challenge to it. In subjects where there are less than 6 seats in all, there can be no reservation. Therefore, subject-wise reservation has been provided where more seats are available, keeping the ratio of reservation in view. The general scheme is not open to attack.

4. At the hearing, counsel for the petitioners reiterated these submissions. Learned Government Advocate appearing for the State and the public officers contended:—

(i) Weightage had been given in accordance with the recommendation of the Indian Medical Council;

(ii) In providing weightage, no discriminatory treatment has been shown and, at any rate, there is a clear difference between the two groups, namely, teachers in the Medical Colleges and Doctors serving in the periphery in non-rural areas on one side and Doctors serving in the periphery in rural areas on the other. Cushioning provided by the medium of weightage is not open to attack;

(iii) Provision for weightage is a public necessity and is in the larger interest of the State;

(iv) As the number of seats provided in any subject is based upon the recommendation of the Indian Medical Council which prescribes an approved proportion of teacher-student strength, there can be no direction for enhancement of seats at this stage;

(v) Selections have already been made and the Post-Graduate study has already commenced. Relief if granted to the petitioners at this stage would disturb the study and a direction to admit the petitioners would keep away several others who but for the weightage would have been preferred to the petitioners.

5. We shall now proceed to examine the correctness of the rival contentions. But before we touch these points directly, we would like to make certain general

observations for indicating what should be the appropriate attitude with which these questions should be looked at. Medical assistance is an indispensable necessity for citizens of a civilized country. Indisputably, bulk of the citizens in India live in the countryside, where medical facility is not adequate, number of hospitals is few and many of them are not appropriately manned. Judicial notice can be taken of the position that there is an egalitarian bias and educated people including doctors prefer to be in urban and semi-urban areas and do not like to go to the countryside.

It is in the general interest of the country as also the people that the most suited people are given facilities for obtaining the highest of qualifications so that society may be best enriched. As was pointed out by the Supreme Court in the case of *Dr. Jagdish Saran v. Union of India*, AIR 1980 SC 820 (Para 16),

"..... Anyone anywhere, humble or high, agrestic or urban, man or woman, and whatever his religion or irreligion, shall be afforded equal chance for admission to any secular educational course or school for cultural growth, training facility, speciality or employment. Each according to his ability, is of pervasive validity, and it is a latent, though radical, fundamental that, given propitious environments, talent is more or less evenly distributed and everyone has a prospect of rising to the peak....."

We do not dispute that the philosophy and pragmatism of universal excellence through universal equal opportunity is part of our culture and constitutional creed. But as the Supreme Court pointed out in the very same case (Para 17).

"This norm of non-discrimination, however, admits of just exceptions geared to equality and does not forbid these basic measures needed to abolish the gaping realities of current inequality afflicting 'socially and educationally backward classes' and 'the Scheduled Castes and the Scheduled Tribes'....." The Indian Medical Council recommended that

"Other conditions being equal, weightage may be given to persons who have worked in rural areas or the Armed Forces Medical Services for at least two years."

This recommendation emphasised upon "other conditions being equal." The recommendation did not refer to the extent of weightage. Clause 5 (1) (b) of the Prospectus provides:—

"Weightage will be given for service in rural area in respect of in-service doctors working under the Government of Orissa. They will be given credit of 3 marks for each completed year of rural service, subject to a maximum of 15 marks."

Rural service has been explained to mean service rendered in areas other than municipal areas or notified area councils. Counsel attacking weightage did not contend that provision for weightage as such was bad and not sustainable. The gravamen of the attack was that to make provision for weightage in a case of this type where the place of posting was beyond the control of the employee was bound to lead to discrimination. It was also contended with considerable emphasis that weightage of fifteen per cent was excessive and was likely to militate against brilliance or excellence in University examinations.

Clause 5 (1) (b) provides that the total marks in M.B.B.S. examination should represent 100 for the purpose of selection. These 100 marks represent, as alleged by the petitioners, and not controverted by the opposite parties, 3000 marks allotted to the different examinations in the M.B.B.S. course. When 3000 is telescoped as 100, addition of 15 marks by way of weightage is, in our opinion, somewhat excessive. There may be instances where top-ranking students may have to be overlooked when full weightage of 15 marks is given on account of 5 years of service in rural area. For instance, a student who has secured more than 70 per cent marks in the M.B.B.S. examination will have to be bypassed to accommodate a Second Division student securing less than 60 per cent marks. While we do not accept the petitioners' challenge to weightage on principle, we must point out that weightage of 15 per cent is somewhat excessive. We are inclined to think that the State Government is also anxious to see that deserving and brilliant students get opportunity to qualify themselves in the Post-Graduate courses so that efficiency in public service improves. That being the position, provision for weightage should be so made that while the social purpose of creating a bias for rural service works out, efficient and top-ranking students with a bright career should not be bypassed. Possibly, weightage between 5 per cent and 10 per cent should be worked out so that the competition for selection may be confined to at least First Division students and those securing less than 60 per cent

marks may not come into the arena through the medium of weightage. This, however, should be left to the State Government to be worked out in an appropriate way and we cannot take the responsibility of deciding what exactly should be the weightage. The recommendation of the Medical Council had clearly indicated that weightage should be available when other conditions are equal. This obviously means that when candidates are almost of the same excellence, weightage could be extended on the basis of service in rural area. In our opinion, the condition had been indicated so that by mere weightage merit may not be brushed aside and the process of selection may not fail to serve the social interest. It is true that postings are not in the hands of the employees, and the State decides the place of posting. In the event of one getting posted in the rural area, credit of weightage is available. The petitioners' counsel harped upon the position that the chance to get weightage thus depended upon the place of posting and since posting was beyond the control of the employee, entitlement to weightage was a matter of chance. We have not been able to see any force in this contention. Keeping the exigencies of public service in view, postings are made. At the time when a Doctor is posted, the fact that he is or is not entitled to weightage for Post-Graduate study does not come into the picture for consideration. Since we have already indicated that weightage as a matter of law cannot be objected to but it should be within reasonable limits, we do not think we should accept the contention that weightage per se is discriminatory.

6. We may next deal with the question of reservation. In paragraph 1 (ii) (a) of the Prospectus, 15 per cent of the seats have been reserved for Scheduled Castes and 5 per cent for Scheduled Tribe candidates. It has also been indicated that the reservation would be in respect of 22 seats in the direct quota and 23 in the in-service quota out of the total of 226 seats. Reservation has also been carried to the specialities where the number of seats in the specialities is substantial. While the total number of reserved seats has been indicated, the subjectwise break up in respect of reservation does not reach that number. On this basis a contention has been advanced that for implementing reservation adequate care has not been taken. The learned Government Advocate has taken the stand that reservation has

been made in terms of the constitutional requirement, but in subjects where the total number of seats is less than 6 or 7, it has not been possible to make any reservation. According to him, the contention advanced on behalf of the petitioner in O.J.C. No. 2010 of 1981 that the State Government has failed to implement reservation should not be accepted in the special facts of the case. We are inclined to accept the submission.

There is absolutely no justification for reserving 2 seats for Medical Officers who have become unsuccessful in Post-Graduate examination outside the State. This is a premium on incompetency, and we agree with the submission advanced at the bar that such reservation should not be provided for particularly when the total number of seats is limited and there is keen demand for opportunity to meritorious students for being provided the facility.

7. The next contention is as to whether at this stage we should interfere in the matter and allow the petitioners to get admitted. There is no dispute that the selection has been on the basis of weightage. Yet, we have no clear picture as to which candidate on the basis of weightage has been preferred to the petitioners. We have not held that weightage is totally bad, nor have we been able to indicate what exactly the weightage should be. That question has been left to the State Government to determine on expert advice. In these circumstances it becomes difficult for us to direct the petitioners to be admitted by deleting weightage or merely on the basis of their performance in the M.B.B.S. examination. We suggest that for the coming years well in advance the Prospectus be published and adequate provision be made regarding weightage keeping what we have indicated above in view.

8. O.J.Cs. 2010, 2115, 1962 and 2214 of 1981 must in the circumstances indicated be dismissed.

9. We shall now come to O.J.C. No. 2294 of 1981. We have already taken note of the position that the petitioner is interested in admission into the super speciality of Neuro-Surgery. Provision for 2 seats has been made. The Head of the Department of the S.C.B. Medical College in the speciality as also the Director of Health are of the view that the petitioner is eminently suitable and if he is given an opportunity of qualifying himself in the super speciality, he would

be able to render 'better' service in the College. With the existing arrangements, according to the Professor, the petitioner could be accommodated. This position has not been refuted seriously. In the circumstances, we allow the application and direct that the petitioner be admitted into the super speciality in Neuro-Surgery subject again to the University Regulations regarding admission.

10. The net result, therefore is that O.J.Cs. 2010, 2115, 1962 and 2214 of 1981 are dismissed while O.J.C. No. 2294 of 1981 is allowed. Let a writ be issued in the last case for implementing the direction. The petitioner in that case is directed to appear before the appropriate authority within one week for purposes of admission subject to clearance by the University. Petitions dismissed and one petition allowed.

11. There would be no order for costs in these cases.

BEHERA, J.— I agree with my Lord the Chief Justice.

Order accordingly.

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B. K. BEHERA AND R. C. PATNAIK, JJ.

Sri Durga Thakurani Bije Nijigarh and others, Appellants v. Chintamani Swain and others, Respondents.

Second Appeal No. 260 of 1975, D/- 16-3-1982.*

(A) Specific Relief Act (47 of 1963), S. 20 — Contract for sale of property of private deity by its Marfatdar (trustee) for legal necessity — It is specifically enforceable. (Hindu Law — Religious endowment — Transfer of Property of deity).

Where the Marfatdar of deity entered into a contract for sale of property of the deity the same would be specifically enforceable when the deity was a private deity and the properties were real debottar and there was legal necessity for sale. In such a case, it could not be said that the contract was not enforceable on the ground that the deity being a perpetual minor, the law applicable to contract executed by guardian of minor for sale of property of the minor was applicable to contract entered into by Marfatdar or trustee for sale of the property of the deity and a contract for sale entered in-

to by the guardian on behalf of minor not being specifically enforceable even though it may be for legal necessity or for benefit of the minor, on the same reasoning the contract for such sale was not enforceable. The analogy of minor was not applicable to deities. AIR 1933 Cal 109, Rel. on. (Para 4)

(B) Contract Act (9 of 1872), S. 11 — Minor — Contract for sale of his property by guardian for legal necessity — It is enforceable. (1911) ILR 39 Cal 232 (PC) Held no longer good law in view of AIR 1948 PC 95; AIR 1951 Orissa 351 held per incuriam.

In India the guardian has legal competency to enter into contract to sell the property of a minor for purpose binding on the estate and in such a case if a default was made, the vendee or the guardian representing the minor could file a suit for specific performance of the contract. (1911) ILR 39 Cal 232 (PC) Held to be no longer good law in view of AIR 1948 PC 95. AIR 1951 Orissa 351 Held per incuriam. (Para 7)

Cases Referred : Chronological Paras

AIR 1965 All 65 : 1964 All LJ 389 (FB)	10
AIR 1962 SC 83	11
AIR 1962 Patna 319	8
AIR 1958 Bom 202	8
AIR 1956 Andh Pra 33 (FB)	8
AIR 1955 Bom 1 (FB)	10
AIR 1954 SC 379	10
AIR 1951 Mad 431	8
AIR 1951 Orissa 351	3, 4, 5, 8, 11
AIR 1948 PC 95 : 1948 All LJ 226	6, 8, 9, 10, 11
AIR 1944 Mad 337	6, 8
AIR 1939 Nag 265	6
AIR 1933 Cal 109 : ILR 60 Cal 111	4
AIR 1933 Mad 322 (FB)	6
AIR 1928 Mad 407	6
AIR 1926 Cal 445	6
AIR 1925 All 595	6
(1911) ILR 39 Cal 232 : 39 Ind App 16 (PC)	5, 6, 8, 9, 11

B. R. Rao and B. L. N. Swamy, for Appellants; M. N. Das, for Respondents.

PATNAIK, J.— This second appeal which has been referred to the Division Bench for disposal raises the question :

"Whether a contract for transfer of property entered into by a marfatdar is specifically enforceable against the deity."

2. To appreciate the point, the facts need be briefly stated :

The plaintiff asserts that property in question is the nominal private debottar of defendant No. 1, a private deity of defendants 2 and 3. In partition, the

*From decision of R. N. Chatterji, Addl. Sub. J., Cuttack-Dhenkanal, D/- 19-7-1975.

deity and the disputed property fell to the share of defendants Nos. 1 and 2. For meeting the expenses of repairs, eviction of trespassers and undesirable persons and for completion of the construction of the temple, defendants Nos. 1 and 2 on 11-12-1961 entered into an agreement to sell the disputed property in respect of which the plaintiff was a tenant, for Rupees 843/-. The property, having belonged to the Khasmahal, permission was sought from the Khasmahal authorities. Since defendants Nos. 1 and 2 did not honour the agreement by executing the sale deed in spite of repeated requests by the plaintiff but made a gift of the property in favour of defendant No. 4, Durga Thakurani represented by defendants Nos. 5 and 6, the suit for specific performance of contract has been filed.

Contest has been made on behalf of the deity through defendant No. 5. Others have been set ex parte. It has been controverted that the property was nominal debottar and there was agreement as alleged. It is said that the plaintiff was guilty of breach of promise. The suit after having had a chequered course through different courts and remand is now before this Court in second appeal. The concluded findings of fact now are:

- (a) the deity is a private deity;
- (b) the properties are real debottar;
- (c) there was legal necessity; and
- (d) there was a completed agreement for sale.

The courts below have concurrently decreed the suit.

3. It is urged on behalf of the appellants (defendants Nos. 4, 5 and 6) that the deity being a perpetual minor, the law applicable to contract executed by guardian of minor for sale of property of the minor is applicable to contract entered into by Marfatdar or trustee for sale of the property of the deity. It is submitted that a contract for sale entered into by the guardian on behalf of minor not being specifically enforceable even though it may be for legal necessity or for benefit of the minor, on the same reasoning the contract in dispute is not enforceable. Reliance is placed on a decision of a Division Bench of this Court in the case of *Suresh v. Ganesh* (AIR 1951 Orissa 351).

4. Mr. Das submits that the decision in the case of *Suresh v. Ganesh* (supra) has no application as the law applicable to minor cannot by analogy be applied to a deity and relies upon a decision of the Division Bench of the Calcutta High

Court reported in (1933) ILR 60 Cal 111: (AIR 1933 Cal 109): *Gopal Shreedhar Mahadeb v. Shasheebhusan Sarkar*. It was held therein:

"It has been argued that the deities are perpetual minors and so no contract made on their behalf should be specifically enforced. The analogy of minority of deities, in our judgment, is a pure fiction, for which no authority is to be found in Hindu law itself and we can conceive of no principle on which on such analogy a contract, otherwise good and valid, can be taken out of the class of contracts of which specific performance may be granted under the law."

We are in agreement with the aforesaid exposition of law and that meets the objection raised by Mr. Rao for the appellants.

5. Coming to the principle decided by this Court in the case of *Suresh v. Ganesh* (AIR 1951 Orissa 351) (supra), we find that the Division Bench placed reliance on a decision of the Privy Council in *Mir Sarwarjan v. Fakhruddin*, (1911) ILR 39 Cal 232: (39 Ind App 16). In that case, the guardian entered into a contract on behalf of the minor for purchase of certain land. Though it was found that it was to the advantage of the minor and was intended to bind the minor's estate, their Lordships of the Privy Council held that the minor could not take advantage of the contract and enforce the same specifically. It was observed therein:

"Their Lordships are of the opinion that it is not within the competence of the guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immoveable property and they are further of the opinion that as the minor in the present case was not bound by the contract, there was no mutuality and that the minor who has now reached his majority cannot obtain specific performance of the contract."

6. The Division Bench held:

"This is an unequivocal recognition by the P. C. of the position that a contract by a guardian on behalf of the minor seeking to bind the minor's estate is invalid."

The argument that in *Sarwarjan's* case the contract was for purchase of property and so, prima facie could not be one for the necessity or benefit of the estate of the minor was repelled and attempt at distinguishing *Sarwarjan's* case was unsuccessful. The Division Bench

followed AIR 1926 Cal 445 (Srinath v. Jatindra); Ramakrishna v. K. Chidambaram (AIR 1928 Mad 407); Venkatachalam v. Sethurammarao (AIR 1933 Mad 322) (FB); Swartharam Ramsaran v. Ramballabh (AIR 1925 All 595) and Krishnachandra v. Rishabha Kumar (AIR 1939 Nag 265) which refused to see in Sarwarjan's case the distinction urged. The Division Bench held that Sarwarjan's case was based on the view :

"Firstly, that the contract by the guardian though for the benefit of the minor is not enforceable and secondly, that since it is not enforceable against the minor's estate, it cannot be enforced in his favour for lack of mutuality."

This decision of the Division Bench was given on 2-9-1949. By then the Privy Council had rendered decision on 26th Feb. 1948 in Subrahmanyam's case reported in AIR 1948 PC 95, reversing the decision of the Madras High Court in AIR 1944 Mad 337.

7. This decision of the Privy Council turned on the scope of S. 53A of the T. P. Act. The facts were :

The respondent, a minor, agreed to sell through guardian and mother certain land to the appellants, the consideration was to be applied in liquidating the debt incurred by the father of the minor. Possession was handed over to the appellants; but the sale deed was not executed. A suit was filed by the minor for recovery of possession. The defendants-appellants relied upon S. 53A of the T. P. Act. Their Lordships observed:—

"Their Lordships entertain no doubt that it was within the powers of the mother as guardian to enter into the contract of sale of 29-11-1935, on behalf the respondent for the purpose of discharging the father's debt, and that, if the sale had been completed by the execution and registration of a deed of sale, the respondent would have been bound under Hindu Law....."

After noticing the provisions contained in S. 11 of the Contract Act, their Lordships said :

".....It is clear that, if the mother and guardian had taken no part at all in the transaction, the respondent could not have entered into a valid contract to sell the land in suit to the appellants, but it is equally clear that such a contract could and did come into existence in the present case....."

Their Lordships further approved a passage from Pollock and Mulla's Indian Contract and Specific Relief Acts :

"A minor's agreement being now decided to be void, it is clear that there is no agreement to be specifically enforced; and it is unnecessary to refer to former decisions and distinction following English authorities which were applicable only on the view now overruled by the Privy Council."

A distinction is drawn between void contract entered into by minors in England and contracts entered into by guardians of minors in India for purpose binding on the estate. The next passage silences all doubts :

"In the present case neither of the two conditions mentioned is wanting, having regard to the findings in the Courts in India. It would appear, therefore, that the contract in the present case was binding upon the respondent from the time when it was executed. If the sale had been completed by a transfer, the transfer would have been a transfer of property of which the respondent and not his mother, was the owner. If an action had been brought for specific performance of the contract, it would have been brought by or against the respondent and not by or against his mother."

Appreciating independently, the question decided in this decision of the Privy Council, there is no doubt that the Privy Council recognised that in India the guardian had legal competency to enter into contract to sell the property of a minor for purpose binding on the estate and in such a case if a default was made, the vendee or the guardian representing the minor could file a suit for specific performance of the contract.

8. It is unfortunate that the decision of the Privy Council in Subrahmanyam's case (AIR 1948 PC 95) (supra) was not cited before the Division Bench which decided Suresh v. Ganesh (AIR 1951 Orissa 351) (supra).

In Ramalingam v. Babanambal, AIR 1951 Mad 431, Viswanatha Sastri, J., in a learned and illuminating judgment exhaustively treated the doctrine of mutuality as developed by English decisions. His Lordship criticised the import of the doctrine into India by Lord Macnaghten in Mir Sarwarjan's case ((1911) ILR 39 Cal 232) (supra). His Lordship traced the history of the doctrine and judicial thinking by reference to decided cases and pointed out the difficulty faced over by English Judges in defining precisely the metes and bounds of the doctrine. His Lordship finally observed :

".....I submit that the doctrine of 'mutuality' illogical in form and in substance unjust, has now been discarded by the very tribunal which was responsible for its introduction in India and it need no longer cast its spell on Indian Courts and sterilise contracts of sale entered into by a guardian on behalf of his ward for the latter's interest or benefit....."

In *Vadakattu Suryaprakasam v. Ake Gangaraju* (AIR 1956 Andh Pra 33), a similar question was posed before a Full Bench of the Andhra Pradesh High Court. Chief Justice Subba Rao (as his Lordship then was), upon review of various decisions of the High Courts and of the Privy Council opined (Para 19) :

"If the contract for sale was for necessity or benefit of the minor, it would be valid and enforceable."

"A minor has no legal competency to enter into a contract or authorise another to do so on his behalf. A guardian therefore steps in to supplement the minor's defective capacity. Capacity is the creation of law whereas authority is derived from the act of parties. The limit and extent of his capacity are conditioned by Hindu Law. He can only function within the doctrine of legal necessity or benefit. The validity of the transaction is judged with reference to the scope of his power to enter into a contract on behalf of the minor. Even then personal liability arising out of the guardian's contract is liability of the minor's estate only."

The Full Bench held that the decision in *Subramanyam's case* (supra) gave a complete go-by to the rule laid down in *Sarwarjan's case* ((1911) ILR 39 Cal 232). It is worthwhile to note that *Sarwarjan's case* was quoted and relied upon by the Madras High Court in AIR 1944 Mad 337 and was reversed by the Privy Council in AIR 1948 PC 95.

Mudholkar, J. in Gujoba Tulsiram v. Nilkanth (AIR 1958 Bom 202) held (as per the head note) :

"Where a minor had received benefit from a contract of sale entered into on his behalf by his father in respect of property solely belonging to them, the vendee was entitled to specific performance of the contract."

A similar question came up for consideration before a Division Bench of the Patna High Court in *Bhageran Rai v. Bhagwan Singh* (AIR 1962 Patna 319). Their Lordships endorsed and followed

the opinion of Viswanatha Sastri, J. in AIR 1951 Mad 431 and held that the doctrine of mutuality as introduced by *Mir Sarwarjan's case* had no application and observed (at p. 324) :

"Where the manager or karta of a Hindu joint family enters into a contract for the sale of immoveable property belonging to the family for a legal necessity, the purchaser is entitled in law to obtain a decree for specific performance of contract though some of the members of the joint family are minors, in case the manager subsequently refuses to complete the transaction of sale..... In the eye of law, there is no distinction between a contract of sale and a contract for purchase, and if the purchaser can enforce specific performance of contract against the minor sellers, there is no reason why the minor sellers cannot similarly enforce the same against the minor purchasers..... To accept this argument will be tantamount to introducing a qualification in the afore-said principle of law laid down by their Lordships of the Privy Council in the case of *Subramanyam*, 75 Ind App 115 : (AIR 1948 PC 95), in that that principle will not come into operation when some of the purchasers happened to be minors a contract can be specifically enforced by or against the minor."

9. In our humble opinion, the decision in *Sarwarjan's case* and in *Subramanyam's case* cannot stand together and the former decision must be held to be no longer good law and deemed to be overruled by the latter decision. The principles laid down in both the cases are irreconcilable and in our opinion *Subramanyam's case* lays down clearly and unequivocally the rule.

10. Mr. M. N. Das, learned counsel for the respondents, contends that the doctrine of 'mutuality' has been given a burial so far as India is concerned by the provision contained in sub-sec. (4) of S. 20 of the Specific Relief Act, 1963 and the divergence of opinion prevailing in various High Courts had been laid to rest. Sub-sec. (4) of S. 20 is as follows:—

"(4) The Court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party."

He submits that the Division Bench decision of this Court before which the decision in *Subramanyam's case* (AIR 1948 PC 95) was not cited and which gave its

decision in ignorance of the said case which was binding on it should be treated as a decision rendered per incuriam and held not binding as authority. He relied upon *State of Bombay v. Chhaganlal* (AIR 1955 Bom 1) where Chief Justice Chagla on behalf of the Full Bench observed :

"So long as the Supreme Court does not take a different view from the view taken by the Privy Council, the decisions of the Privy Council are still binding upon High Courts."

In *Kishan Chand v. Ram Babu* (AIR 1965 All 65 (FB)), it has been held :

"The decision of the Privy Council was a declaration of the law within the meaning of S. 212 of the Government of India Act and was binding upon all courts in India. It was the law when the Constitution came into force, with effect from 26-1-1950. Under Art. 372 the law in force continued to be in force until altered or repealed. Even after Constitution the law declared by the Judicial Committee continues to be the law by virtue of Art. 372, so long as the Supreme Court does not lay down a different law."

In *Srinivas v. Narayan* (AIR 1954 SC 379), the Supreme Court observed that the decision of the Privy Council was binding on the Indian Courts and they cannot refuse to follow it and are obliged to discover a distinction. However, the Supreme Court itself was not hampered by any such limitation.

11. Mr. Das further contends that in view of the law, the decision in *Subrahmanyam's* case was binding on this Court and the decision in the case of *Suresh v. Ganesh* (AIR 1951 Orissa 351) given by this Court relying upon *Sarwarjan's* case which was impliedly overruled by the Privy Council in its later decision is not binding on this Division Bench. He relied upon the passage from *Jaisri Sahu v. Rajdewan* (AIR 1962 SC 83), where exceptions to the general rule of binding nature of precedents are enumerated:

1. The Court is entitled and bound to decide which of two conflicting decisions of its own it will follow;

2. The court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot in its opinion, stand with a decision of the House of Lords (now Supreme Court); and

3. The court is not bound to follow a decision of its own if given per incuriam. A decision is given per incuriam when

the court has acted in ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction which covered the case before it, or when it has acted in ignorance of a decision of the House of Lords. In the former case it must decide which decision to follow and in the latter it is bound by the decision of the House of Lords.

A decision may also be given per incuriam when it is given in ignorance of the terms of a statute or of a rule having the force of a statute. A decision should not be treated as given per incuriam however, simply because of a deficiency of parties, or because the court had not the benefit of the best argument, and, as a general rule, the only cases in which decisions should be held to be given per incuriam are those given in ignorance of some inconsistent statute or binding authority. Even if a decision of the Court of Appeal has misinterpreted a previous decision of the House of Lords, the court of appeal must follow its previous decision and leave the House of Lords to rectify the mistake."

This passage from the *Halsbury's Laws of England* was cited with approval by the Supreme Court, substituting the Privy Council for the House of Lords. We are of the opinion that the decision in the case of *Suresh v. Ganesh* given in ignorance of *Subrahmanyam's* case which was binding on this Court was given per incuriam and is not binding on us. The law laid down by the Privy Council in *Subrahmanyam's* case is clear and we have had the further advantage of the learned opinions of *Subba Rao, C. J.* and *Viswanatha Sastri, J.* We hold that a contract for transfer of property entered into by a guardian is specifically enforceable against the minor if the same is by a guardian competent in law and the transfer is for legal necessity or for benefit of the minor.

12. In the result, the contract in question is specifically enforceable on the findings as rendered by the courts below which have been extracted in paragraph 2 of this judgment and the suit has been rightly decreed. It has, however, been brought to our notice that the property belonged to the *Khasmahal* and permission from *Khasmahal* is necessary before execution of the sale deed. Hence to the decree passed by the courts below, it shall be added that defendants 2 and 3 do pursue, and take necessary steps for disposal of the application for sanction already filed and in the event the applica-

tion is no longer pending, make the necessary application to the Khasmahal for sanction within one month from today, and within one month from the receipt of the sanction, the property shall be conveyed to the plaintiff. As permission of the Khasmahal was essential, the sale deed executed by the court below on failure of defendants 2 and 3 to execute is not in accordance with law. The sale deed is, therefore, cancelled. In the result, the appeal has no merit and is dismissed. In the circumstances, no costs.

BEHERA, J.— I agree.

Appeal dismissed.

AIR 1982 ORISSA 163

**R. N. MISRA, C. J. AND
B. K. BEHERA, J.**

Dharamchand Jain, Petitioner v. State of Orissa and others, Opposite Parties.

O. J. C. Nos. 1240 of 1976 and 46C of 1977, D/- 7-4-1982.

(A) Constitution of India, Art. 226 — Delay and laches — Order of Central Govt. under Rr. 54 and 55 of Mineral Concession Rules — State Govt. waiting for more than six years to move High Court and more than six months from date of knowledge of stand taken by Central Govt. — Writ application by State Govt. liable to be dismissed on ground of delay and laches and also on ground that such application challenging superior Tribunals' order would not be maintainable. (Mineral Concession Rules (1960), Rr. 54, 55). (Para 2)

(B) Mineral Concession Rules (1960), Rr. 54, 55 — Order granting lease by Central Govt. — It must be executed by State Govt.

The Central Government has the same power as the State Government in the matter of grant of the mining lease. Under the scheme of the Act and the Rules, the direction of the Central Government has got to be given effect to and it is for the State Government to implement the direction by making the grant. Thus the State Government must come forward to execute the lease deed in terms of the direction of the Central Government. AIR 1976 SC 1433, Rel. on. (Para 3)

Cases Referred: Chronological Paras
AIR 1976 SC 1433. 2, 3

R. Mohanty, for Petitioner; Govt. Advocate and Standing Counsel (Central), for Opposite Parties.

R. N. MISRA, C. J.— On 15th of July, 1969, petitioner in O. J. C. No. 1240 of 1976 applied to the State Government for grant of a mining lease of iron ore over an area of 251 acres in village Dalpahara in Champua sub-division of the district of Keonjhar. As the said application was not disposed of within twelve months from the date of its receipt, petitioner invoked the revisional jurisdiction of the Central Government under the Mineral Concession Rules against the deemed rejection. On 5th Jan., 1971, the State Government forwarded its comments on the revision application and it was pointed out that the area for which the petitioner applied lay within the leasehold area of M/s. M. A. Tulloch & Co. for manganese ore. On 15th Feb., 1971, petitioner sent his counter-comments and stated that M/s. M. A. Tulloch & Company had confirmed that they had taken lease for manganese ore only and had no objection if the area applied for by the petitioner for iron ore was given to the petitioner. On 5th June, 1971, the Central Government in exercise of powers vested under Rules 54 and 55 of the Mineral Concession Rules directed the State Government to grant the mining lease for iron ore in favour of the petitioner and specified in their order that M/s. M. A. Tulloch & Co. had declared that they had no interest for taking the lease of iron ore and had no objection to the grant of lease in favour of the petitioner. In the absence of any further challenge to the direction of the Central Government, it became final. On 12th June, 1971, on the basis of the Central Government's direction, petitioner moved the State Government for expediting grant of the mining lease. On 14th Oct., 1971, the State Government without complying with the order of the Central Government moved for reconsideration of the matter. On 27th Dec., 1971, the Central Government wrote to the petitioner to offer his comments on the basis of the subsequent letter of the State Government. Petitioner sent his comments on the 24th Jan., 1972 and pointed out that the revisional order was final and could not be reopened. Emphasis was laid by the petitioner on the feature that M/s. M. A. Tulloch & Co. had no objection and, therefore, the request of the State Government for reconsideration was without any foundation. Petitioner also prayed for a further direction to the State Government to implement the revisional direction. On 12th of Feb., 1974, the Central Government indicated that it had

become functus officio after making the revisional order of 5th June, 1971. A copy of the letter (Annexure 10) reads thus:—

"I am directed to refer to your letter... .. on the above subject and while inviting your attention to this Ministry's letter of even number dt. 1-5-1973 and to say that the Central Government has become functus officio after the issue of final order. You are, therefore, requested to pursue the matter with the State Government or alternatively seek relief from an appropriate court of law."

Petitioner moved the State Government on several occasions for complying with the revisional direction and when the State Government failed to take steps, petitioner moved this Court by filing a writ application on 29-11-1976, where the relief claimed is for a mandamus to the State Government to implement the revisional order of the Central Government. This application has been registered as O.J.C. No. 1240 of 1976.

About seven months after the presentation of the petitioner's application, on behalf of the State Government an application under Art. 226 of the Constitution has been filed challenging the revisional direction of the Central Government made on 5th June, 1971 and asking for quashing thereof. The said writ application has been registered as O.J.C. No. 460 of 1977. The position, therefore, is, while petitioner of O.J.C. No. 1240 of 1976 wants implementation of the Central Government's direction, the State of Orissa who is petitioner in the connected matter, has asked for quashing of the revisional direction itself. Since both the cases involve common questions of fact and law at the instance of the counsel for parties both the applications were heard at a time and this common judgment shall cover both the cases.

2. We shall first deal with the writ application filed by the State (O.J.C. No. 460 of 1977). Serious objection has been raised by opposite party No. 2 to the maintainability of the writ application on the ground that the application has been made more than six years after the impugned order and as such a belated application should not be entertained. With a view to explaining away the delay, in para. 18 of the writ application it has been pleaded that the State Government pointed out to the Central Government by its letter No. 9182 dated 14-10-71 for reconsideration of the matter. The Central Government asked for the comments of opposite party No. 2 and the com-

ments given by the latter were communicated to the State Government on 1-5-1972. The State Government furnished further comments on 16-2-73 but no further communication was received by the State Government. It has been further pleaded on behalf of the State that in these circumstances the order dated 5-6-1971 was not taken as the final order. In the same paragraph it was further pleaded that the communication sent by the Central Government to opposite party No. 2 was not known to the State as a copy thereof had not been received. On 18-12-76 notice in O.J.C. No. 1240 of 1976 filed by opposite party No. 2 was received by the State and therefrom the order of the Central Government was known.

The Central Government has filed a counter-affidavit. With reference to paragraph 18 of the writ application, in para. 14 of the counter-affidavit it has been pleaded:—

"..... I submit that the correspondence with the petitioner and opposite party No. 2 is admitted. The petitioner was also informed by letter dated 1-5-73 that once the Central Government passes an order under R. 55 of the Mineral Concession Rules, 1960, the Central Government has no further jurisdiction to revise their order passed on the revision application." There is no denial on behalf of the State to this assertion in the counter-affidavit of the Central Government. Thus by May, 1973, the Central Government had communicated to the State that it had no jurisdiction to entertain any further reference for clarification or alteration from the State Government. Admittedly, there is no power of review vested in the Central Government. Once final orders are passed, the Central Government must have become functus officio. Nothing has been shown to us which would vest jurisdiction in the Central Government to entertain an application for reconsideration of its decision. Over and above these aspects, conceding that the State had notice of the final order only in December, 1976, there is absolutely no justification why the State should have taken time till 24th June, 1977 to move the Court. As it is, by Dec., 1976, more than 5½ years had been lost and, therefore, very prompt action should have been taken to move this Court in case the State wanted to challenge the Central Government's direction of June, 1971. As had been pointed out by Prof. De Smith in his famous book "Judicial Review of Administrative Action", the right to cer-

tiorari is lost by acquiescence or implied waiver. The conduct of the State in waiting for more than six years to move this Court and more than six months from the date of knowledge of the stand taken by the Central Government as noticed above is clearly indicative of the fact that diligent steps were not taken by the State in moving this Court and it would not at all be appropriate to entertain the writ application more than six years after the order was passed for the relief of certiorari. We, therefore, decline to entertain the application of the State on the ground of unusual and unexplained delay.

We may point out that the direction of the Central Government was within the ambit of the Mines and Minerals (Regulation & Development) Act and the Mineral Concession Rules. Even if the submission of the State is accepted that the direction was an erroneous one, it did not affect the jurisdiction of the Central Government as the duly constituted Tribunal to make the order. An erroneous order is as much binding as a valid one on those who are bound by the order. It has been held by the Supreme Court in *Dharam Chand v. State of Bihar*. AIR 1976 SC 1433:— (Paras 2 & 5)

"We might mention here that under R. 54 of the Mineral Concession Rules, 1960, the Central Government acts as a revisional tribunal against any order passed by the State Government and has obviously, therefore, the same powers as the State Government....."

In these circumstances, therefore, when the Central Government allowed the revision application and directed the State Government to grant the licence to the appellant, the order must be deemed to be an order passed by the Central Government granting the prayer of the appellant for issue of the mining lease. It was clearly not open to the State Government to decline to carry out the orders of the Central Government on this ground, particularly because the Central Government was a tribunal superior to the State Government. If a ground came into existence subsequent to the making of the order of the Central Government which warranted a reconsideration of the order of the Central Government as indicated above (Here, the State Government wanted a review by pointing out mistakes in the Central Government's order), the State Government could have brought this ground to the notice of the Central Government. However, one thing is manifestly clear that

the State Government could not have refused to implement the order of the Central Government unless the Central Government itself chose to revise it either on a reference by the State Government or suo motu. In fact, to take the view that the State Government could decline to carry out the order of the Central Government on some ground which it thinks proper would be subversive of judicial discipline. The earlier order of the Central Government stood unvaried and unvacated and the State Government was bound to implement it....."

The State Government were bound by the superior Tribunal's direction and, as a quasi-judicial authority under the Act, it was not entitled to file a writ application to challenge the order of the superior Tribunal. We are, therefore, of the view that the application filed by the State has got to be dismissed both on the ground of delay and laches as also on the ground that at its instance the writ application challenging the superior Tribunal's order would not be maintainable.

3. Coming to the other writ application (O. J. C. No. 1240 of 1976) where the applicant for the mining lease is the petitioner, the relief claimed is enforcement of the Central Government's order. We have already extracted what the Supreme Court said in *Dharamchand's* case (AIR 1976 SC 1433), that is, the Central Government had the same power as the State Government in the matter of grant of the mining lease. The direction of the Central Government was to grant the lease and that direction has become final. Under the scheme of the Act and the Rules, the direction of the Central Government has got to be given effect to and it is for the State Government now to implement the direction by making the grant. Judicial discipline, therefore, warrants that the State Government must come forward to execute the lease deed in terms of the direction of the Central Government. We accordingly allow the prayer of the applicant for the mining lease, allow O. J. C. No. 1240 of 1976 and direct that a writ of mandamus shall issue to the State Government for giving effect to the order of the Central Government dated 5-6-1971 within two months from the date of service of the writ.

4. O. J. C. No. 460 of 1977 is dismissed while O. J. C. No. 1240 of 1976 is allowed. The applicant for the mining

lease shall be entitled to consolidated costs of Rs. 250/-.

BEHERA, J.:— 5. I agree with my Lord the Chief Justice.

Order accordingly.

AIR 1982 ORISSA 166

DR. B. N. MISRA, J.

Secretary, Works Department, Govt. of Orissa and others, Appellants v. Ghanashyam Sahu, Respondent.

Misc. Appeal No. 48 of 1982, D/- 26-3-1982.*

(A) Arbitration Act (10 of 1940), Ss. 8 (2) and 20 — Arbitrator appointed by court under S. 8 (2) — Provisions of Section 20 cannot be availed of. AIR 1976 SC 1745, Rel. on. (Para 3)

(B) Arbitration Act (10 of 1940), S. 13 — Interest — Jurisdiction of Arbitrator — No clause in agreement prohibiting award of interest from due date till date of claim — Arbitrator has jurisdiction to award interest accordingly. (1971) 37 Cut LT 937 and AIR 1978 Orissa 121, Rel. on. (Para 4)

Cases Referred : Chronological Paras

AIR 1978 Orissa 121 : (1978) 45 Cut LT 443 4

AIR 1976 SC 1745 3

(1971) 37 Cut LT 937 : (1971) 2 Cut WR 524 4

B. Nayak, Addl. Govt. Advocate, for Appellants; Devananda Misra, Deepak Misra and A. Deo, for Respondent.

JUDGMENT:— This appeal under Section 39 (1) (vi) of the Arbitration Act, 1940 (hereinafter referred to as the Act) is directed against the judgment dated 13-11-1981 passed by the learned Subordinate Judge, Bhubaneswar in O. S. No. 62 of 1981-I.

2. The respondent is a contractor. Appellant No. 3 had entrusted him with the construction work of the road to connect the capital at Bhubaneswar with the University. Appellant No. 3 and the respondent entered into an agreement — vide Agreement No. 10-F-2 of 1973-74. Disputes arose between the parties and as appellant No. 2 failed to appoint an Arbitrator as per Clause 23 of the Agreement the respondent moved the Court for appointment of an Arbitrator under S. 8 (2) of the Act. The learned Subordinate Judge appointed an Arbitrator

in Misc. Case No. 210 of 1979. The Arbitrator called for the statement of claims and counter-claims from the parties and finally made an award of Rupees 1,82,637.72 p. in favour of the respondent as against his claim for Rupees 3,41,735.00. This award of Rupees 1,82,637.72 p. includes the principal amount of Rs. 93,942.45 p., interest at 18 per cent per annum from the due date till the date of the claim and pendente lite interest at the same rate up to the date of the award. The Arbitrator left it to the Court to award future interest. By his judgment dated 13-11-1981, the learned Subordinate Judge upheld the award and granted future interest to the respondent at 12 per cent per annum from the date of the decree till final payment.

3. On going through the award I find that the Arbitrator has not given any reasons for his decision. It is the settled position of law that the Arbitrator is the sole Judge of the facts and law involved in the case before him and his decision when not supported by reasons is not open for review by the Court. The learned counsel for the appellants has submitted that after appointment of the Arbitrator under S. 8 (2) of the Act, it was incumbent on the respondent to join the appellants in making a joint reference to the Arbitrator and in case the joint reference could not be made, to invoke the jurisdiction of the Court under S. 20 of the Act. This submission must be rejected as it is based on a complete misconception of the provisions of the Act. The jurisdiction conferred on the Court under S. 8 is quite distinct from that conferred on it under S. 20 of the Act. In AIR 1976 SC 1745 (Union of India v. Om Prakash) it was held (at p. 1748) :

"..... The Act contemplates three kinds of arbitration: (i) arbitration without intervention of a Court, dealt with in Chapter II of the Act which includes S. 3 to S. 19, (ii) arbitration with intervention of a Court where there is no suit pending, dealt with in Chapter III which consists of only one section, viz., Section 20; and (iii) arbitration in suits, which is covered by Chapter IV. It is clear from the provisions of Chapter II that after the appointment of arbitrator, the proceedings are to be outside Court and up to the stage of filing the award intervention of Court is not contemplated unless any occasion arises requiring the Court to remove the arbitrator under S. 11. An agreement to submit differ-

*From order of S. K. Satpathy, Sub. J., Bhubaneswar, D/- 13-11-1981.

ences to arbitration implies an agreement to refer the differences to the arbitrator. Section 8 only empowers the Court to appoint an arbitrator where the parties do not concur in the appointment. Section 20 occurring in Chapter III contains provisions for arbitration with the intervention of a Court where there is no suit pending....."

After extracting Sec. 20 of the Act, the Supreme Court further observed (at p. 1748) :

"This section (Sec. 20) confers power on the Court to order the agreement to be filed and, further, to make an order of reference to the arbitrator appointed by the parties, or, where the parties cannot agree upon an appointment, to an arbitrator appointed by the Court. Sub-sec. (1) of S. 20 makes it plain that the provisions of the section can be availed of only if no proceeding under Chap. II has been initiated. Section 8 does not contain any provision empowering the Court to make an order of reference to the arbitrator as one finds in sub-sec. (4) of S. 20. Thus it seems clear that the Court in the instant cases had no jurisdiction, after appointing an arbitrator under S. 8 (2), to proceed further to make an order referring the disputes to the arbitrator."

In the present case there is no dispute at all that the Arbitrator was appointed by the Court under Sec. 8 (2) of the Act. Therefore, as pointed out in the aforesaid decision, the provisions of S. 20 could not be availed of after a proceeding under Chapter II of the Act had been initiated.

4. Learned counsel for the appellants has further urged that the Arbitrator had no jurisdiction to award interest from the due date till the date of the claim. This point has been considered by this Court on a number of occasions and it has been consistently held that in the absence of a specific clause in the agreement prohibiting award of interest, the Arbitrator has jurisdiction to award interest from the due date of payment till the date of the award (See (1971) 37 Cut LT 937 — State of Orissa v. Govinda Choudhury; (1978) 45 Cut LT 443 : (AIR 1978 Orissa 121) — Executive Engineer, Ganjam (Roads and Buildings) Division v. Sankar Maharana). In the present case it is conceded that there is no clause in the agreement prohibiting award of interest from the due date till the date of the claim. Hence I must hold that the Arbitrator had jurisdiction to award such interest.

5. Finally, on going through the award I find that there is no error apparent on the face of it. The impugned judgment does not call for interference. This appeal is accordingly dismissed. In the circumstances of this case parties will bear their own costs.

Appeal dismissed.

AIR 1982 ORISSA 167

R. N. MISRA, C. J. AND
B. K. BEHERA, J.

South Eastern Roadways, Petitioner v. Satyanarayan and others, Opposite Parties.

Original Jurn. Case No. 965 of 1977, D/- 23-3-1982.

Orissa House Rent Control Act (31 of 1958), S. 7 (1), (2) and (4) — Application for eviction filed by one of co-sharers — Other co-sharers opposing eviction — Application is not maintainable. (1967) 2 Andh WR 200, AIR 1972 AP 375, Dissented from.

Where the other co-sharer landlords oppose the eviction of a tenant, the application for eviction filed by one co-sharer cannot be maintained. The remedy to meet such a situation would be for the co-sharer to sue for partition, get exclusive title to a part of the tenement and then apply for eviction from the specified portion. Otherwise, to allow relief of eviction against the wishes of the remaining co-sharers would certainly interfere with their right of enjoyment which would include enjoyment through tenant. AIR 1935 Bom 262 and AIR 1973 Guj 131 (FB), Relied on. (1967) 2 Andh WR 200 and AIR 1972 Andh Pra 375, Dissented from. (Paras 2, 3)

Cases Referred : Chronological Paras
AIR 1973 Guj 131 (FB) 2
AIR 1972 Andh Pra 375 2
(1967) 2 Andh WR 200 2
AIR 1935 Bom 262 2

S. C. Mohapatra and S. Rath, for Petitioner; S. S. Basu and Addl. Standing Counsel, for Opposite Parties.

R. N. MISRA, C. J. :— This is a tenant's application challenging the affirming appellate order of the Chief Judicial Magistrate, Berhampur, in a proceeding for eviction from the tenanted premises. Challenge is on the ground that the premises in question belonged to 3 co-owners but the application for eviction had been filed by only one of them, being opposite party No. 1. He had sought

for eviction on the ground of personal necessity and default in payment of rent. The two other co-sharers having two-third share, being opposite parties 2 and 3 respectively, did not support the claim for eviction. On the other hand, they stated that they did not want eviction of the tenant and pleaded that they had been receiving the rent. The Controller passed an order of eviction by holding that there was default and that order of eviction has been sustained in appeal. That is how the tenant has filed this application challenging the order of eviction.

2. It is contended on behalf of the petitioner relying on two decisions, one of the Bombay High Court in *Vagha Jesing v. Manilal Bhogilal Desai*, AIR 1935 Bom 262 and the other in the case of *Nanalal Girdharlal v. Gulamnabi Jamalbhai Motorwala*, AIR 1973 Guj 131 (FB), that in a case of this type where co-owners were not supporting the claim for eviction by one co-sharer, the application for eviction would not be tenable. On the other hand, reliance has been placed by the counsel for opposite party No. 1 on a Bench decision of the Andhra Pradesh High Court in the case of *Damodaram Chetti v. Vungarala Rukmaniamma*, (1967) 2 Andh WR 200, the ratio whereof has been followed in another case being the case of *Md. Abdul Razack v. Saleemunnisa Sahaba*, AIR 1972 Andh Pra 375. We are inclined to think that where one co-sharer makes an application for eviction for and on behalf of all, he is bound to implead the non-joining co-sharers as opposite parties. The law is clear that in the case of a trespasser, a co-sharer is entitled to evict such trespasser from the entire property as eviction would enure to the benefit of all the landlords. That, however, would not be the position when the claim of eviction is against a tenant who has interest in the property. Where the co-sharer landlords oppose eviction, the position would be very much against the maintainability of the application by one co-sharer. Admittedly, until there is a partition and it has been found as a fact that there has been no partition of the premises, each co-owner would be entitled to possess every part of the property. That is a necessary incidence of co-ownership. Therefore, the Controller cannot grant eviction from any definite part of the property by saying that it belonged to the co-owner asking for eviction. The Andhra Pradesh decision poses the difficulty the co-sharer-landlord would

face where the tenant and one-co-sharer collude. We do not think, that should be the right approach. In fact, to meet such a situation the remedy should be for the co-sharer to sue for partition, get exclusive title to a part of the tenement and then ask for eviction from the certain portion; otherwise, to allow relief of eviction against the wishes of the remaining co-sharers would certainly interfere with their right of enjoyment which would include enjoyment through a tenant. In these premises, it becomes difficult for us to accept the view of the Division Bench of the Andhra Pradesh High Court indicated in the decision referred to above.

3. On the reasoning indicated, it would follow that the application for eviction was not tenable and should have been dismissed. The Controller as also the appellate authority went wrong in holding that the application was maintainable and that an order of eviction should follow.

4. The writ application is allowed and the impugned order of the Controller as upheld in appeal is set aside. There would be no order for costs.

The application for eviction stands dismissed.

BEHERA, J.:— I agree with my Lord the Chief Justice.

Application allowed.

AIR 1982 ORISSA 168

N. K. DAS, J.

P. S. Oberoi, Appellant v. The Orissa Forest Corporation Ltd., Respondent.

Misc. Appeal No. 42 of 1981, D/- 15-3-1982.*

(A) Arbitration Act (10 of 1940), S. 30 — Ex parte proceeding — Non-appearance by party even after sufficient notice — Arbitrator proceeding ex parte — Action of arbitrator did not amount to legal misconduct.

There is no statutory rule, however that if an arbitrator proceeds ex parte without giving notice of his intention to proceed in that manner, the award made by him must be set aside. In the absence of such an inflexible statutory provision, the question of notice is a rule of prudence and convenience. If either party after the arbitrator has given him sufficient notice and proper opportunities of

*From order of S. K. Satpathy, Sub. J., Bhubaneswar, D/- 31-1-1981.

attending, will not appear, the arbitrator may proceed in his absence. The true test is, has the complainant, who takes exception to the validity of the award, been in fact prejudiced by the omission of the arbitrator to serve the special notice on him. If it is established that, notwithstanding such warning, he would not have appeared before the arbitrator, he has really no grievance and cannot invite the court to set aside the award on account of the alleged defect in procedure. If there was no intention of a party to appear in spite of notice, there would be no prejudice if an ex parte award was passed against such an recalcitrant party. AIR 1920 Cal 853, AIR 1935 Sind 228, AIR 1930 Sind 190 and AIR 1961 Punj 206, Foll. (Para 5)

The arbitrator is not bound by any technical rules of procedure for conducting the proceeding before him. So long as he follows substantially the rules of natural justice, fairly hears both parties and determines without any ambiguity all matters referred to him for arbitration, his award must be upheld. ILR (1961) Cut 544; (1965) 31 Cut LT 260 and 1979 BLJR 720, Foll. (Para 5)

Where in a dispute between a timber contractor and Orissa Forest Corporation the arbitrator (an advocate) as appointed by the Court in proceeding started by contractor under S. 20, Arbitration Act (in which proceeding the Corporation remained absent) and in spite of notices of several dates through its Divisional Manager the Corporation neither appeared nor participated in proceedings before the arbitrator, however the arbitrator proceeded ex parte against the Corporation and an award was passed by him after receiving documents and recording statements, it could not be said that the Corporation was in any way prejudiced. The rules of natural justice had been complied with and sufficient opportunity was given to the Corporation and, as such, it could not be said that the award must be set aside for legal misconduct of the arbitrator as the action of the arbitrator did not amount to legal misconduct. Case law discussed. (Para 5)

(B) Arbitration Act (19 of 1940), Sections 20 (4), 8 (1) (b), 36. — Dispute between contractor and Orissa Forest Corporation — Application under S. 20 by contractor — One advocate, appointed as arbitrator — Appeal as well as application under O. 9, R. 13, C. P. C. dismissed — Appointment of arbitrator remained unchallenged — Named arbitrator (i.e.

Chairman of Corporation), biased against contractor — Appointment of arbitrator was not without jurisdiction — Thus, reference was not void. AIR 1979 Orissa 88 and AIR 1980 SC 103, Foll. (Paras 6, 7)

Cases Referred : Chronological Paras

AIR 1980 SC 103 : 1979 All LJ 1317	7
AIR 1979 Orissa 19	6, 9
AIR 1979 Orissa 88 : 46 Cut LT 237	7
1979 BLJR 720 : 1979 Pat LJR 582	5
AIR 1978 Cal 454	5
AIR 1971 SC 2298	7
AIR 1968 Cal 333	6
AIR 1967 SC 249	6
(1965) 31 Cut LT 260	5
ILR (1961) Cut 544	5
AIR 1961 Punjab 206	5
AIR 1959 All 711	5
AIR 1959 Cal 620	5
AIR 1955 Cal 354	5
AIR 1954 All 244 : 1953 All LJ 670	5
AIR 1954 Orissa 234	5
AIR 1950 Lahore 145	6
AIR 1935 Sind 228	5
AIR 1930 Sind 190	5
AIR 1924 Cal 524	5
AIR 1920 Cal 853	5

S. C. Mohapatra, R. Mohanty and P. K. Ray, for Appellant; S. Patnaik, for Respondent.

JUDGMENT:— Appellant is a contractor under the Orissa Forest Corporation for transport of round timbers and an agreement had been entered into by the parties on 11-8-1978. The Divisional Manager of the respondent had signed the agreement on behalf of the respondent. As disputes arose between the parties, the present appellant instituted O. S. No. 41/79-I under Sec. 20 of the Arbitration Act for appointment of an arbitrator. The court appointed one Shri S. H. Rao, an advocate of Jeypore as the arbitrator. The arbitrator called upon the parties to file statements of claims. In pursuance of the notice of the arbitrator, the present appellant appeared and filed his statement of claims, but the respondent did not appear nor participated in the arbitration proceedings. The arbitrator passed an award for Rupees 2,25,000.00. The said award was challenged by the present respondent under Ss. 30 and 33 of the Arbitration Act and the application of the respondent was registered as Misc. Case No. 240/80.

It was alleged that the appellant did not transport the entire quantity of timber and did not perform any work in some coupes. Therefore, the Divisional Manager got the work done with the help of other contractors. Without raising any

dispute, the appellant filed an application under S. 20 of the Arbitration Act for appointment of arbitrator. With fraudulent design, the appellant impleaded the Divisional Manager representing the Orissa Forest Corporation, though the Divisional Manager had no authority to represent the corporation in legal matters. No notice was served on the corporation or any other principal officer of the corporation. By practising fraud on the court, the appellant got Shri Rao appointed as arbitrator, who is a retained lawyer and the legal adviser of the appellant. It was further pleaded that according to the arbitration clause, any dispute arising shall be decided on the sole arbitration of the Chairman of the Corporation, or the Managing Director, or the Chief Executive Marketing, as may be nominated by the Chairman.

In case the said Chairman or the Managing Director or the Chief Executive Marketing, as the case may be, is not available or willing to be the arbitrator, then the arbitration clause would be ignored and considered as non-existent. Thus, according to the respondent, the arbitration clause does not provide for appointment of any outsider as arbitrator. If the named arbitrators are not available or willing to act as arbitrator, the arbitration clause was non-operative. In order to appoint an outsider as arbitrator, there should have been a proceeding to remove or revoke the authority of the appointed arbitrator. It was further contended that Shri Rao, the arbitrator, was a retained lawyer for the appellant and he did not give any proper notice to the respondent while hearing the arbitration matter *ex parte*. Whatever notice was sent by the arbitrator was to the Divisional Manager who was not authorised. In short, the respondent contended that the reference was void and the award suffered from legal misconduct of the arbitrator.

2. The appellant filed a counter-affidavit denying the allegations of the respondent and contended that the Divisional Manager was a party to the agreement and, as such, he was the proper party. The allegation that the arbitrator was the retained lawyer was denied. It was further contended that in spite of notice by the arbitrator nobody appeared on behalf of the respondent and, as such, the arbitrator had acted according to law and there was no fraud practised and the award was a proper one.

3. Undisputedly, a decree was passed in O. S. No. 41/70 which was filed under S. 20 of the Arbitration Act. The present respondent filed an application under O. 9, R. 13 of C. P. C. to set aside the *ex parte* decree. In the said application, one of the main contentions of the respondent was that the Divisional Manager was not authorised to issue order to be sued and he had no authority to represent the corporation. That application was disposed of on contest and it was held that the Divisional Manager being the signatory to the agreement was the opposite party. The same question was also raised here. The learned Subordinate Judge has held that the *ex parte* judgment passed by the Subordinate Judge (sic) cannot be questioned at the present stage, but he held that according to the terms of the agreement, the appointment of an outsider as arbitrator was wrong and the arbitrator lacked initial jurisdiction. The appointment under S. 20 was void and the arbitrator had misconducted himself as he had not issued proper notice to the respondent expressing his intention to proceed *ex parte*.

4. The following facts are not disputed. An agreement was entered into by the parties on 11-8-1978. On 28-3-1979 the appellant filed a petition for appointment of arbitrator and the said petition was registered as O. S. No. 41/79. Service of notice on the present respondent was held to be sufficient on 19-8-1979. On 3-9-1979, an application was sent by the Divisional Manager of the respondent to adjourn the suit and the suit was adjourned to 26-11-1979 when *ex parte* order was passed, directing filing of the agreement and the decree was drawn up in the next month. On 27-11-1979 notice was served on the Divisional Manager to appear on 10-12-1979 and to produce the document. On 10-12-1979, Shri S. Hanumanta Rao, Advocate was appointed as the arbitrator. The arbitrator issued notice on 27-12-1979 to both parties to file their statements. The notice was received by the Divisional Manager on 29-12-1979.

On 7-1-1980 a letter was sent by the Divisional Manager to the court intimating that the respondent was not willing to appoint Shri Rao as the arbitrator. A copy of this letter was also received by the arbitrator on 10-1-1980. On 12-1-1980 another notice was sent by the arbitrator fixing the case to 10-2-1980. That was received by the Divisional Manager on 15-2-1980. The corporation was set *ex*

parte by the arbitrator and the matter was posted to 23-3-1980 for evidence. Thereafter, the case was again posted to 26-3-1980. Evidence was recorded and documents were received by the arbitrator and the award was passed for Rupees 2,25,000/-. The award was sent to the court on 4-4-1980 and the Divisional Manager also received a copy of the award on 5-4-1980. A petition under O. 9, R. 13 of C. P. C. was then filed to set aside the ex parte decree passed in O. S. No. 41/79 on 5-5-1980. Being unsuccessful, M. A. No. 99/80 was filed in the High Court on 12-5-1980 which was later withdrawn.

5. The learned Subordinate Judge has held that the arbitrator was not interested in the case and that notice to the Divisional Manager was notice to the corporation. On two grounds, he has set aside the award, namely, there was no notice at the time of passing the ex parte award and this amounts to legal misconduct. The other ground is that the arbitration clause was not available and, as such, the award was illegal.

As regards notice by the arbitrator, it appears from the records submitted by the arbitrator that several dates were given to the present respondent to appear, but there was no appearance and ultimately the ex parte award was passed after hearing and considering the claims submitted by the present appellant. Notice was given on each date by the arbitrator which was also received by the Divisional Manager and ultimately the Divisional Manager wrote a letter that the respondent did not want that particular person as the arbitrator. The fact that due notices were sent on each date by the arbitrator is not disputed. The only dispute raised by the respondent is that before disposing of the proceeding ex parte, the arbitrator should have given prior notice to the respondent that in his absence on any particular date the matter would be disposed of ex parte. Undoubtedly, respondent was not responding to the notices of the arbitrator and was all along recalcitrant. Where the time and place of meeting appointed by the arbitrator are reasonable, and due notice has been given to the parties, but one of the parties refuses to attend, the arbitrator may proceed with the reference in his absence. Where the arbitrator proposes to proceed with the reference notwithstanding the absence of one of the parties, it is advisable that he should give that party distinct notice of his intention to do so. See Halsbury's

Laws of England, Fourth Edition, Vol. 2, 306 para 590).

The question came up before a Division Bench of the Calcutta High Court in *Udaichand Panna Lall v. Debibux Jewanram*, AIR 1920 Cal 853. Sir Asutosh Mukherjee, J. held that there is no statutory rule however that if an arbitrator proceeds ex parte without giving notice of his intention to proceed in that manner, the award made by him must be set aside. In the absence of such an inflexible statutory provision, the question of notice is a rule of prudence and convenience. If either party, after the arbitrator has given him sufficient notice and proper opportunities of attending, will not appear, the arbitrator may proceed in his absence. The true test is, has the complainant, who takes exception to the validity of the award, been in fact prejudiced by the omission of the arbitrator to serve the special notice on him. If it is established that, notwithstanding such warning, he would not have appeared before the arbitrator, he has really no grievance and cannot invite the court to set aside the award on account of the alleged defect in procedure.

In the instant case the proceeding was started before the Subordinate Judge. The respondent never appeared. On submission of a panel of names, the learned Subordinate Judge appointed an arbitrator. At that stage also the respondent did not co-operate. The arbitrator, after being appointed, gave notice for several dates. On 27-12-79 notice was given to both the parties to submit their statements and such notice was received by the Divisional Manager of the respondent. A letter was written on 7-1-80 by the Divisional Manager that the respondent did not want the particular person to act as arbitrator. Again notice was sent on 12-1-1980 and the case was fixed to 10-2-80. This notice was received on 15-2-80. On 2-3-80 the following order was passed by the arbitrator:—

"x x The respondent has not turned up today. He has not filed any counter. I have waited till 8 p.m. to see if the respondent would take any step in the matter. The respondent has not sent any intimation nor has he prayed for time. In fact, ever since the commencement of this arbitration proceeding the respondent has not responded at all except sending a copy of his letter addressed to the Sub-Judge, Bhubaneswar vide his Memo No. 48 (4) dated 7-1-1980 in which he has expressed that he is not agreeable for my

appointment as arbitrator in this case. From the silence it is clear that the respondent does not want to co-operate in the conduct of the arbitration proceedings or to defend himself. In the circumstances as I have already given sufficient opportunity to him, there is no point in further waiting for him particularly when he exhibited an attitude of callousness and indifference. The respondent is therefore set ex parte.

The case is posted to 23-3-1980 at 10 A.M. for ex parte evidence of the claimant
xx xx"

The arbitrator was sick on 23-3-80 and the case was posted to 26-3-80. From the orders passed on 26-3-80, it appears that the claimant was present with evidence and he had filed a true copy of the agreement along with the schedules forming part of the agreement. Statements were recorded and award was to be passed. This would show that there was no prejudice to the respondent. The case reported in AIR 1920 Cal 853 (supra) has been followed by the Calcutta High Court in *Bhowanidas Ram Govind v. Harsukhdas Balkishandas*, AIR 1924 Cal 524; *Premchand Manickchand v. Fort Gloster Jute Manufacturing Co. Ltd.*, AIR 1959 Cal 620 and *Dipti Bikash Sen v. India Automobiles*, AIR 1978 Cal 454. The Allahabad High Court also in *Dori Lal v. Lal Sheo*, AIR 1954 All 244, has followed the principles laid down in AIR 1920 Cal 853. A Division Bench of this Court in *V. Gurumurthy Raju v. V. Narasimha Raju*, AIR 1954 Orissa 234 has also held that if reasonable and substantial principle has been complied, then that will amount to compliance of the principles of natural justice. Even, verbal information is sufficient. To the same effect are also two decisions of the Sind High Court.

In *Grahams Trading Co. v. Chandulal Parmanand*, AIR 1935 Sind 228, it has been held that if there was no intention of a party to appear in spite of notice, there would be no prejudice if an ex parte award was passed against such a recalcitrant party. So also in *Thadomal v. Menghraj*, AIR 1930 Sind 190, it has been held that when actual knowledge of notice is there and there is non-appearance, the ex parte award does not become invalid. The Punjab High Court in *Azad Hind Chemicals Ltd. v. Ram Lal*, AIR 1961 Punj 206 has also held that if such ex parte award is passed against a recalcitrant party, then there would be no prejudice. This Court in *Union of India v. Joginder Singh & Co.*, ILR (1961) Cut 544 has also held that the

arbitrator is not bound by any technical rules of procedure for conducting the proceeding before him. So long as he follows substantially the rules of natural justice, fairly hears both parties and determines without any ambiguity all matters referred to him for arbitration, his award must be upheld. The technicalities of the Civil P. C. apply to the Civil Court before whom the award is filed and challenged. This case has been followed in *Choudhury Radhanath Nanda v. Union of India*, (1965) 31 Cut LT 260. In *Chatterjee Bros. and Company v. State of Bihar*, 1979 BLJR 720, it has been held that the Civil P. C. does not apply to arbitration proceeding.

Section 41 (a) of the Arbitration Act makes it clear that the provisions of the Civil P. C. shall apply to all proceedings before the Court and to all appeals under the Act. It is contended on behalf of the respondent that according to the provisions of the Civil P. C. when a matter is to be heard ex parte, there should be a previous order that if on a particular date the contesting party does not appear, then he will be set ex parte. The arbitrator, in the instant case, having not done so, it is challenged by the respondent that the entire proceeding is bad. As I have already observed above and in view of the consistent decisions of several High Courts, it should be held that there was no prejudice caused to the respondent in the instant case and the rules of natural justice have been complied with and sufficient opportunity was given to the respondent and, as such, it cannot be held that the award is to be set aside for legal misconduct of the arbitrator as the action of the arbitrator does not amount to legal misconduct.

There is of course a Division Bench decision of the Calcutta High Court in *Juggilal Kamlapat v. General Fibre Dealers Ltd.*, AIR 1955 Cal 354. A careful examination of this ruling would show that this is not contrary to the principle laid down in AIR 1920 Cal 853. It was a case in which the party reached a few minutes late after the ex parte order was passed, as he had gone to Kashmir and reached just at that time. The facts and circumstances of that case are different. This principle was again followed in *Smt. Dulari Devi v. Rajendra Prakash*, AIR 1959 All 711. But I have already held that these decisions are not contrary to the principles laid down in AIR 1920 Cal 853 and the facts and circumstances were different.

6. The next question is whether the reference to the arbitrator was without jurisdiction and whether the proceeding before the arbitrator was without jurisdiction. Clause 20 of the agreement runs as follows:—

"20. If any dispute arises regarding any matter arising out of or incidental to this agreement or regarding interpretation of any clause or term of this agreement, the matter shall be decided on the sole arbitration of the Chairman of the Corporation or the Managing Director or the Chief Executive Marketing as may be nominated by the Chairman and the provisions of the Indian Arbitration Act, 1940 shall apply. In case the said Chairman or the Managing Director or the Chief Executive Marketing as the case may be is not available or willing to be the arbitrator, this arbitration clause should be ignored and considered non-existent. In anticipation of relief from arbitrator no party can apply or obtain any order of stay or injunction from court."

It may be pointed out here that the appointment of the arbitrator by court was not challenged. Against that appointment, M. A. No. 99/80 was filed but that was withdrawn. A letter was sent by the respondent on 7-1-80 by the Divisional Manager to court intimating that the respondent was not willing to the appointment of Shri S. Hanumantha Rao as the arbitrator. Nowhere, it was challenged that the court had no jurisdiction to appoint the arbitrator. It would thus appear that the appointment of the arbitrator went unchallenged by the respondent. In the arbitration clause, as has been reproduced above, it has been stated that the arbitration clause would be deemed to be non-existent if the three authorities mentioned therein are not available or not willing. It would appear from that clause that the arbitrator clause prevails.

It will only be deemed to be not existent if those three authorities are not willing or not available. There had been definite allegation against the chairman that he had already decided against the present appellant and so he could not be the arbitrator. This allegation was before the court when he appointed the arbitrator. So, there was allegation of bias against a particular person mentioned in the arbitration clause. This allegation was also agitated in the M. A. which was dismissed as withdrawn. This fact was also agitated by the present respondent in the proceeding under O. 9 R. 13 C. P. C.

for restoration, which was also dismissed. The appointment of the present arbitrator is not without jurisdiction. It does not say that if there is sole arbitrator appointed, the appointment of another arbitrator is not without jurisdiction. Sec. 20 of the Arbitration Act may be referred to. It has also been held in *Fertiliser Corporation of India Ltd. v. Ravi Kumar Ohri*, AIR 1979 Orissa 19 in para 7 that appointment of such arbitrator is not without jurisdiction.

It is contended on behalf of the respondent that if it is without jurisdiction, then the matter can be agitated at any stage. But as I have already stated above, the respondent agitated this matter in a Miscellaneous Appeal as well as in a petition for restoration and those have been dismissed. The letter dated 7-1-80 also does not say that the clause is not available. The order of the Court is also not bad, inasmuch as the present appellant alleged that the arbitrator named in the agreement was unfit to be the arbitrator and this allegation was before the court when he appointed the arbitrator. It has been held in a Division Bench of the Calcutta High Court in *Union of India v. M. S. Grewal & Co.*, AIR 1968 Cal 333, that in the absence of any allegation that the arbitrator is unfit, the appointment of another arbitrator amounts to refusing to file the arbitration agreement and if such an order is passed that is appealable. It would appear that in the instant case appeals were filed and were dismissed.

It has also been held in *Yar Muhammad v. Ghulam Sarwar*, AIR 1950 Lahore 145, that if the arbitrator named in the agreement is found not to be competent for acting as such, it will be presumed that it was intended to supply the vacancy and the parties may themselves agree to another arbitrator being nominated by them, or failing that, by the Court. Unless it is shown that it was intended by the parties that the vacancy shall not be filled up, the agreement will be kept alive and allowed to be filed. There is no ban in the arbitration clause that the parties cannot fill up the vacancy and in absence of such clause, the court can appoint an arbitrator. It has also been held in *U. P. Co-operative Federation Ltd. v. Sunder Bros.*, Delhi, AIR 1967 SC 249, that if there is any bias of an officer of the Department to be an arbitrator, it is also desirable that the court should appoint another arbitrator.

7. In the facts and circumstances of this case, which are peculiar, it is clear that the challenges about the appointment

of the arbitrator have already been negatived in M.A. filed by the respondent and also in the application under O. 9, R. 13, C.P.C. At the initial stage, by letter dated 7-1-80 the respondent also did not challenge the appointment of the arbitrator. There was definite allegation against the Chairman of the Corporation before the court while ordering for appointment of the arbitrator. Taking an overall view and considering the peculiar facts and circumstances of the case, I hold that the appointment of the arbitrator was not without jurisdiction and the reference was not void. The reference is not a nullity.

It has also been held by this Court in *Tata Iron & Steel Co. Ltd. v. Rajrishi Mineral Industries*, (1978) 46 Cut LT 237: (AIR 1979 Orissa 88), para 8, that unless a negative intention is indicated, S. 8 (1) (b) of the Act would be applicable and under the provisions of S. 20 (4) of the Act, which confers power on the Court to appoint arbitrator or umpire, jurisdiction would be vested in the Court to make the appointment and thus fill up the vacancy. The Supreme Court has also held in *Union of India v. Raghunath Singh & Co.*, AIR 1980 SC 103, that only if the arbitration agreement did show that the parties did not intend to supply the vacancy, the court had no power to supply the vacancy under S. 8 (1) (b). If no such intention could be culled out from the arbitration clause, the court could supply the vacancy. When there was a named arbitrator, even though he was named by office, it was open to the court to supply the vacancy in his place under S. 8 (1) (b). Reliance for this has been placed on *Prabhat General Agencies v. Union of India*, AIR 1971 SC 2298.

8. There is another facet of this case. There is no dispute that by virtue of Section 37 (1) of the Arbitration Act, all the provisions of the Limitation Act shall apply to arbitration as they apply to proceedings in court. By virtue of the aforesaid provision, the Limitation Act also applies. The party should have stated at the time when the application under S. 20 of the Arbitration Act was under consideration that the arbitration clause is not available. The party cannot be allowed to say this afterwards to frustrate the entire proceeding. It was open to the respondent to state at that stage that the persons named in clause 20 of the agreement are (not) willing and (not) available and that the arbitration clause is non-existent.

9. It is contended by the respondent that there was no proper notice on the respondent. The notice that was served on the Divisional Manager is not sufficient notice. The learned Subordinate Judge has negatived this contention. I entirely agree with the reasoning given by the learned Subordinate Judge. It has also been held in AIR 1979 Orissa 19 para 7 (referred to above) that such notice is also sufficient. In the instant case, the Divisional Manager is the person who admittedly signed the agreement. Notices have been received by the Divisional Manager. He has also intimated the court that the respondent was not willing for the appointment of Shri S. H. Rao as the arbitrator. The very same points were also urged in the Miscellaneous Appeal as well as in the petition under O. 9, R. 13, C.P.C. The said appeal and the application have already been dismissed. In such circumstances, I hold that the notice was sufficient.

10. The respondent contends that the arbitrator was biased because he happened to be lawyer for the appellant. A report was called for from the arbitrator. It appears that the arbitrator was also a lawyer for the respondent. No definite bias has been established in this case. The very same points were also urged in the Miscellaneous Appeal as well as in the application under O. 9, R. 13, C.P.C. and both the said matters have been dismissed. I entirely agree with the findings of the learned Subordinate Judge on this point.

11. In the result, the appeal is allowed. The judgment of the learned Subordinate Judge so far as absence of proper notice and jurisdiction about the reference are concerned is set aside and the award of the arbitrator is made a rule of the Court.

12. No costs.

Appeal allowed.

AIR 1982 ORISSA 174

R. C. PATNAIK, J.

Miti Bewa, Appellant v. Daitari Nayak and others, Respondents.

Second Appeal No. 359 of 1977, D/- 5-3-1982.*

Evidence Act (1 of 1872), Ss. 101-104 — Suit by illiterate lady for declaration of title and setting aside sale deed — Alle-

*From order of S. S. Pande, Sub-J., Anandapur, D/- 24-9-1977.

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gation that sale deed was taken from her on pretext of power of attorney — Burden to prove intelligent execution of sale deed by lady is on purchaser — Lower Appellate Court not approaching the evidence in this perspective of law — Case remanded for disposal according to law. (Contract Act (1872), S. 16).

Where a suit was filed by an illiterate lady for declaration of title and setting aside sale deed executed by her on allegation that the sale deed was taken from her on the pretext of power of attorney by her son-in-law, who was living with her for a score of years and was managing her property, the burden to prove intelligent execution of sale deed by lady was on the purchaser. The lower Appellate Court failed to approach the evidence in this perspective of law: the case was, therefore, remanded by High Court to lower Appellate Court for disposal according to law. AIR 1963 SC 1203, Rel. on.

(Para 7)

Cases Referred: Chronological Paras

(1977) 2 Cut WR 730 8

(1968) 34 Cut LT 874: ILR (1968) Cut 576 8

AIR 1963 SC 1203 7

AIR 1961 Orissa 100: 26 Cut LT 304 8

AIR 1961 Orissa 180 8

S. Misra No. 2 and N. E. Acharya, for Appellant; S. Misra No. 1; S. K. Nayak, D. P. Sarangi, J. M. Mohanty and B. Das for Respondents.

JUDGMENT:— This is a plaintiff's second appeal against the confirming decisions of the courts below, arising out of a suit for declaration of title on declaration that defendant No. 1 had no title to the property and for confirmation of possession and injunction and for setting aside the sale deeds executed by defendant No. 1 in favour of defendant No. 2 and the sale deed in favour of defendant No. 6.

2. The plaintiff alleged that she was the heir of the property left by her husband, her son having had a premature death. Defendant No. 1 has married her eldest daughter. After the death of her son, defendant No. 1, her son-in-law came to live in her house and looked after her. Some time later, he asked her to execute a power-of-attorney for facility of management of her property. In good faith, she executed a document in favour of defendant No. 1. She continued to enjoy and possess the property left by her husband till in 1975 her possession was disturbed and on enquiry she learned that on the pretext of the power-of-attorney

a sale deed was taken from her on 20-2-1961 and defendant No. 1 later on alienated property in favour of defendant No. 2 and a sale deed was obtained by defendant No. 6. She alleged that she had no idea that a sale deed was taken because she was throughout in possession.

3. Defendant No. 9 was a co-sharer of the plaintiff's husband. He and defendant No. 1 filed joint written statement supporting the case of the plaintiff. Defendant No. 1 stated that the sale deed executed by the plaintiff in his favour was a sham document and he did not acquire any right, title or interest. Defendants 2, 3, 5 and 6 filed a joint written statement stating that defendant No. 1 had joined hands with the plaintiff with a view to depriving them of their property. Plaintiff knowingly executed the sale deed which was acted upon and various purchases were made by them from defendant No. 1 and so on the title was unimpeachable and they were in possession.

4. The trial Court recorded a finding that defendant No. 1 was in an advantageous position to prevail upon the plaintiff and the onus was on the purchasers to prove that the documents were duly executed by the plaintiff. It further found that defendant No. 1 had furnished no explanation as to under what circumstances he obtained the sale deed instead of power-of-attorney. The question of delivery of possession was not important as defendant No. 1 was staying in the house of the plaintiff. Having regard to the relationship, the low consideration, i.e., Rs. 300 for 2.70 acres was not material and the sale deed Ext. B was duly executed by the plaintiff. The suit was also barred by limitation. The appellate Court found that the suit was barred by limitation, the suit having been filed beyond 12 years from the time of transfer by defendant No. 1. The question of adequacy of consideration was irrelevant. The transfers by defendant No. 1 in favour of defendant No. 2 and others were valid and the plaintiff had no title to the property.

5. The appellate judgment, to say the least, is confused, unclear and perfunctory. The complaint of the parties before me is well-warranted. Issues have been jumbled up and the discussion is not clear.

6. The approach to the evidence does not appear to have been made keeping the perspective of the law in the background nor does there appear a discussion of the law applicable.

7. Admittedly the plaintiff is an illiterate lady. Her thumb impression on

Ext. B is eloquent testimony in support. Defendant No. 1 is the son-in-law. He lives with the plaintiff for a score of years and more, manages the household and looks after the property. He had the capacity and occasion to influence, prevail upon. Naturally the mother-in-law was his ward and the relationship was one of trust. 2.70 acres were taken under Ext. B, the registered sale deed, by the son-in-law from the mother-in-law for a consideration of Rs. 300. The plaintiff impugned the transaction of 1961 on 3-9-1975. The law is clear. In *Mst. Kharbuja Kuer v. Jang Bahadur Rai* (AIR 1963 SC 1203) it was held:

"As regard documents taken from pardanashin women (illiterate ladies have been equated with pardanashin women by judge-made law) the court has to ascertain that the party executing them has been a free agent and duly informed of what she was about. The reason for the rule is that the ordinary presumption that a person understands the document to which he has affixed his name does not apply in the case of a pardanashin woman. The burden of proof shall always rest upon the person who seeks to sustain a transaction entered into with a pardanashin lady to establish that the said document was entered into by her after clearly understanding the nature of the transaction. It should be established that it was not her physical act but also her mental act. The burden can be discharged not only by proving that the document was explained to her and that she understood it but also by other evidence, direct and circumstantial."

8. As I am inclined to remand the matter to the lower Appellate Court for rehearing of the Appeal and disposal, I am refraining from making any observation which might fetter an independent determination by the lower Appellate Court. Suffice it, I draw attention to a few decisions. The lower Appellate Court would do well to refer to the same and decide the case according to the principles laid down therein. Reference may be made to *Chandhala Bewa v. Madhab Panda* (1960-26 Cut LT 304): (AIR 1961 Orissa 100); *Dharanidhar Jena v. Pranakrushna Sahu*, (1977-2 Cut WR 730); *Ko'ni v. V. R. L. Murty* (AIR 1961 Orissa 180) and *Agadhei Malikani v. Abhimanyu Mallik* (1968-34 Cut LT 874).

9. The learned lower Appellate Court should independently assess and appreciate the evidence and express firm opinion on the questions involved and not in

the halting way the findings have been recorded in the judgment impugned.

10. In the result, the judgment of the lower Appellate Court is set aside and the matter is remitted to it for disposal afresh keeping in mind the observations made in this judgment. The appeal be expeditiously disposed of. Costs shall abide the results.

Order accordingly.

AIR 1982 ORISSA 176

R. N. MISRA, C. J. AND
B. K. BEHERA, J.

Dharam Chand Jain, Petitioner v. Union of India and others, Opposite Parties.

Original Jurisdiction Cases Nos. 1286 and 1287 of 1978, D/- 24-3-1982.

Mineral Concession Rules (1960), Rr. 58 (1) (b), 59 — Notification of dereservation of certain areas — Date from which area shall be available for grant, not notified in official gazette — Applications by petitioner for grant of mining lease — State Government holding applications to be premature — Conclusion of State Government affirmed by Central Government in revision — Conclusion not irrelevant — No interference by High Court under Art. 226 of Constitution. (Constitution of India, Art. 226).

(Para 4)

Cases Referred: Chronological Paras

AIR 1975 Madh Pra 22	4
AIR 1968 Madh Pra 42	4

R. Mohanty, for Petitioner; Standing Counsel (Central) and Addl. Standing Counsel, for Opposite Parties.

R. N. MISRA, C. J.:— The State Government by a Notification dated 5th March, 1974 dereserved an area of 749.32 hectares as also another area of 142 hectares within the Tomka-Daitari area and following such dereservation the petitioner made two separate applications under the Mineral Concession Rules of 1960 (hereinafter referred to as the 'Rules') for grant of mining leases in his favour for the entire dereserved area on 16-4-74. When the State Government failed to pass any order within the statutory period contemplated under R. 24 of the Rules, the petitioner filed revisions against such deemed rejection under R. 54. On 29-9-75 the revision applications were allowed in the following terms:—

"(a) The deemed rejection by the State Government of the application for mine-

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ral concession that the petitioner had made is hereby set aside only so as to enable the State Government to pass final and speaking orders on merits thereupon;

(b) The State Government is hereby directed to pass such final orders within a period not exceeding 100 days from the date of issue of this order provided that if the prior approval of the Central Government is required for any reasons before the passing of such final orders by the State Government their requisite reference shall be made to the Central Government within 60 days from the date of issue of this order."

On 1-12-1976, long after the period indicated in the revisional order, the State Government rejected both the applications by saying:—

"Whereas the application has been made in response to the State Government Notification No. 2041-III (C) MC-38/73 dated 5-3-74 published in the Orissa Gazette in S.R.O. No. 174/74 which has not been done following the procedure laid down in R. 58 (1) of the Mineral Concession Rules, 1960 inasmuch as the date from which the area shall be made available for grant has not been stated therein and as such no area can be considered for grant in response to the said Notification;

Whereas the application is premature under R. 60 of the Mineral Concession Rules, 1960;

Whereas the area is covered by a prior M. L. application of M/s. Orissa Mining Corporation Ltd. which is a public sector Corporation;

Whereas the State Government have decided to exploit the entire applied area for chromite only in the public sector through the Orissa Mining Corporation Ltd.;

Now, therefore, the State Government are pleased to reject the said application." On 29-1-77 the petitioner again moved the Central Government in revision challenging the rejection. On 3-8-77, during the pendency of the revision, the State Government made an order of reservation of a large patch of area including the two areas applied for by the petitioner. On 3-8-78 the Central Government dismissed both the revisions holding that the Notification of dereservation made under R. 58 (1) (b) of the Rules was not in conformity with the requirement and, therefore, the State Government had

rightly rejected the applications by treating them as premature. Two separate writ applications have been filed in this Court challenging the rejection of the two applications as also the confirmation thereof by the Central Government in the two revisions carried by the petitioner. O.J.C. No. 1286 of 1978 relates to 142 hectares while O.J.C. No. 1287 of 1978 is in relation to the application relating to 749.32 hectares. Since both the writ applications raised common questions of fact and law, both were heard together and this common judgment governs both.

2. The State Government has filed a counter-affidavit supporting the order of rejection and the petitioner has thereafter filed a rejoinder.

3. Three questions actually arise for determination in these cases, namely:—

(i) The procedure under Rr. 58 and 59 of the Mineral Concession Rules is not mandatory and the Notification of the State Government dereserving the area was really not vitiated;

(ii) The State Government cannot take advantage of its own mistake and reject the applications lawfully made; and

(iii) Reservation during pendency of the revision applications was bad and contrary to the instructions issued by the Central Government in Annexure 3-B.

4. Rules 58 and 59 as far as relevant may be extracted here:—

"58. Availability of areas for re-grant to be notified—

(1) No area which was previously held or which is being held under a prospecting licence or a mining lease, as the case may be, or in respect of which the order granting licence or lease has been revoked under sub-rule (1) of R. 15 or sub-rule (1) of R. 31, shall be available for grant unless—

(a)

(b) the date from which the area shall be available for grant is notified in the official Gazette at least 30 days in advance.

(2) The Central Government may, for reasons to be recorded in writing, relax the provision of sub-rule (1) in any special case.

59. Availability of certain areas for grant to be notified.

In the case of any land which is otherwise available for the grant of a prospecting licence or a mining lease but in respect of which the State Government

has refused to grant a prospecting licence or a mining lease on the ground that the land should be reserved for any purpose the State Government shall, as soon as such land becomes again available for the grant of prospecting licence or mining lease, grant the licence or lease after following the procedure laid down in R. 58."

Though in the instant case R. 58 as such has no application, since R. 59 lays down the same procedure to be followed, the provision thereof becomes relevant. Admittedly, in the dereservation Notification dated 5th March, 1974, the date from which the area shall be available for grant was not notified in the Official Gazette. It may be, as contended on behalf of the petitioner, that the requirement of the Rule is not mandatory inasmuch as sub-rule (2) of R. 58 vests discretion in the Central Government, for reasons to be recorded, to relax the requirement in a special case. There can, however, be no doubt that the Rule makes a very wholesome provision and puts the world at large to notice that the area would be available for grant and intending applicants were free to apply in accordance with law. Sub-rule (2) of R. 58 vested jurisdiction in the Central Government to exercise the discretion contemplated therein.

The Central Government has not relaxed the requirement of sub-rule (1) and it is not for the Court to go into that aspect of the matter. Mr. Mohanty for the petitioner relied upon the decisions of the Madhya Pradesh High Court, one being the case of J. C. Rishi v. Union of India, AIR 1968 Madh Pra 42, and the other being the case of Jayanti Mishra v. Union of India, AIR 1975 Madh Pra 22, in support of his contention that even if the date from which the grant would be available is not notified, if applications are made beyond 30 days from the date of the dereservation Notification, they were available to be considered. We do not think, the question for consideration should be examined from that angle.

These are certiorari proceedings and the Court has to consider whether the impugned orders are in accordance with law. Undoubtedly, in the Notification of dereservation in question no date was indicated though the Rule required a date to be indicated. Though power was vested in the Central Government to relax the requirement, no relaxation has been asked for or made. In such circumstances, it was open to the State Gov-

ernment to hold that there was no appropriate Notification of dereservation and consequently the two applications made by the petitioner were premature. As the conclusion of the State Government which has been affirmed in revision by the Central Government cannot be said to be irrelevant or not germane to the provisions of law, we do not think it is appropriate for the Court to expand the scope of interference as in appeal and entertain other considerations for examining the merit of the matter.

5. Once, upon the aforesaid analysis, the conclusion of the State Government that the applications were premature is upheld, the other contentions advanced on behalf of the petitioner do not require examination. Even if the dereservation is considered to be inappropriate when revisions before the Central Government were pending, the rejection of the applications for grant as upheld in revision being found not to be bad, the question of propriety of reservation need not be examined.

6. On the analysis indicated, both the applications must fail. We make no order for costs.

BEHERA, J.— I agree with My Lord the Chief Justice.

Applications dismissed.

AIR 1982 ORISSA 178

N. K. DAS AND R. C. PATNAIK, JJ.

D. Chaturbhuj Jain Bhansali and another, Petitioners v. Bijoy Chandra Bakshi and others, Opposite Parties.

Original Journ. Case No. 947 of 1977.
D/- 6-4-1982.

Orissa House Rent Control Act (31 of 1958), S. 7 (2) — Suit for eviction — Landlord claiming bona fide requirement of house for his occupation — Tenant also leading counter-evidence — Appellate Court allowing eviction application — Tenant cannot be said to be prejudiced — Tenant cannot take advantage of subsequent petition filed by landlord for enhancement of rent and also for sale of property to him.

Where in an eviction proceeding, the landlord claimed that he wanted the house for his occupation inasmuch as the portion of his ancestral house occupied by him was not convenient for his occupation and that he wanted the house also to start a shop in the ground floor as it

was situated on the main road of the town and the tenant had also led counter-evidence, there could not be any question of prejudice in allowing the eviction application by the Appellate Court. (Para 9)

Further, if the landlord had filed a petition for enhancement of house rent during the pendency of eviction application and also made a suggestion to the tenant for sale of the property to him, the tenant could not get advantage of such position for quashing the judgment of the Appellate Court by issuing the writ of certiorari nor would it be a decisive question. AIR 1977 Punj & Har 158 (FB), AIR 1981 Ori 81, Disting. (Paras 10, 11)

Cases Referred: Chronological Paras

AIR 1981 Ori 81: 50 Cut LT 500	9
AIR 1977 Punj & Har 158 (FB)	8, 9
AIR 1964 SC 477	5
AIR 1960 SC 1168	5
AIR 1958 SC 398	5
AIR 1955 SC 233	5

A. Mukherjee, A. K. Misra and P. R. Barik, for Petitioners; G. Rath, P. C. Mohapatra and Addl. Govt. Advocate, for Opposite Parties,

DAS, J.:— Tenant in a proceeding for eviction under the Orissa House Rent Control Act is the petitioner. Admittedly, petitioner is a tenant under opposite party No. 1 in respect of a double-storied building on the main road of Jeypore town. Opposite party No. 1 filed a case for eviction on the ground that petitioner No. 1 has sublet the house to petitioner No. 2 and is in arrears of house rent and that opposite party No. 1 requires the house in good faith for his residence and for opening a shop.

2. The present petitioners in their counter contended that petitioner No. 2 is the son of petitioner No. 1 and there is no question of subletting. He is not a wilful defaulter. It is further stated that opposite party No. 1 has got sufficient other houses and at present he is residing in his ancestral house which has been divided into four equal portions. There is no need of opening any shop.

3. The House Rent Controller dismissed the application for eviction, but the appellate court set aside the judgment of the House Rent Controller and allowed the petition for eviction holding that opposite party No. 1 requires the house for his residence and also for starting a motor parts shop.

4. It is contended by Mr. Mukherjee, the learned counsel for the petitioners,

that petitioner No. 2 being the son of petitioner No. 1, there is no question of subletting. He further contends that opposite party No. 1 has his ancestral house and he has not stated in the petition filed before the House Rent Controller that he requires the house for starting a motor parts shop and this fact has been developed at the time of hearing. Mr. Rath, the learned counsel for opposite party No. 1, contends that apart from the question whether petitioner No. 1 has sublet the house to petitioner No. 2, the concurrent finding is that opposite party No. 1 requires the house in good faith for his occupation and for starting a shop. The relationship of petitioner No. 1 with petitioner No. 2 being admitted, the question of subletting the house does not arise.

5. It is contended on behalf of the petitioners that opposite party No. 1 filed a petition for enhancement of house rent during the pendency of the application for eviction and also made a suggestion to the petitioners for sale of the property to them. The appellate court has not taken notice of these facts and, therefore, cannot be said to have any objective satisfaction for setting aside the judgment of the House Rent Controller. Petitioners have prayed for issuance of a writ of certiorari quashing the judgment of the appellate court. In *Syed Yakoob v. K. S. Radhakrishnan* AIR 1964 SC 477, it has been held (at p. 479):

"A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals: these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can, similarly, be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice.

The jurisdiction of High Court to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an appellate Court. This limitation necessarily means that findings of fact reached by the inferior court or Tribunal as result of the appreciation of evidence cannot be reopened or questioned in writ proceedings.

An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which had influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari.

A finding of fact recorded by the Tribunal cannot, however, be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding being within the exclusive jurisdiction of the Tribunal, the points cannot be agitated before a writ Court."

The Supreme Court relied upon three previous decisions of that Court, namely, *Hari Vishnu Kamath v. Ahmad Ishaque*, AIR 1955 SC 233; *Nagendra Nath v. Commissioner of Hills Division*, AIR 1958 SC 398 and *Kaushalya Devi v. Bachittar Singh*, AIR 1960 SC 1168.

6. There is no dispute about the fact that there has been no wrong interpretation or misinterpretation of any provision of law. The only question, therefore, is whether a writ of certiorari can be issued to quash the appellate judgment simply on the fact that it has not taken into consideration the facts that opposite party No. 1, during the pendency of the eviction proceeding, demanded higher rate of rent and made a proposal to the petitioners for sale of the house. Further, opposite party No. 1 having his ancestral house which he is occupying, there is no bona fide requirement of the house in question and that opposite party No. 1 has not mentioned in the petition for eviction that he requires the house for starting a motor parts shop and has simply stated that he requires the house for opening a shop.

7. Admittedly, the house is a double-storeyed building and is situated on the main road of Jeypore town. It has been

found by the appellate Court that the ancestral house of opposite party No. 1 has been partitioned and opposite party No. 1 is occupying a portion which he has got by partition towards the backside of the building and he has to pass through the house of his co-sharers in order to come to the main road. As opposite party No. 1 has to pass through the house of his co-sharers, there have been ill-feelings, quarrels and dissatisfaction. Therefore, the house in question being on the main road and a double storeyed building, opposite party No. 1 requires the same for his occupation. This is a finding of fact. As regards non-mention of the words 'motor-parts shop' in the application before the House Rent Controller, it does not vitiate the claim of opposite party No. 1 for eviction of the petitioners. It has been provided in S. 7 of the Orissa House Rent Control Act that the landlord can claim possession of the house if he requires the house in good faith for occupation or use of himself, any member of his family or of any person or persons for whose benefit the house is held by him. The application is to be made in form 'A' appended to the Rules under the Orissa House Rent Control Act. This form does not specify anywhere any heading as to details of the requirement. On the other hand, the form requires detailed description of the house. Opposite party No. 1 has also stated that he requires the house for opening a shop. This in our opinion was sufficient to specify the requirement. In view of the facts that opposite party No. 1 is occupying a portion of his ancestral house towards the backside and it is not convenient for his access to that house from the main road; he intends to occupy the house in question which is situated on the main road and that he requires the house for his residence and also to start a shop in the ground floor as the house abuts the main road, there is sufficient proof of his bona fide requirement of the house.

8. Reliance has been placed by the petitioners on a decision reported in *Banka Ram v. Smt. Sarasti Devi*, AIR 1977 Punj & Har 158 (FB). This case is distinguishable. That was a case where there was a provision under S. 13 of the East Punjab Urban Rent Restriction Act that it should be contained in the petition for eviction that the applicant is not occupying another residential building in the urban area concerned and that he has not vacated such building without sufficient cause after the commencement of

the Act in the urban area. These two elements which were statutorily required to be stated in the petition had not been mentioned in the petition. It was, therefore, held that it was essential for the landlord to plead the ingredients of the Act in his eviction application. When the applicant had not pleaded, the prayer for eviction was refused. Under the Orissa House Rent Control Act, there is no such restriction, inasmuch as there is no such provision to be mentioned in the application. Therefore, the facts and circumstances of the Punjab & Haryana case are completely different from the instant case.

9. Petitioners have also relied upon *M/s. Health Stores v. Musamat Rahima Bai*, (1980) 50 Cut LT 500: (AIR 1981 Ori 81). That was a case in which the burden of proof had been wrongly placed and all the grounds taken were found to be not acceptable. Therefore, that case is of no help to the petitioners. It has also been held in *Banke Ram's case* (AIR 1977 Punj & Har 158) (FB) (supra) that if parties have entered into evidence and have, in fact, led evidence in the case, there cannot be any question of prejudice. In the instant case, after opposite party No. 1 had led evidence claiming that he wanted the house for his occupation, inasmuch as the portion of his ancestral house occupied by him was not convenient for his occupation and that he wanted the house also to start a motor-parts shop in its ground floor as it is situated on the main road, the petitioners have also led counter-evidence. Therefore, there cannot be any question of prejudice.

10. The question of requirement and the reasons for requirement are to be considered at the time of making the application. Subsequently, if the landlord wants to increase the rate of rent or if the case for eviction drags on for a long time and being desperate and coming to a breaking point makes an offer for sale during the pendency of the case, the petitioners cannot take advantage of this situation, nor will it be a decisive question.

11. For the above reasons, we hold that the findings of the appellate Court cannot be said to be based on no evidence. There is no arbitrariness in the said findings.

12. On the aforesaid analysis, we hold that the writ petition has no merit. It is, accordingly, dismissed. But in the circumstances of the case, we award no costs. We, however, direct the petitioners

to vacate the premises within six months from today.

B. C. PATNAIK, J.— I agree.

Petition dismissed.

AIR 1982 ORISSA 181

R. N. MISRA, C. J. AND

B. K. BEHERA, J.

Kari Khuntia and others, Petitioners; v. The State of Orissa and others, Opposite Parties.

Original Journ. Case No. 593 of 1980, D/- 18-3-1982.

Land Acquisition Act (1 of 1894), Ss. 4 (1), 5A — Acquisition for public purpose — Land of petitioners comprising one single plot — Lands sought to be acquired described as parts of whole plots — Sketch map of acquired area made available for inspection — Acquired area, not away from office of Collector — Notice also given at convenient place in locality — Petitioners, not filing any objection within time — Held, there was no scope for prejudice in making representation under S. 5A. AIR 1975 SC 1182 and AIR 1974 SC 2077, Expld. (Paras 5, 6)

Cases Referred : Chronological Paras

AIR 1980 SC 309	7
AIR 1978 SC 515	6
AIR 1975 SC 1182	5
AIR 1974 SC 2077	5
AIR 1970 SC 802	4

R. Mohanty, M. Patra, B. Dagara and M. R. Patra, for Petitioners; Govt. Advocate, B. Rath and M. R. Panda, for Opposite Parties.

R. N. MISRA, C. J.— Five petitioners have jointly filed this application under Art. 226 of the Constitution challenging acquisition proceedings taken under the Land Acquisition Act 1 of 1894 (hereinafter referred to as the 'Act') notification u/s. 4 (1) of the Act wherefor is dated 5-7-1978 published in the Orissa Gazette on 27-7-1978. The petitioners contend that acquisition proceedings in regard to the lands given in Schs. A, A-1 and A-2 of the writ application are vitiated on account of:—

(i) Want of clear description of the property sought to be acquired as parts of the whole plots were notified;

(ii) No notice of hearing u/s. 5-A of the Act was served on the petitioners and no opportunity of being heard was extended to them;

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(iii) Notification u/s. 6 of the Act shows that an area of 0.865 decimals was sought to be acquired out of 0.381 decimals in plot No. 1490. Such a glaring mistake is indicative of non-application of mind; and

(iv) Acquisition was contrary to the master plan prepared under the Greater Cuttack Improvement Trust Act inasmuch as the acquired area was earmarked for residential purpose and could not, therefore, be utilised for purposes of private bus and taxi stand.

2. The S. 4 (1) Notification in Annexure 1 indicated that the lands described below were intended to be acquired for a public purpose, namely, for locating the private bus stand and taxi stand at Badambadi:—

Khata No.	Plot No.	Total area	Acquisition area
1	2	3	4
793	1486	0.773 dec.	0.295 dec.
521	1487	0.897 dec.	0.688 dec.
521	1488	0.082 dec.	0.082 dec.
270	1489	0.078 dec.	0.076 dec.
521	1490	0.391 dec.	0.265 dec.
Total ...		Ac. 1.406 dec.	

As averred in paragraph 2 of the writ application, 'A' schedule land belongs to the petitioner No. 1 while the land under Sch. A-1 belongs to the petitioners 2 and 3 together and similarly the land under Schedule A-2 belongs to the petitioners 4 and 5. Acquisition of plots Nos. 1488 and 1489 is in entirety and part acquisition is in respect of the remaining 3 plots.

The petitioners are not interested in plot No. 1486. Petitioners 2 and 3 are interested in a little more than 166 decimals out of the total acquired area of Ac.0.688 decimals appertaining to plot No. 1487 while petitioners 4 and 5 are interested in Ac.0.126 decimals of plot No. 1487. Petitioners 4 and 5 appear to be interested in portions of plots Nos. 1488 and 1489, wrongly shown as plot No. 1439, in Schedule A-2 of the writ application.

3. Two counter-affidavits have been filed, one by opposite parties 1, 2, 3 and 5 and the other by opposite party No. 4. The joint counter-affidavit supports the acquisition and has disputed the several contentions advanced on behalf of the petitioners. In the counter affidavit of the Executive Officer while the stand taken by the other opposite parties has been generally supported, with refer-

ence to the reservation of the area for residential purpose no challenge has been advanced.

4. There is no dispute that the acquisition is for a public purpose. Admittedly, the provisions of S. 17 (1) of the Act were not invoked and, therefore, the land owners were entitled to a hearing u/s. 5-A of the Act. The petitioners assail that when 0.688 decimals out of 0.897 decimals of plot No. 1487 was notified for acquisition, clear demarcation should have been given to indicate the acquired area. Reliance has been placed on the decision of the Supreme Court in the case of Gunwant Kaur v. Bhatinda Municipality, AIR 1970 SC 802, where it has been observed (at p. 804) :—

"The Collector was acting for and on behalf of the State Government to make an offer of compensation for the lands to be acquired. The appellants were entitled to challenge the correctness of the Collector's opinion. Again the jurisdiction of the Collector depended upon the issue of a valid notification and the mere fact that the Collector was satisfied that the true area of land demarcated corresponded to the area notified — whatever that expression may mean — did not prevent the owners of the lands from contending before the High Court that they had no opportunity of making their representations under S. 5-A of the Act and of satisfying the Collector that the lands should not be acquired."

5. As we have already pointed out, the petitioners did not file any objection within the time allowed under the law. In the Schedules they have given, with reference to plot No. 1487 they have clearly indicated their area in respect of a part of the plot and have not specifically pleaded that they were not in a position to know whether their land had been notified for acquisition. The Notification u/s. 4 (1) (Annexure-1) indicates that a sketch map of the acquired area was also available to be inspected in the office of the Land Acquisition Collector. The property is located in the town of Cuttack and not away from the office of the Collector. The land to be acquired, in which the petitioners are interested is ultimately one single plot. The scope of prejudice is, therefore, very much minimised.

We may refer to two later decisions of the Supreme Court, one being the case of Aflatoon v. Lt. Governor, Delhi, AIR 1974 SC 2077, and the other being the case of Inderjit C. Parekh v. State of

Gujarat, AIR 1975 SC 1182. In *Aflaton v. Lt. Governor, Delhi* (AIR 1974 SC 2077) it was pointed out that whether the particulars given in the S. 4 Notification are sufficient to enable an objection to be filed under S. 5-A would depend upon the facts and circumstances of each case. We are of the view that in the facts of this case which we have detailed above, there was no scope for prejudice in making of a representation u/s. 5-A of the Act. In *Inderjit C. Parekh's case* (AIR 1975 SC 1182) it was pointed out that where the Notification u/s. 4 in which the area of the land to be acquired was stated as "part of Survey No. 56A measuring about 3000 sq. yards." was withdrawn and a fresh notification under S. 4 was published wherein the area was described as "5600 sq. yds. from the north-west corner of Survey No. 56A," no objection was available to be raised. The ratio of *Inderjit C. Parekh's case* clearly indicates that in the absence of prejudice no objection is indeed available.

6. The next question for consideration is as to whether there has been a denial of opportunity of making a representation of hearing as provided u/s. 5-A of the Act. Undoubtedly, the opportunity statutorily provided u/s. 5-A of the Act is an important one and the right of the owner to raise objection to acquisition though subservient to the right of eminent domain authorising the State to acquire lands of citizens for public purpose should not be lightly affected. The Land Acquisition Officer did issue notice and it has been categorically pleaded that the notices were duly served in the Thakur Ghar which is an important site in the locality and the report dated 8-11-1978 shows that copy of the notice was served by affixture after non-acceptance. Service has been duly attested and the Land Acquisition Officer who exercised powers of the court for certain purposes accepted such service of notice as adequate. Reliance was placed on the terms of S. 45 of the Act to challenge the adequacy of such service. On the materials placed before us, we are, however, not satisfied that it is open to the petitioners to challenge service in the teeth of the service report and the satisfaction of the Land Acquisition Officer. As pointed out by the Supreme Court in the case of *Bai Malimabu v. State of Gujarat*, AIR 1978 SC 515, the requirements of S. 4 (1) are (at p. 518):—

".....giving of a general notice and by two methods — (1) by the publication

of the notification in the Official Gazette and (2) causing public notice of the substance of such notification to be given at convenient places in the locality."

Admittedly, there has been a Gazette Notification and there is no serious dispute that notice had been given at a convenient place in the locality. We do not think, there is substance in the petitioner's challenge that there was no due notice.

7. Challenge to the acquisition was also on the ground that lands of some others had been released and the petitioners' lands were being taken away. The Supreme Court pointed out in the case of *Financial Commr., Haryana v. Kala Devi*, AIR 1980 SC 309 that the Court cannot interfere unless choice was made with oblique ends or was otherwise void. On the materials before us we do not think, a case has been made out to justify the stand of the petitioners.

8. For the reasons we have indicated, this writ application must stand dismissed but without any order for costs.

BEHERA, J.:— I agree with My Lord the Chief Justice.

Application dismissed.

AIR 1982 ORISSA 183

R. N. MISRA, C. J. AND

B. K. BEHERA, J.

Chinta Narayanamma, Petitioner v. Kholli Sahu and others, Opposite Parties.

Original Jurn. Case No. 1173 of 1980, D/- 17-3-1982.

(A) Constitution of India, Art. 226 — Finding of fact — Rent proceedings — Concurrent findings of fact by statutory authorities by giving cogent reasons therefor — Findings not perverse in nature — Cannot be interfered with in writ petition. AIR 1982 SC 756, Rel. on. (Para 4)

(B) Orissa House Rent Control Act (4 of 1988), S. 7 — Eviction — Suit for, on ground of bona fide requirement — Failure of landlady to examine herself as witness to substantiate her case — Adverse inference drawn against her by statutory authorities — Valid. (Evidence Act (1872), S. 114 Illu. (g)). AIR 1981 Bom 1, Rel. on. (Para 5)

Cases Referred : Chronological Paras
AIR 1982 SC 756 : (1981) 4 SCC 246 :
1982 All LJ 270 (1) 4

DZ/DZ/B682/82/VNP/MVJ

AIR 1981 Bom 1

5

N. V. Ramdas, B. L. N. Swamy, N. R. Agrawal and Y. S. N. Murty, for Petitioner; P. V. Ramdas and R. Mohanty, for Opposite Parties.

BEHERA, J.:— Challenge in this application under Arts. 226 and 227 of the Constitution is to the original and appellate orders (Annexures 1' and 2) passed by the House Rent Controller and the Chief Judicial Magistrate, rejecting the application of the petitioner under the Orissa House Rent Control Act, 1967 (Act 4 of 1968) (hereinafter referred to as the Act) and dismissing her claim for eviction of the opposite party No. 1 on the grounds (a) that the opposite party No. 1 was a wilful defaulter in the payment of rent and (b) the house in occupation of the opposite party No. 1 was required for the bona fide requirement of the petitioner. The petitioner seeks a direction from this Court for the eviction of the opposite party No. 1 after quashing Annexures 1 and 2.

2. The petitioner had inducted the opposite party No. 1 as a tenant from 25-1-1963 on a monthly rent of Rs. 35/- which later was enhanced to Rs. 45/- per month. The opposite party No. 1, it was alleged, was irregular in the payment of rent and since October, 1975, wilfully defaulted in the payment of rent. The other ground for the eviction of the opposite party No. 1 was that the petitioner intended to shift to the house in occupation of the opposite party No. 1 as she wanted to sell the present house under her occupation to discharge a loan amount of Rs. 35,000/- incurred by her, her grandson and others from the Orissa State Financial Corporation. The petitioner had also alleged that the opposite party No. 1 had taken the house for residential purpose on rent, but had used the same as his godown causing damages to the house. She had also claimed higher rent at the rate of Rs. 250/- per month as the house in question was in a commercial and business locality. All the grounds had been controverted by the opposite party No. 1 before the House Rent Controller (opposite party No. 2). Both the sides produced evidence before the opposite party No. 2 who, on a consideration of the materials placed before him, held that the petitioner had no bona fide requirement of the tenanted house and that the opposite party No. 1 was not a wilful defaulter. It was also held that the opposite party No. 1 had not been using the tenanted house as a go-

down nor had any damage been caused to that house. The rent was, however, increased to Rs. 100/-. Both the sides unsuccessfully appealed before the Chief Judicial Magistrate, Berhampur (opposite party No. 3), the petitioner challenging the findings of the opposite party No. 2 against her and the opposite party No. 1 challenging the enhancement of rent against him.

3. Mr. Y. S. N. Murty, the learned counsel for the petitioner, has submitted that the findings arrived at by the opposite party Nos. 2 and 3 with regard to the wilful default of the opposite party No. 1 and the bona fide requirement of the tenanted house of the petitioner are unreasonable and perverse. Mr. B. Mohanty, the learned counsel for the opposite party No. 1, has, however, submitted that the impugned orders are reasonable and well-founded and would not call for interference by this Court in its extraordinary jurisdiction.

4. Concurrent findings of fact of the statutory authorities giving cogent reasons therefor are not open to challenge in writ jurisdiction unless the findings are perverse or based on no evidence (See *Babu v. Deputy Director of Consolidation* (1981) 4 SCC 246: (AIR 1982 SC 756)). Both the opposite parties Nos. 2 and 3 have, for clear and good reasons, held as a fact that the opposite party No. 1 was not a wilful defaulter and accepted his case that the practice was that the petitioner used to collect rent from the opposite party No. 1 and as since October, 1975, no collection was made from him, he waited for some time and then remitted Rs. 180/- by postal money order on 27-2-1976 being the rent from 23-10-1975 to 28-2-1976 which was refused by the petitioner, evidenced by Ext. J. It would appear from Ext. K, the savings bank account with the Canara Bank, that the opposite party No. 1 then went on depositing the house rent in this account. True, this account had been opened on 29-6-1977 after the institution of the case under the Act, but this circumstance, by itself, would not warrant a conclusion that the opposite party No. 1 had been a wilful defaulter. Both the original and the appellate authorities have come to a concurrent finding in this regard against the petitioner and we see no justifiable ground to hold that this finding is based on no evidence or that this finding is perverse.

5. Section 7 of the Act provides that if the landlord requires the house in good

faith for the occupation or use of himself, any member of his family or of any person or persons for whose benefit the house is held by him, he may, subject to the provisions of the Act, apply to the Controller for an order directing the tenant to put him in possession of the house. The word "requires" involves some element of need and the onus is on the landlord to show fact and circumstances proving the necessity which must be an honest one. It should not be the outcome of an oblique motive or a false pretence. On a consideration of the materials before them, the opposite party Nos. 2 and 3 have concurrently found that there was no clear and cogent material on the record that the petitioner had incurred the loan from the Orissa State Financial Corporation and had to discharge the debt for which sale of the house at present in her occupation was necessary and that, therefore, she required the tenanted house for her own occupation. The other ground that as the family deity was in the tenanted house, the marriage of the grand-daughter of the petitioner was to be performed in that house had not been accepted by both the authorities and in our view, rightly so, in view of the fact that the marriage of the other grand-daughters had been performed in the house presently under the occupation of the petitioner, PW 3, the grandson of the petitioner, had testified about this necessity, but had admitted that the marriages of his other sisters had been performed in the present residential house of the petitioner. Both the authorities had drawn adverse inference for the non-examination of the petitioner herself as a witness either by appearing before the opposite party No. 2 or by making an application to be examined on commission. The petitioner would be the best person to testify about her bona fide requirement. Instead of examining herself, the petitioner chose to examine PW 3, her grandson or her behalf and PW 3 was said to be the power-of-attorney holder of the petitioner. Both the authorities have held that the petitioner had deliberately avoided to be examined to substantiate her case. In a case of this nature, involving the question of bona fide requirement of the house in good faith, the examination of the petitioner would be necessary and in this connection, reference may be made to the observations of the Bombay High Court in the case of Nanalal Goverdhandas & Co. v. Smt. Samratbai Lilachand Shah, AIR

1981 Bom 1. Section 13 (1) (g) of the Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947) provides that the premises must be reasonably and bona fide required by the landlord. The landlady in that case had not been examined and Ramanlal, her son, who was said to be her constituted attorney, was examined on her behalf. It was observed and held thus (at p. 8) :

"22. It may be the requirement for somebody else but not by somebody else. In all cases the requirement must be by the landlord himself. It is also implicit in the above propositions which have emerged from the examination of the various cases that there must be a nexus between the interests of the landlord and the occupation of the premises by himself or by somebody else. If there is no nexus of the interests of the landlord with the occupation of the premises, then the condition mentioned in S. 13 (1) (g) cannot be said to have been fulfilled. Section 13 (1) (g) says that the premises must be reasonably and bona fide required by the landlord. The bona fide requirement is in the first place a state of mind though it may be something more. It must, therefore, be deposed to by the person who is requiring the premises under S. 13 (1) (g) namely, the landlord. If the landlord does not step into the witness-box to bring before the Court legal evidence for proving his requirement, then it cannot be said that he reasonably and bona fide requires the premises as mentioned in S. 13 (1) (g). The landlord can delegate the authority to conduct a case but he cannot delegate the duty to depose.

23. While examining the rival contentions of the parties, I have mentioned in sufficient detail the evidence that has come on record in this case. However, it would be useful if I enumerate again the facts which have been established. The respondent, who is the landlady, has not been examined in support of her case nor has she been examined as a witness on commission. On this ground alone the suit of the respondent ought to have been dismissed because the bona fide requirement which, as I have mentioned above, is a state of mind and something more must be proved in this case. Ramanlal, the respondent's son, is said to be her constituted attorney but that could only be for the purpose of conducting the case but his evidence cannot be substituted for the legal evidence of the landlady herself."

In our view, the learned Judge of the Bombay High Court has correctly laid down the law and the opposite parties Nos. 2 and 3 were justified in drawing adverse inference against the petitioner for not examining herself as a witness.

6. We thus find that the impugned orders cannot be said to be unreasonable or perverse calling for interference by this Court. We would accordingly dismiss the application, but in the circumstances of the case, make no order as to costs.

R. N. MISRA, C. J.:— I agree.

Application dismissed.

AIR 1982 ORISSA 186

R. N. MISRA, C. J.

Bhagabat Sahu, Petitioner v. Parbati Samal and others, Opposite Parties.

Civil Revn. No. 666 of 1979, D/- 16-3-1982.*

(A) Civil P. C. (5 of 1908), S. 47 — Scope — Judgment-debtors contending that they were not properly represented and were not parties to the decree — Objection does not fall within ambit of S. 47 and must be decided by a separate suit. AIR 1946 Nag 275, (1909) 36 Ind App 168 (PC), AIR 1917 Cal 844, AIR 1940 Pat 59 and AIR 1924 Nag 81, Rel. on.; AIR 1969 Ori 52, and AIR 1968 SC 954, Disting. (Para 6)

(B) Civil P. C. (5 of 1908), O. 2, R. 33 — Scope — Impleadment of minor — Duty of Court.

Once the minors are appropriately impleaded and represented, the duty under R. 2 of O. 33, C. P. C. would come to an end and the proceeding before the court must be taken to have been duly constituted. A distinction must be drawn between a case where the minors are not adequately represented from the commencement and the proceeding at its inception, therefore, is a nullity and a case where the minors are adequately represented and there is a duly constituted proceeding where the guardian acts for some time and then omits to take steps.

(Para 3)

Cases Referred : Chronological Paras

AIR 1969 Ori 52	7
AIR 1968 SC 954	7
AIR 1946 Nag 275	5

*From order passed by D. K. Sahoo, Munsif 1st Class, Cuttack, D/- 10-5-1979.

AIR 1940 Pat 59	6
AIR 1924 Nag 81	6
AIR 1917 Cal 844	6
(1909) 36 Ind App 168 : ILR 31 All 572 (PC)	6

R. K. Mohapatra, P. C. Misra and S. C. Sahu, for Petitioner; B. H. Mohanty, S. C. Misra, N. K. Laha and S. Mohanty, for Opposite Parties.

ORDER:— The decree-holder in a title suit assails in this application u/s. 115 of the Civil P. C. the order of the Executing Court entered on an application u/s. 47 of the Civil P. C. holding that the final decree was not executable.

2. The short facts relevant for the point arising for consideration are these:

The plaintiff-petitioner filed two suits, being Money Suit No. 320 of 1965 for realisation of a specific amount and Title Suit No. 129 of 1966 for dissolution of a partnership and rendition of accounts. The two suits were heard analogously and decreed on 22-7-68. The defendant preferred Title Appeal No. 115 of 1968 and Money Appeal No. 31 of 1968 against the respective decrees. Money Appeal No. 31 of 1968 was dismissed and the Title Appeal was allowed. Thereupon the plaintiff-petitioner preferred Second Appeal No. 7 of 1970 against the reversing decree of the Title Appeal and the defendant preferred Second Appeal No. 4 of 1970 against the affirming decree in the Money Appeal. During the pendency of these two appeals before this Court, the sole defendant died on 1-12-72 leaving behind his widow, 3 sons and 4 daughters. In defendant's Second Appeal No. 4 of 1970 the legal representatives were substituted on their own asking and in Second Appeal No. 7/70, the plaintiff-appellant took steps for bringing the legal representatives of the deceased defendant on record. Second Appeal No. 4 of 1970 was dismissed and the money decree became final. Second Appeal No. 7 of 1970 was remanded to the lower Appellate Court on the points indicated in this Court's judgment. After remand, the legal representatives were heard and their appeal was dismissed on contest on 21-12-73. As the legal representatives of the defendant did not prefer any further appeal, the appellate decree became final. The plaintiff levied Execution Case No. 9 of 1973 for realisation of the money decree and the amount was recovered. The plaintiff filed another independent execution case for realisation of the costs decreed in the preliminary decree in the Title Suit and the same was also paid by the legal re-

representatives of the original defendant. Final decree proceeding was taken by the plaintiff as the defendant's legal representatives failed to amicably finalise the accounts. In the final decree proceeding notices were issued to the opposite parties and the opposite party No. 1, the mother, received notices for self and as mother-guardian of the minor children on 2-9-74. When a pleader-commissioner was appointed in the final decree proceeding, the mother also appeared for herself and for the minor children as would appear from a memorandum of appearance available in the records of the original suit in the final decree proceeding. The memorandum is dated 14-12-74. The commissioner allowed time, but thereafter the mother did not take any steps. The commissioner submitted report after taking accounts and ultimately the final decree was passed. When Execution Case No. 6 of 1978 was levied for recovery of the money in terms of the final decree, the mother-guardian for self and as guardian of the minors as also some of the legal representatives of the original defendant who had become major in the meantime filed an objection. At their instance, the objection was treated as an application u/s. 47 of the Civil P. C. and Miscellaneous Case No. 218 of 1978 was registered. In the executing court it was contended that the final decree was passed without getting the minors adequately represented and, therefore, the minors were not bound by the decree and the decree itself became a nullity. This objection of the judgment-debtors has been accepted. That is how the decree holder is before this Court in revision.

3. The question that is canvassed has two facets:—

(i) Whether the legal representatives of the original defendant were really unrepresented and, (ii) in case they, admittedly minors, went unrepresented, whether the decree was a nullity and could be ignored by the executing court.

I have already pointed out that when the original defendant died, the legal representatives were brought on record. The minor children were asked to be represented by their mother, the natural guardian. The natural guardian received summons from the court and entered appearance. She also participated in the final decree proceeding and even took steps before the Pleadar-Commissioner but later chose not to appear in the proceedings and allowed the matter to get concluded *ex parte*.

Order 32, R. 3 C.P.C. requires that where the defendant is a minor, the court, on being satisfied of the fact of minority, is to appoint a proper person to be guardian for the suit for such minor. This provision was obviously applicable to the facts of this case. The court had done its duty in ensuring that the minor children of the original defendant were appropriately represented by their natural guardian. If the final decree proceeding had been allowed to continue without the legal representatives of the defendant being represented, possibly it would be a clear case of the decision being a nullity. It is open to a guardian representing the interests of the minors after he or she is aware of the scope of the litigation while acting prudently not to contest the lis. This would be certainly a matter of prudent management of the minors' interests and, therefore, a matter within the competence of the guardian. Once the defendants are appropriately impleaded and represented, the duty under R. 2 of O. 33, C. P. C. would come to an end and the proceeding before the court must be taken to have been duly constituted. A distinction must be drawn between a case where the minors are not adequately represented from the commencement and the proceeding at its inception, therefore, is a nullity and a case where the minors are adequately represented and there is a duly constituted proceeding where the guardian acts for some time and then omits to take steps.

4. Section 47 of the Civil P. C. provides:—

"All questions arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge or satisfaction of the decree shall be determined by the court executing the decree....."

That the decree was not obtained validly is strictly not a matter within the ambit of discharge or satisfaction. Does it come within the scope of execution?

5. In *Mangal Prasad Hiraram v. Teklal*, AIR 1946 Nag 275, a learned single Judge dealt with a question of this type and indicated:—

"..... The ordinary principle is that an executing Court cannot go behind a decree. A person dissatisfied with a decree on the ground that he was not properly represented can have the decree set aside by an independent suit."

6. These were the weighty observations of the Privy Council in *Rashid-un-*

missa v. Mahammad Ismail Khan, (1909) 36 Ind App 168. To the same effect are the observations of the Calcutta High Court in Kalipada Sirkar v. Hari Mohan Dalal, AIR 1917 Cal 844 as also of the Patna High Court in Umar v. Mahabir Lal, AIR 1940 Pat 59. In Biharsingh v. Nawalsingh, AIR 1924 Nag 81, it was stated that it was not open to a judgment-debtor on the execution side to raise any objection challenging the very foundation of a decree, that an objection that the decree was collusive or in respect of a non-existing debt is not one relating to the execution, discharge or satisfaction of the decree and cannot be tried under S. 47, C.P.C., and that such a question can only be tried in a regular suit brought for the purpose. Puranik, J. in the Nagpur case pointed out that Section 47 takes for granted that a valid decree exists and all questions arising between the parties to the suit in which the decree was passed on their representatives and relating to execution, discharge or satisfaction of the decree are to be determined by the court executing the decree and not by a separate suit. If the judgment-debtors contend that they were not properly represented and were not thus parties to the decree they cannot come u/s. 47 as if they were parties to the suit. This is a matter, therefore, which has to be decided by a separate suit. I am inclined to agree with this principle. Where the objection is that the decree is a nullity because judgment-debtors were not duly represented and, therefore, were not strictly parties to the suit, that must be a matter left to be agitated in an independent action and not to be within the ambit of S. 47 of the Civil P. C.

7. Counsel for the judgment-debtors, on the other hand, indicated to me two decisions, one of this Court in Manoranjan Samanta Kumar v. Brundabati Veergam, AIR 1969 Ori 52, and the other of the Supreme Court in Ram Chandra Arya v. Man Singh, AIR 1968 SC 954. The facts of both the cases are somewhat different and the question that arises for consideration in this case did not fall for decision in either of those two cases. The principle which I have indicated leads to a reasonable conclusion that not by way of objection u/s. 47, C.P.C. but by an independent action the judgment-debtors were entitled to raise their objection against the decree. The executing Court, in my opinion, went beyond its jurisdiction in entertaining the ob-

jection and holding that the decree obtained in a properly constituted proceeding was a nullity and was, therefore, not executable.

8. The Civil Revision is accordingly allowed and the order of the executing Court is vacated. There would be no order for costs.

Revision allowed.

AIR 1982 ORISSA 183

R. N. MISRA, C. J. AND
J. K. MOHANTY, J.

Rajkishore Senapati and others, Petitioners v. Utkal University and another, Respondents.

O. J. Cs. Nos. 1077 to 1081 of 1979, D/- 24-4-1981.

Evidence Act (1 of 1872), S. 115 — Estoppel — Petitioners initially declared successful in annual B.A. examination — Subsequent notification by University declaring them to have failed — University when estopped from changing its initial declaration.

In the instant case the petitioners who appeared at the annual B.A. examination were initially declared successful by the University on the basis of marks added by applying hard case rules. Under this non-statutory rule if a candidate fails in any two subject for a total of 15 marks or less in written papers he can be made to pass in both the subjects in case the deficiency in each subject was 5% or less. Being so declared, some of the petitioners took admission to higher classes while some others registered themselves in employment exchange. Subsequently, on finding that the hard case rules were wrongly applied the University by subsequent notification declared the petitioners to have failed in the examination.

Held, University was estopped from changing its initial declaration. (Para 6)

Whatever has been done in the matter of application of the hard case rules leading to the declaration of the initial result was within the knowledge of the University and petitioners cannot be held to have been aware of anything relating to it. The mistake, if any, was, therefore, not mutual but only within the knowledge of the University and its officers. By its own conduct, the University having represented to the petitioners that they had passed and the petitioners having changed their position on the basis of such representation, the University was precluded by the rules of estoppel from

FY/GY/D51/81/VVG

acting otherwise in derogation to the representation made earlier. Case law discussed. (Paras 5, 6)

Cases Referred: Chronological Paras

AIR 1978 Orissa 65	5
AIR 1978 Orissa 68	5
AIR 1973 All 442	5
AIR 1971 Orissa 276: ILR (1971) Cut 242	1

Dr. S. C. Dash, for Petitioners; S. C. Mohapatra and N. C. Panigrahi, for Respondents.

MISRA, C. J.:— Petitioner in each of these five writ applications appeared at the Annual B. A. Examination of the Utkal University of the year 1979 from the Nimapara College. The Utkal University has framed a set of hard case rules in terms of which if a candidate fails in any two subjects for a total of 15 marks or less in written papers, he could be made to pass in both the subjects in case the deficiency in each subject was five per cent or less. As indicated by a Bench of this Court in the case of Smt. Gita Mishra v. Utkal University ILR (1971) Cut 242: (AIR 1971 Orissa 276) these Rules have been in vogue for many years and have been treated to be valid. The five petitioners had failed in English and Modern Indian Language. During the year in question instead of the Board of Examiners scrutinizing the cases of such candidates as the petitioners, the Tabulators were authorised to give effect to the hard case rules. On the basis of the addition of marks given by the Tabulators each of the petitioners was declared to have passed the Annual B. A. Examination. The Principal of the Nimapara College as agent of the University issued the certificates and mark-sheets. On the basis of such certificates each of the petitioners took further steps for securing seats for higher study and/or registering himself for employment. Within about a little more than two weeks from the date of publication of the results by a fresh notification each of the petitioners was declared to have failed. These writ applications have been filed challenging the subsequent notification that petitioners

have failed to pass the Annual B. A. Examination.

2. Given below is a statement showing case-wise the marks actually added in respect of each of the petitioners and the total permissible addition:—

(See Table below)

Dr. Das on behalf of the petitioners in a common argument contends that under the Statutes it is the Board of Examiners who was to look into these cases and apply the hard case rules. In the year 1979, the work was not assigned to the Board of Examiners as required by the Statutes and the Tabulators were asked to do the job. Even if a mistake had occurred to the extent that more than five per cent marks have been added, since the results had been duly published and the petitioners had already taken further steps on the basis of the published results, the University authorities were estopped from recalling the publication and declaring the petitioners to have failed.

3. Two separate affidavits have been filed— one by the Utkal University (Opposite Party No. 1) and the other by the Principal of the College from where petitioners took the examination. In the counter-affidavit, it has been conceded that though the Statute required that the Board of Examiners should have scrutinized the results for the purpose of application of the hard case rules, contrary to the statutory mandate in the year in question, the work has been handled by the Tabulators. The Controller of Examinations who has given the counter-affidavit in paragraph 18 thereof has pleaded:

"That the statement in paragraph 6 of the writ application is not correct. The matters relating to hard case rules are no more being sent to the Board of Conducting Examiners. This step has been taken by the University to expedite the publication of the results as the candidates were suffering a lot on account of delay in publication of their results. If the matter would have been sent to the Board of Conducting Examiners, there would not have been any scope for any

Case Number	Marks actually added			Total permissible limit		
	English	M.I.L.	Total	English	M.I.L.	Total
OJC 1077/79	6	8	14	8	4	12
OJC 1078/79	8	6	14	8	4	12
OJC 1079/79	1	8	9	8	4	12
OJC 1080/79	7	8	15	8	4	12
OJC 1081/79	9	6	15	8	4	12

mistake and the mistake would have been detected by competent examiners who are thorough in the statutory provisions. The matters not having been submitted to the Board of Conducting Examiners and the Tabulators themselves having made the mistake, this mistake has been reflected in the tabulation register and accordingly a mistaken result was published. The University would have no objection if the entire publication of the result is cancelled as the same has not been referred to the Board of Conducting Examiners. In that case the result of the petitioner would also be cancelled and the correct position would come in the subsequent notification. It is a correct submission by the petitioner that the Tabulators are unknown to the statute relating to publication of the results by the University....."

We are surprised by the stand taken by the University. If the law required that the matter had to be handled by the Board of Conducting Examiners and if the Tabulators were unknown to the statutes, it is beyond comprehension that a statutory authority like the University dealing with cases of thousands of students would take to a procedure not approved by law and when confronted with certain difficulties would come forward to plead that it had no objection to have the entire publication of results of one year to be cancelled. It is difficult for us to accede to such a stand as all those who passed in the year 1979 are not before us and to declare their results to have been cancelled at this stage might put them in a very embarrassing situation to their prejudice. The conceded position, however, remains that the Board of Conducting Examiners which is the prescribed authority did not scrutinize the answer papers and the work had been handled by Tabulators who were not authorised under the Statutes.

4. That the matters relating to the petitioners had not been handled by the prescribed authority, but the Tabulators had dealt with the same, was within the special knowledge of the University and was not known to the petitioners. The Tabulators while applying the hard case rules to the petitioners kept in view the fact that failure was in two subjects and the total deficiency was within the range of 15. They, however, overlooked the limitation that deficiency should be within the ambit of five per cent. The addition in the M.I.L. paper in every case and in the English paper in O.J.C. No.

1081 of 1979 has been beyond the permissible limit with reference to the five per cent limit.

5. The question for consideration now is as to whether the rule of estoppel is applicable against the University and in the facts and circumstances indicated the University should have been held to have been estopped from changing the declaration of petitioners' results as initially done. Whatever has been done in the matter of application of the hard case rules leading to the declaration of the initial result was within the knowledge of the University and petitioners cannot be held to have been aware of anything relating to it. The mistake, if any, was, therefore, not mutual but only within the knowledge of the University and its officers. Though the extent of change on the basis of representation may not be substantial, there is clear material that each of the petitioners had changed his position to some extent. Some of the petitioners had after obtaining their mark sheets applied for admission for higher study while others had registered themselves with the employment exchange in search of service. We shall not, therefore, be wrong in saying that on the basis of the representation made by the University to the petitioners, they have taken steps on the footing that they have become graduates of the Utkal University. The only other aspect to consider for the application of the rule of estoppel is whether by extending the rule, we cover the field of Statutes. The Hard Case Rules are not statutory and have been evolved as an administrative process to meet hard cases. A mistake in relation to the application of the rules, therefore, does not involve any statutory rule. As we have already indicated, of the three aspects relating to the application of the hard case rules, mistake was committed in respect of only one, namely the upper limit of five per cent had been lost sight of while addition was confined to total marks of 15 and to cases where failure was in two subjects. In our view, a situation of this type is clearly covered by the rule indicated by a Division Bench of this Court in the case of Naba Kishore Gadapalla v. Utkal University, AIR 1978 Orissa 65. In a later decision in the case of Haripada Das v. Utkal University, AIR 1978 Orissa 68, the learned Chief Justice while referring to the earlier case stated:—

".....This again was not a case where the plea of estoppel against statute was

accepted. The petitioner succeeded on the basis of commission and omission of the University. In para 4 of the judgment the court has said (at p. 67 of AIR):—

"The University cannot be permitted to plead by disclosing facts within its special knowledge that the mark-sheet was erroneous and petitioner as a fact had secured only 44 marks and not 56 as disclosed contemporaneously by the University."

We are inclined to think that on the facts of this case, the rule of estoppel has full application. The principle followed by the Allahabad High Court in the case of Anil Kumar Srivastava v. University of Allahabad, AIR 1973 All 442 is also applicable and estoppel in this case is not against statute. By its own conduct, the University having represented to the petitioners that they had passed and the petitioners having changed their position on the basis of such representation, the University is precluded by the rules of estoppel from acting otherwise in derogation to the representation made earlier. Mr. Mohapatra for the University emphasizes upon the feature that the time-lag between the two notifications was small. We are aware of the position that the cancellation came within about a fortnight. But that by itself does not take the matter out of the ambit of the application of the rules of estoppel particularly when even within that period, petitioners had taken steps on the basis of representation that they had passed. On the analysis indicated above, each of these writ applications must succeed and the initial notification holding that the petitioners had been successful at the Annual B. A. Examination of 1979 must be sustained and the impugned notification under Annexure-5 declaring each of the petitioners to have failed is quashed. As in our view, the action of the University was not mala fide, we do not award costs.

6. Before we part with these cases, we must again reiterate what we have been saying on several occasions. The University is an institution which must function appropriately in order that it may continue to serve the purpose for which it has been set up. To err is human, but there must be a limit to errors and a statutory public body like the University must conduct itself in such a way that confidence of the public in its activities may not be shaken and representations made by the University in the shape of its decisions and notifications should be

foolproof so that people at large can act upon such representations. This can be possible if errors are ruled out to the point of the minimum. It pains us to find that the past conduct of the University spread over years has been far below the expectation and repeated warnings held out by us have not brought about any positive change.

J. K. MOHANTY, J.:— I agree.

Application allowed.

AIR 1982 ORISSA 191

R. N. MISRA, C. J.

Mulraj Doshi, Petitioner v. Gangadhar Singhania, Opposite Party.

Civil Revn. No. 167 of 1981, D/- 21-4-1982.*

(A) Civil P. C. (5 of 1908), Sec. 24 — Words "competent to try" refers to pecuniary jurisdiction and not territorial jurisdiction. AIR 1973 Mad 2 (FB), Rel. on.

(Para 4)

(B) Civil P. C. (5 of 1908), Sec. 24 — Execution proceeding before Court of Munsif — Pendency — It can be transferred by District Judge to Subordinate Judge competent to try it. (Orissa House Rent Control Act (4 of 1963), S. 15).

Section 15 of the Orissa House Rent Control Act after making the order of eviction a decree by a deeming provision fixes the Court where execution has to be levied. The use of the words "shall be executable.....in the Court of the Munsif within the local limits of whose jurisdiction the house is situate" has no other effect than indicating the executing Court. Once the execution case is filed in that Court and the proceeding commences in the prescribed manner, it becomes a pending civil proceeding to which the Civil P. C. applies. Consequently the District Judge can exercise his power under S. 24, C. P. C. to transfer such proceeding to the Subordinate Judge competent to try it. Case law discussed.

(Para 15)

Cases Referred : Chronological Paras

AIR 1981 Raj 176	4
AIR 1973 Mad 2 (FB)	4
AIR 1971 Ori 71 (FB)	3
(1968) 34 Cut LT 43	3
AIR 1966 SC 1888 : 1966 Cri LJ 1514	3
ILR (1963) Cut 905 : 29 Cut LT 594	3
AIR 1962 SC 903	3
AIR 1961 Mad 247 : 1961 (1) Cri LJ 821	3

*From order passed by B. N. Misra, Sub. J., Rourkela, D/- 23-2-1981.

EZ/FZ/C210/82/VNP/SSG—H

AIR 1958 Andh Pra 216 4
 AIR 1956 Bom 481 (FB) 3
 AIR 1948 PC 12 3
 AIR 1941 All 101 (FB) 3
 AIR 1933 All 178 (1) : 136 Ind Cas 384 4

A. K. Mohanty, Ch. S. Das and S. C. Mohapatra, for Petitioner; R. C. Misra, for Opposite Party.

ORDER :— This is a judgment-debtor's application under S. 115 of the Civil P. C. challenging the executability of the order of eviction passed by the Controller amounting to a decree in the court of the Subordinate Judge at Rourkela. The opposite party filed House Rent Control Case No. 28 of 1968, obtained an order of eviction and levied execution thereof in the court of the Munsif, Panposh. The District Judge of Sundergarh transferred the said case in exercise of powers under S. 24 of the Civil P. C. to the court of the Subordinate Judge at Rourkela. When notice to show cause why the order of eviction may not be executed was issued, the judgment-debtor appeared before the Subordinate Judge and objected to his jurisdiction to proceed with the execution on the ground that it was contrary to the provisions of Sec. 15 of the Orissa House Rent Control Act. The objection has been overruled and the judgment-debtor has carried this revision application.

2. Section 15 of the Act provides :—

"The order of the Controller made under S. 7 directing the tenant to put the landlord in possession of the house, shall be deemed to be a decree and shall be executable as such in the Court of the Munsif within the local limits of whose jurisdiction the house is situate."

Relying on this provision, the judgment-debtor has contended that the order of eviction having been deemed to be a decree is only executable in the court of the Munsif and such a statutory execution is not available to be transferred to any court other than the named one. Therefore, in exercise of powers under S. 24 of the Civil P. C., the District Judge had no jurisdiction to transfer the case to a court other than the court of the Munsif. At the time the stay application came up for consideration, the entire matter was heard. Mr. S. C. Mohapatra volunteered to support the application and petitioner's counsel assisted Mr. Mohapatra in support of the stand taken in the revision. According to Mr. Mohapatra, the direction for transfer of the execution case is contrary to law, inasmuch as the statute constitutes the Mun-

sif with local jurisdiction to be the executing court.

3. It is not disputed that the Munsif named in S. 15 of the Orissa House Rent Control Act is a Civil Court and to proceedings in his Court, the Civil P. C. has application. The Supreme Court in the case of Ram Chandra Aggarwal v. State of Uttar Pradesh, AIR 1966 SC 1888, was considering the applicability of S. 24 of the Civil P. C. to a reference made under S. 146 of the Criminal P. C. It observed (at p. 1891):—

"The next contention — and it was the one pressed strenuously by him — was that a proceeding upon a reference under Sec. 146 (1) entertained by a civil Court not being an original proceeding the provisions of S. 141, C. P. C. are not attracted and that, therefore, those provisions of the Civil Procedure Code which relate to suits are not applicable to a proceeding undertaken by a civil Court upon a reference to it under S. 146 (1) of the Code of Criminal Procedure. A number of cases dealing with this point were brought to our notice either by him or by Mr. Goyal. It seems to us, however, that those cases are not relevant for deciding the point which is before us. In passing, however, we may mention the fact that a Full Bench of the Allahabad High Court has held in *Maha Ram v. Harbans*, ILR (1941) All 193 : (AIR 1941 All 101) (FB) that the civil Court to which an issue on the question of proprietary rights has been submitted by a revenue Court under S. 271 of the Agra Tenancy Act, 1926 has jurisdiction to refer the issue to arbitration under paragraph 1 of Schedule II of the C.P.C. This decision is based upon the view that by virtue of S. 141, C. P. C. the provisions relating to arbitration contained in the second schedule to the Code of Civil Procedure, before the repeal of that schedule, applied to a proceeding of this kind. Similarly recently this Court has held in *Munshi Ram v. Banwari-lal*, AIR 1962 SC 903 that under Section 41 of the Arbitration Act and also under S. 141, C. P. C. it was competent to the Court before which an award made by an arbitration tribunal is filed for passing a decree in terms thereof to permit parties to compromise their dispute under O. XXIII, R. 3, C.P.C. Though there is no discussion, this Court has acted upon the view that the expression civil proceeding in Sec. 141 is not necessarily confined to an original proceeding like a suit or an application for appointment of a guardian etc., but that

it applies also to a proceeding which is not an original proceeding. Thus, though we say that it is not necessary to consider in this case whether the proceeding before the civil Court is a civil proceeding as contemplated by S. 141 or not there is good authority for saying that it is a civil proceeding. All that we are concerned with in this case is whether the provisions of S. 24 (1) (b) of the Code of Civil Procedure are available with respect to a proceeding arising out of a reference under S. 146 (1), Cr. P. C. The relevant portion of S. 24 may, therefore, be set out. It reads thus :

XX XX XX
It plainly speaks of other proceeding pending in any court subordinate to it and not only to the civil proceeding pending before a subordinate Court. The decisions of the Privy Council and one decision of this Court which we have earlier quoted would warrant the application of the provisions of the Code of Civil Procedure generally to a proceeding before a civil Court arising out of a reference to it by a Magistrate under S. 146 (1) of the Code of Criminal Procedure. The expression proceeding used in this section is not a term of art which has acquired a definite meaning. What its meaning is when it occurs in a particular statute or a provision of a statute will have to be ascertained by looking at the relevant statute. Looking to the context in which the word has been used in S. 24 (1) (b) of the Code of Civil Procedure it would appear to us to be something going on in a Court in relation to the adjudication of a dispute other than a suit or an appeal. Bearing in mind that the term proceeding indicates something in which business is conducted according to a prescribed mode it would be only right to give it, as used in the aforesaid provision, a comprehensive meaning so as to include within it all matters coming up for judicial adjudication and not to confine it to a civil proceeding alone. In a recent case Kochadai Naidu v. Nagayamsami Naidu, ILR (1961) Mad 413 : (AIR 1961 Mad 247), Ramachandra Iyer, J. (as he then was) was called upon to consider the very question which arises before us. The learned Judge held that a proceeding before a Civil Court arising out of a reference to it under S. 146 (1), Cr. P. C. can be transferred by the High Court or District Court under S. 24, C. P. C. because it is in any case a proceeding. He has also considered this question from

the angle of the nature of the proceeding and expressed the view that the proceeding was a civil proceeding to which the procedure for suits could, with the aid of S. 141, C. P. C. be applied. If indeed the term proceeding in S. 24 is not confined to a civil proceeding there is no need whatsoever of taking the aid of S. 141, C. P. C."

A learned single Judge in this Court in the case of Binayak Boxi v. Harihar Misra, (1968) 34 Cut LT 43, has taken the same view. Lord Simonds speaking for the Judicial Committee in the case of Adaikappa Chettiar v. Chandrasekhara Thevar, AIR 1948 PC 12, observed :—

".....The true rule is that where a legal right is in dispute and the ordinary Court of the country are seized of such dispute the Courts are governed by the ordinary rules of procedure applicable thereto and an appeal lies, if authorised by such rules, notwithstanding that the legal right claimed arises under a special statute which does not in terms confer a right of appeal....."

A learned single Judge of this Court in the case of Lakshman Kumar Patnaik v. Smt. Binapani Sahu, ILR (1963) Cut 905, held that to the execution proceeding arising out of an order under the Orissa House Rent Control Act, the Code of Civil Procedure has full application. Once the order of eviction is deemed to be a decree and is executed in the Civil Court, there can be no scope to dispute that the Code of Civil Procedure would apply.

A Full Bench of this Court in the case of Land Acquisition Officer, Kalahandi v. Mst. Rahim Rai, AIR 1971 Orissa 71 (FB) dealing with references under the Land Acquisition Act also held :—

"The result of the aforesaid analysis is that a Subordinate Judge while functioning as a Court under the Act is a court subordinate to the District Judge and the latter has jurisdiction to transfer the case to the Subordinate Judge."

A Full Bench of the Bombay High Court in the case of Ranchhodlal Vallabhdas v. Mahendrakumar Ambalal, AIR 1956 Bom 481 (FB) took the view that the District Judge was entitled to exercise jurisdiction under S. 24 of the Civil P. C. in the matter of transferring a proceeding under the Bombay Rents, Hotel and Lodging House Rates Control Act.

4. By the Amending Act of 1976 (Central Act 104 of 1976), sub-sec. (3) was inserted into S. 24 of the Civil P. C. and

'proceeding' was defined to include 'a proceeding for the execution of a decree or order'. Under S. 24 in order that a transfer may be directed, it is necessary —

(i) that the suit or proceeding must be pending before the Court from which it is transferred;

(ii) that the Court to which it is transferred is one competent to try it; and

(iii) that the Court to which it is transferred is subordinate to the High Court or the District Court which orders the transfer.

There is no dispute before us that conditions (i) and (iii) are satisfied in this case, namely, the execution case was pending at the time of transfer and that the Munsif, Panposh was a Court subordinate to the District Judge of Sundergarh. The only question which requires examination in view of the contentions advanced is whether the Court of the Subordinate Judge of Rourkela is one competent to try it. It was pointed out by a Division Bench of the Andhra Pradesh High Court in the case of *Dronavajjula Vidyamba v. Vallabhajosyula Lakshmi Venkayamma*, AIR 1958 Andh Pra 218 that where the proceeding had been instituted in the Court of the lowest grade competent to try it and it was transferred under S. 24 to a Court of higher grade, S. 15 of the Civil P. C. was not available to be relied upon to raise an objection in the matter of the Court of higher grade entertaining the suit. A Full Bench of the Madras High Court in the case of *P. Madhavan Unni v. M. Jayapandia Nadar*, AIR 1973 Mad 2 (FB), dealing with the phrase "competent to try" occurring in S. 24 (1) of the Code, held (at p. 6):—

".....To hold that it is necessary that the Court to which the case is transferred must have territorial jurisdiction would make it impossible for a High Court to transfer a case pending in the Court of a District Judge to that of the District Judge of another district, for these District Judges would not have concurrent territorial jurisdiction. The section would, therefore, be nullified if the interpretation put upon it in the case of *Ramdas v. Habibullah*, 136 Ind Cas 384 : (AIR 1933 All 178 (1)), were to be accepted. In order not to render the section useless, I am constrained to hold that the word competent must be taken to refer to pecuniary jurisdiction only." Though a decision to the contrary was cited before me in the case of *Hakim Mohammed Ali v. Bhanwari Bai*, AIR

1981 Raj 176, I am inclined to accept the view indicated by the Full Bench of the Madras High Court, namely "competent to try" under Sec. 24 of the Civil P. C. refers to pecuniary jurisdiction and not territorial jurisdiction.

5. Section 15 of the Orissa House Rent Control Act after making the order of eviction a decree by a deeming provision fixes the Court where execution has to be levied. The use of the words "shall be executable in the Court of the Munsif within the local limits of whose jurisdiction the house is situate" has no other effect than indicating the executing Court. Once the execution case is filed in that Court and the proceeding commences in the prescribed manner, it becomes a pending civil proceeding to which the Code of Civil Procedure applies and in view of what has been stated above, it must follow that the District Judge has power to exercise jurisdiction under S. 24 of the Civil P. C. The objection of the judgment-debtor that the District Judge would have no jurisdiction to transfer the execution proceeding is without any force and has been rightly rejected.

6. Counsel for the opposite party had pointed out that the order of transfer by the District Judge should have been challenged and not the order of the executing Court on the question of maintainability. As I find, this seems to be a case where the direction of transfer was before the judgment-debtor appeared. He, therefore, filed his objection in the transferee Court. In view of what I have said above on merit of the matter, this aspect does not require any independent examination.

7. The Civil Revision fails and is dismissed. There will be no order for costs.
Revision dismissed.

AIR 1982 ORISSA 194

Dr. B. N. MISRA, J.

Laxman Hota, Appellant v. Rama Chandra Hota and others, Respondents.
Second Appeal No. 91 of 1977, D/- 5-4-1982.*

Hindu Minority and Guardianship Act (32 of 1956), S. 8 (1) and (3) — Sale of property to minor represented by natural guardian — Agreement of resale of property to vendor, under specified con-

*From decision of J. Das, Addl. Dist. Judge, Puri, D/- 17-12-1976.

EZ/FZ/C224/82/MVJ

ditions — Latter agreement, on facts, held was void and not voidable. (Hindu Law — Alienation — Right of guardian).

The plaintiff, defendant No. 1 and defendant No. 2 were brothers. It was alleged by plaintiff in suit for specific performance of contract that the suit land had fallen to his share and he sold the land to defendant No. 2 who was a minor and represented by their father for Rs. 300. The plaintiff's further case was that on the same day the father-guardian on behalf of defendant 2 entered into an agreement Ext. 1 with the plaintiff that in case defendant 2 decided to sell the suit land in future he must sell it to the plaintiff for Rs. 500. There were disputes and the defendant 2 sold the property to defendant No. 1. The suit was filed when defendant 2 threatened to dispossess the plaintiff.

Held, that the document Ext. 1 was neither a contract of sale nor a contract of purchase. It was a peculiar document and sought to create a kind of pre-emptive right in favour of the plaintiff. The stipulations undoubtedly place the minor in a position of serious disadvantage and are against his interest. Further, the recitals in Ext. 1 executed by the father-guardian purporting to create rights in favour of the plaintiff were not at all necessary or reasonable and proper for the benefit of the minor or for realisation, protection or benefit of the minor's estate. The document (Ext. 1) is far in excess of the powers of the natural guardian and in gross violation of the provisions contained in S. 8 (1) of the Act. (Para 6)

Further, when a natural guardian disposes of immoveable property in contravention of sub-sec. (1) or sub-sec. (2) such disposal becomes voidable at the instance of the minor or any person claiming under him. A transaction by a natural guardian in contravention of sub-sec. (1) or sub-sec. (2) which does not amount to a disposal of immoveable property will not attract the application of sub-sec. (3). In the instant case the natural guardian of minor has not disposed of any immoveable property through Ext. 1. Hence Ext. 1 is not voidable but entirely void being in contra-

(Continued on Col. 2)

vention of the statutory provisions contained in sub-sec. (1) of S. 8 of the Act. (Case law discussed). (Para 6)

Cases Referred : Chronological Paras

AIR 1981 SC 519	4
AIR 1971 Mys 194	6
AIR 1969 Bom 140	4
AIR 1956 Andh Pra 33 (FB)	4
AIR 1951 Mad 431 : (1950) 2 Mad LJ 597	4
AIR 1948 PC 95 : 1948 All LJ 226	4
(1912) 9 All LJ 33 : ILR 39 Cal 232 (PC)	4

R. K. Mohapatra and A. N. Misra, for Appellant; P. K. Misra, for Respondents.

JUDGMENT:— This appeal has been filed by the plaintiff against the affirming decision of the learned Additional District Judge, Puri. Plaintiff's suit is for specific performance of contract and costs. The following genealogy, which is admitted would show the relationship of the parties.

(See Genealogical Table below)

The suit is in respect of A.O. 2— deci-

16
imals out of A.O. 07 decimals of homestead land appertaining to plot No. 238, Khata No. 94 of Mouza Satyabadi alias Penthapada. The following facts are not in dispute. First, the suit land being 1/3rd of the suit plot had fallen to the share of the plaintiff in a partition between him, his brother (defendant No. 1) and his father, the late Somanath, before the other brothers were born. Second, on 15-4-1963, while defendant No. 2 was a minor, the plaintiff sold the suit land to defendant No. 2 represented by his father by a registered deed of sale for a consideration of Rs. 300. The plaintiff's further case is that on the same day on which he sold the suit land to defendant No. 2, that is on 15-4-1963, the late Somanath as the father-guardian and on behalf of defendant No. 2 entered into an agreement (Ext. 1) with the plaintiff that in case defendant No. 2 would decide to sell the suit land in future he must sell it to the plaintiff for a consideration of Rs. 500. The plaintiff asserts that this agreement was made in the presence of his elder brother, defendant No. 1. Some time thereafter disputes

Somanath Hota — Golapi—D. 3

Ramchandra D. 1	Laxman (Plf.)	Bharat D. 2	Satughna D. 4	Bijay D. 5	Ajay D. 6
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arose between defendant No. 1 and the plaintiff and the former influenced the late Somanath and defendant No. 2 and fraudulently got a sale deed executed by defendant No. 2 in his favour on 10-2-1967 for a purported consideration of Rs. 400 while in fact no consideration was paid. Defendant No. 1 threatened to dispossess the plaintiff from the suit land and hence the suit.

2. Defendants 1 and 2 and the guardian ad litem of minor defendant No. 6 contested the suit while the other defendants were set ex parte. In his written statement defendant No. 1 has denied that he had purchased the suit land with the previous knowledge of the agreement (Ext. 1) purported to have been executed by the late Somanath on behalf of defendant No. 2. He has also denied that there was any agreement to the effect that defendant No. 2 was bound to sell the property to the plaintiff for Rs. 500 and he has pleaded that even if such an agreement was in existence, he was not legally bound by it since he purchased the suit-land without any knowledge of any such agreement and for consideration. He has also claimed to be in possession of the suit-land on the strength of the sale deed executed in his favour by defendant No. 2. In his written statement defendant No. 2 has substantially supported the case of defendant No. 1. He has pleaded that the suit land was purchased by his father-guardian on his behalf on 15-4-1963 for consideration of Rs. 300 and he had taken over possession of the suit land since after the purchase. On 10-2-1967, after he had attained majority, he sold the suit land to defendant No. 1 for consideration and delivered possession of the suit land to defendant No. 1. He has further pleaded that he had no knowledge of any agreement executed by his father on his behalf during his minority and even if there was such agreement it was not legally binding upon him. The guardian ad litem has also denied. The allegations contained in the plaint. Both the Courts below have held that the agreement (Ext. 1) was not valid and hence not enforceable and that defendant No. 1 was a bona fide purchaser for value without notice of the agreement, Ext. 1. The plaintiff's suit was accordingly dismissed by the learned trial Court and the said decision has been confirmed in appeal.

3. The hearing of this appeal is confined to the following two questions:—

(i) Whether the agreement, Ext. 1, is valid and enforceable in law; and

(ii) Whether the finding recorded by both the lower Courts that defendant No. 1 was a bona fide purchaser for value without notice of Ext. 1 is vitiated in law?

4. As regards the first question, it would be useful to begin with a reference to the following important decisions which deal with the powers of the guardian of a Hindu minor. In AIR 1956 Andh Pra 33 (FB) (Vadakattu Surya-prakasam v. Ake Gangaraju) the question which arose for consideration was whether a contract entered into by a guardian of a Hindu minor for sale or for purchase of immovable property was specifically enforceable against the minor. The opinion of the Full Bench was delivered by the learned Chief Justice. As pointed out in AIR 1969 Bom 140 (Popat Namdeo Sodarver v. Jagu Pandu Govekar) the principles and points made out in the Full Bench decision of the Andhra Pradesh High Court may be stated as follows:—

"(1) A minor has no legal competency to enter into a contract or authorise another to do so on his behalf. A guardian, therefore, steps in to supplement the minor's defective capacity;

(2) Capacity is the creation of law, whereas authority is derived from (nature of) the act of parties;

(3) The limit and extent of the guardian's capacity (authority) are conditioned by Hindu law. They can only function within the doctrine of legal necessity or benefit. The validity of the transaction is judged with reference to the scope of his power to enter into a contract on behalf of the minor;

(4) Even the personal liability arising out of the guardian's contract is a liability of the minor's estate only;

(5) Since the guardian under the Hindu law has the legal competency to enter into a contract on behalf of the minor for necessity or for the benefit of the estate, the contract is valid from the time of its inception, and since either party can enforce the contract, the test of mutuality is satisfied;

(6) There cannot be any essential distinction between a contract of sale and contract of purchase. The difference is only one of degree. There is no differ-

ence in principle between the case of purchase by a guardian and that of a case of a sale by a guardian, because both depend for their validity on the competency of the guardian acting within the scope of his power under Hindu law.

(7) An agreement to convey or purchase is only a preliminary step in completing a transaction of sale or purchase as the case may be. Without negotiations and without any agreement, oral or in writing, rarely is a sale deed executed and registered. To hold that guardian can execute a sale deed in respect of a specific property but he cannot legally enter into an agreement to convey or purchase the same is incongruous and illogical;

(8) Contracts to sell or purchase property are transactions closely connected with dealings in immoveable property by a guardian giving rise to obligations annexed to that property. They cannot be equated with contracts of loans imposing personal obligations on the minor.

(9) The courts following the decision in *Mir Sarwarjan's case*, (1912) ILR 39 Cal 232: (1912-9 All LJ 33) (PC) (*Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri*) had held that a contract of sale or purchase entered into by a guardian on behalf of a minor could not be enforced against the minor on the ground of mutuality. That view is no longer sound in view of the later Privy Council, decision in 75 Ind App 115: (AIR 1948 PC 95) (*Sri Kakulam Subrahmanyam v. Kurra Subba Rao*) which, in clear and unambiguous terms, rules otherwise."

The powers of a Hindu guardian to bind a minor in a contract for purchase of immovable property recently came up for consideration before the Supreme Court in AIR 1981 SC 519 (*Manik Chandra v. Ramchandra*). The Supreme Court referred to the aforesaid Full Bench decision of the Andhra Pradesh High Court and observed (para 4):

"..... In *Suryaprakasam v. Gangaraju*, AIR 1956 Andh Pra 33 at p. 40 (FB), the Andhra Pradesh High Court expressed its view that it had no hesitation to hold that the considered judgment of the Judicial Committee in AIR 1948 PC 95: (ILR (1949) Mad 141) must be taken as overruling all the previous decisions based on 32 Cal 232 (PC). (The refer-

ence 32 Cal 232 (PC) appears to be an error for (1912) ILR 39 Cal 232: (9 All LJ 33) (PC)). It also held that there could not be any essential distinction between the contract of sale and contract of purchase. The High Court cited with approval the view taken by Vishwanatha Sastri, J. of the Madras High Court in AIR 1951 Mad 431: (1950) 2 Mad LJ 597. It is unnecessary to go into this question any further as after the passing of Hindu Minority Act, 1956, the guardian of a Hindu minor has power to do all acts which are necessary or reasonable and proper for the benefit of the minor or for realisation, protection or benefit of the minor's estate. This provision makes it clear that the guardian is entitled to act so as to bind the minor if it is necessary or reasonable and proper for the benefit of the minor. The power thus conferred by the section is in no way more restricted than what was recognised under the Hindu Law. It is not disputed in this case that the contract entered into by the guardian is for the benefit of the minor.

xx xx xx
xx xx xx

..... The submission was that the contract by the guardian which binds the minor to make a payment, would be in the nature of a personal covenant and as such is excluded by S. 8. In support of his plea, the learned counsel relied on S. 55 (5) (b) of the Transfer of Property Act and submitted that so far as the payment of the purchase price is concerned, there is personal covenant. We are unable to accept this contention for it cannot be said that the guardian by the contract was binding the minor by his personal covenant. As it is within the competence of the guardian, the contract is entered into effectively on behalf of the minor and the liability to pay the money is the liability of the minor under the Transfer of Property Act. We are unable to accept the plea that in a contract for purchase of property, the guardian would be binding the minor by his personal covenant. In the result we find that the contract entered into by the guardian on behalf of the minors is enforceable....."

5. Now I proceed to examine the agreement, Ext. 1. This document was executed on 15-4-1963 in favour of the plaintiff by the late Somanath on behalf of his son, defendant No. 2, who was then minor. It is stated therein that as

in case of sale to somebody else great loss was likely to be caused to the plaintiff, if at all in future defendant No. 2 would decide to sell the property, he must sell it to the plaintiff for a consideration of Rs. 500 and that if the property would be sold by defendant No. 2 to somebody else without the permission of the plaintiff, such sale would be invalid and inoperative. I find that this document (Ext. 1) is neither a contract of sale nor a contract of purchase. It is a peculiar document and seeks to create a kind of pre-emptive right in favour of the plaintiff. There is no stipulation in the document that the plaintiff for his part was obliged to buy the property as and when defendant No. 2 would choose to offer the property for sale to him. The consideration is for ever fixed at Rs. 500 irrespective of the contemporaneous market value of the property. These stipulations undoubtedly place the minor (defendant No. 2) in a position of serious disadvantage and are against his interest. Further, the recitals in Ext. 1 executed by the father-guardian purporting to create rights in favour of the plaintiff were not at all necessary or reasonable and proper the benefit of the minor (defendant No. 2) or for realisation, protection or benefit of the minor's estate. Learned counsel for the appellant does not seriously dispute that the document (Ext. 1) is far in excess of the powers of the natural guardian and in gross violation of the provisions contained in S. 8 (1) of the Hindu Minority and Guardianship Act, 1956 (hereinafter referred to as the Act).

6. On behalf of the appellant it is submitted that although Ext. 1 violates the provisions contained in sub-sec. (1) of S. 8 of the Act, it is not void, but voidable under sub-sec. (3) of S. 8 of the Act and that as defendant No. 2 has not expressly exercised his option to avoid the agreement (Ext. 1), it must continue to be valid. In support of this contention reliance is placed on a decision of the Mysore High Court reported in AIR 1971 Mys 194 (Linga Reddy v. Ramachandrappa). In the aforesaid case the question for consideration was whether a contract to purchase entered into by a natural guardian in contravention of S. 8 (1) was void and unenforceable. That decision cannot have any application to the facts of this case. As already pointed out, the agreement (Ext. 1) is not a contract to purchase entered into

by the natural guardian on behalf of the minor. It being unnecessary I do not express any opinion on the observation in the Mysore case that a contract to purchase immovable property by a natural guardian of a Hindu minor in contravention of sub-sec. (1) of S. 8 cannot be considered as a void transaction, but that it is only a voidable transaction which can be avoided at the instance of the minor or any person claiming under him. For the purpose of this case it is necessary to refer to sub-sec. (3) of S. 8 of the Act which provides:

"Any disposal of immoveable property by a natural guardian, in contravention of sub-section (1) or sub-section (2), is voidable at the instance of the minor or any person claiming under him."

A careful reading of the aforesaid provision would leave no room for doubt that only when a natural guardian disposes of immoveable property in contravention of sub-sec. (1) or sub-sec. (2) that such disposal becomes voidable at the instance of the minor or any person claiming under him. A transaction by a natural guardian in contravention of sub-sec. (1) or sub-sec. (2) which does not amount to a disposal of immovable property will not attract the application of sub-sec. (3). In the present case the natural guardian of minor defendant No. 2 has not disposed of any immovable property through Ext. 1. Hence I am of the opinion that Ext. 1 is not voidable but entirely void being in contravention of the statutory provisions contained in sub-sec. (1) of S. 8 of the Act. Accordingly, I hold that the agreement (Ext. 1) is neither legally valid nor enforceable.

7. As regards the second question, the concurrent finding of the Courts below is that defendant No. 1 is a purchaser for value without notice of the agreement (Ext. 1). The Courts below have considered the oral and documentary evidence adduced by both sides and have arrived at the conclusion that defendant No. 1 was not aware of the existence of Ext. 1 at the time when he purchased the suit land from defendant No. 2 on 10-2-1967. I see no reason to interfere with this concurrent finding of fact. Hence I hold that the finding that defendant No. 1 is a bona fide purchaser for value without notice of Ext. 1 is not vitiated in law.

8. In the result, this appeal fails and it is dismissed. In the circumstances of

this case, parties will bear their own costs throughout.

Appeal dismissed.

AIR 1982 ORISSA 199

R. N. MISRA, C. J. AND
R. C. PATNAIK, J.

State of Orissa, Appellant v. Purnananda Samal and others, Respondents.

First Appeal No. 62 of 1976, D/- 1-12-1981.

Civil P. C. (5 of 1908), O. 1, R. 10 (2) — Application in appeal for substitution of L. Rs. by plaintiff State — Suit decreed and in appeal some of the respondents found to be dead — One of them dead when suit was filed — No explanation given for long delay of about one year in filing application for substitution of L. Rs. — Held on facts that decree could not be set aside and case remitted back nor L. Rs. would be added as parties under O. 1, R. 10 (2).

Where in the appeal by the plaintiff-State against the decree passed against it some respondents were found to be dead though death in each case excepting one had occurred long before and one of the respondents was dead even when the suit was filed, on an application for substitution of the legal representatives of the deceased respondents and for condonation of the delay in making of the application, it was held that the decree would not be set aside and case remitted back to give opportunity to the L. Rs. of the defendant who was dead at the time of filing of the suit nor the legal representatives of the deceased respondents would be added as parties under O. 1, R. 10 (2) when there was no explanation for delay of about a year in making of the application and appeal would be deemed to have abated against the deceased respondents.

(Para 4)

On account of the negligence of one side to the litigation, even if it happens to be the State to comply with the mandatory requirements of the procedural law, rights had accrued to others and to disturb such rights without any cogent or valid reason would be indiscreet and

would also not be sound exercise of judicial discretion. (Para 5)

To add the legal representatives of respondent who was dead when suit was filed for the first time in appeal against judgment of trial Court would certainly be prejudicial to the legal representatives. They would have no occasion for filing a written statement and they would be precluded from leading evidence in support of their possible stand in the litigation. To plant them into the lis at the appellate stage would, therefore, be prejudicial to their interest. Impleading a dead man was an act of gross negligence and the conduct of the plaintiff could not be lost sight of in dealing with the question. It could not be contended that the suit could be remanded by vacating the decree and the legal representatives of the respondent could be given adequate opportunity of participating in the contest for it would be conceding a premium in favour of negligence. If the matter was remitted to the trial Judge for dealing with the question of substitution and abatement an indifferent and negligent litigant would be allowed to control the proceeding and in return for his negligent conduct, he would have the advantage of getting the decree against him set aside on technical ground and to the utter prejudice of the successful party who after a bona fide contest had succeeded in obtaining a decree on merits in his favour. (Para 3)

Cases Referred: Chronological Paras

AIR 1972 Him Pra 65	4
(1969) Second Appeal No. 479 of 1965, D/- 26-3-1969 (Orissa), Dhubai v. Anirudha Das Gountia	4
AIR 1966 Patna 323	4
AIR 1956 Patna 373	4
AIR 1952 Patna 267	4

Addl. Govt. Advocate, for Appellant.

JUDGMENT:— This is a plaintiff's appeal against the judgment and decree of the learned Subordinate Judge of Cuttack. The suit was instituted on 11-4-1970, the judgment was delivered on 18-12-1975 and the decree is dated 8-1-1976. The first appeal was presented in this Court on 19-3-1976. 8 respondents were found to be dead in this court though death in each case excepting one had occurred long before. The particulars are given below:—

Serial Number	Number of the respondent.	Date of death.	Date of knowledge of the appellant.	Date of application for substitution.
1	2	3	4	5
1.	R. 48	23-8-1970	Feb. 1977	1-2-1978
2.	R. 30	4-5-1972	-do-	-do-
3.	R. 104	15-1-1978	-do-	-do-
4.	R. 21	4-5-1974	-do-	-do-
5.	R. 101	4-7-1974	-do-	-do-
6.	R. 83	25-1-1976	-do-	-do-
7.	R. 15	23-11-1976	-do-	-do-

Apart from these deaths, respondent No. 29 was dead on 1-6-1969, yet in the suit filed on 11-4-1970, he was impleaded as a defendant.

2. From the record of the first appeal, it appears that notices were taken out to these respondents along with others and in view of the report of the process server that these respondents were not found at the addresses given, fresh notices were directed to these respondents by order dated 14-1-1977. A memorandum was filed on behalf of the appellant on 27-1-1977 to the following effect:—

"On 14-1-77, two weeks' time was granted for fresh service on the respondents. As the correct address of the respondent could not be collected two weeks' further time may be granted in the above noted case."

On 2-3-1977, on the basis of the said memorandum, the following order was made:—

"As requested further ten days time allowed to comply order No. 5 dated 14-1-77, failing which place before the Bench for dismissal as against concerned respondents....."

On 8-4-1977, two weeks' further time was obtained from the Court for filing of requisites for service to these respondents. On 18-8-1977, the matter was again listed, as notwithstanding the order dated 8-4-1977, steps were not taken. A week's time was allowed that day for complying with the earlier direction. No action was taken by the appellant to comply with these orders. Therefore, the matter was relisted on 21-9-1977, when a further extension by one week was granted. Requisites were not filed against these respondents and notice to them was not taken. On 1-2-1978, the application for substitution as against these deceased respondents was made along with an application for set-

ting aside abatement and for condoning the delay in making of the application.

3. In regard to respondent No. 29 who died prior to the institution of the suit, learned Additional Government Advocate says that the legal representatives should be brought on record in exercise of powers under O. 1, R. 10 of C.P.C. Sub-rule (2) of that Rule provides:—

"The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added." This provision does vest wide powers in the Court but the same has to be exercised in a prudent and judicious manner. It is the obligation of every litigant to make appropriate enquiries and obtain requisite information about the state of the defendants on the date the suit is filed. If a reasonable enquiry had been made prior to the institution of the suit, the information which has now been in possession of the appellant could have been obtained and a dead person could not have been added as a defendant. To add the legal representatives of respondent No. 29 for the first time at this stage would certainly be prejudicial to the legal representatives. They would have no occasion for filing a written statement and they would be precluded from leading evidence in support of their possible stand in the litigation. To plant them into the lis at this stage would, therefore, be prejudicial to their interest. Impleading a dead man was an act of gross negligence and the conduct of the plaintiff cannot be lost sight of in dealing with the question. Again, to accept the submission of learned Additional Government Advocate that the suit could be remanded by vacating the decree and the legal representatives of respondent No. 29 could be given adequate opportunity of participating in the contest would be conceding a premium in favour of negligence. Ordinarily award of costs relieve the affected party from the strain and stress of litigation,

but a stage comes in every litigation where mere award of costs would not be a panacea to go the whole way. In our opinion, this seems to be a case where if for the utter negligence of the plaintiff-appellant, we vacate the decree of the trial court, it would amount to a wholly unwarranted treatment to the matter.

4. Five deaths occurred during the pendency of the suit. Learned Additional Government Advocate says that deaths during the suit were not known and steps for substitution could not be taken before the suit was disposed of. He relies on several authorities in support of his proposition that the proper court to deal with a case of abatement and substitution would be the Court where death occurred. (See AIR 1952 Patna 267 (Ram Saran Ahir v. Prithvi Nath Singh), AIR 1956 Patna 373 (Mrs. Gladys Coutts v. Dharkhan Singh), AIR 1966 Patna 323 (Gurucharan Singh v. Gorekhnath Singh), unreported decision of a learned single Judge in Second Appeal No. 479 of 1965 disposed of on 26-3-1969 (Dhobai v. Anirudha Das Gountia), AIR 1972 Him Pra. 65 (Ram Sain v. Bhagirath).) On the basis of these authorities he contends that the judgment and decree of the trial Court be set aside and the matter be remitted to the learned trial Judge for dealing with the question of substitution and/or abatement. We are aware of a line of judicial thinking which has adopted the aforesaid basis, but we are not impressed with the argument, as if this be accepted, an indifferent and negligent litigant would be allowed to control the proceeding and in return for his negligent conduct, he would have the advantage of getting the decree against him set aside on technical ground and to the utter prejudice of the successful party who after a bona fide contest had succeeded in obtaining a decree on merits in his favour. It is the obligation of a litigant while presenting an appeal to take stock of the respondents on the day of such presentation. If in this case the several deaths which occurred during the pendency of the suit were not within the knowledge of the plaintiff-appellant, these could have been noticed if proper enquiry had been made at the time of presentation of the first appeal. In that event, the appellant could have taken steps even before the trial Court before presenting the appeal to obtain orders of

substitution or, as would be material in the case of respondent No. 83, an application for leave to proceed against the legal representatives could have accompanied the memorandum of first appeal. That also was not done. It is a well-settled proposition of law that procedural law should be allowed to work in aid of justice and the same should be liberally interpreted to advance its cause and not to stifle it. But the relevant question to ask at this point is, justice to what? It is the obligation of the Court to look at the litigation in a dispassionate way keeping both the parties in view. Where after a bona fide contest has been raised the suit is ultimately disposed the right that was accrued in favour of the defendant should not be allowed to be lightly interfered with and he should not be made to suffer by adopting the procedure followed in the Patna cases and thereby prejudice him. Everyone except those to whom to get involved in litigation is a pleasure would like to be free from litigation. When a defendant has raised a bona fide contest and succeeded, if the litigation is revived by obliterating the success with a view to overcoming a lacuna which was brought into the record by callous indifference and negligence of the plaintiff, the defendant would be dealt with in an unjust manner. We are, therefore, of the view that unless there be any special circumstances or justification, in every case as a rule the principle indicated in the Patna cases should not be followed and before a decree is vacated merely on the principle that it is the court where abatement took place that has to consider the substitution application if made, decrees should not be vacated and the relief to which the appellant on merit may not be entitled to, should not be conceded. We do not intend to close the doors finally by pronouncing that the Patna principles should not be adopted in any case. We would, however, like to sound a word of caution so that this practice should not be freely resorted to. In the facts of the present case, for the reasons we have indicated, we see no justification to set aside the decree merely for the reason that the plaintiff had failed to take steps for substitution in respect of the defendants who were dead when the suit was pending. It is true that a decree against a dead man is a nullity and, therefore, the decree so far as the deceased defendants are

concerned would not be operative. That, however, does not justify a reversal of the decree.

5. Apart from these considerations, there is another important feature which should not be lost sight of. In para 5 of the petition for condonation of delay, it has been stated on affidavit on behalf of the appellant that on 15-2-1977, a memorandum to the following effect was filed in this Court:—

"In the abovenoted case steps for fresh service on respondents Nos. 15, 21, 29, 30, 48, 83, 101 and 104 could not be taken as they are reported to be dead. Steps are being taken for substitution of legal representatives in place of deceased respondents."

We have already taken note of the fact that the petition for substitution was filed on 1-2-1978 — thus after a total delay of 11½ months. The only justification indicated in the petition would appear from paragraphs 5, 6 and 7 which are extracted for convenience:—

"5. That the concerned officer (Land Acquisition Officer, Civil, Cuttack) caused enquiry to be made but since the enquiry involved a number of respondents, it took some considerable time before information regarding them was available. Information was received in February, 1977, during the enquiry that respondents Nos. 15, 21, 29, 30, 48, 83, 101 and 104 were dead. But their exact dates of death and names and addresses of their legal representatives required further enquiry. Accordingly a memo was filed on 15-2-1977 to the following effect:—

"In the abovenoted case steps for fresh service on respondents Nos. 15, 21, 29, 30, 48, 83, 101 and 104 could not be taken as they are reported to be dead. Steps are being taken for substitution of legal representatives in place of deceased respondents."

6. That after the aforesaid memo, enquiry proceeded in order to ascertain the exact dates of deaths and names and addresses of the legal representatives of the deceased respondents. The concerned officer had no personal knowledge of the dates of death and names and addresses of the legal representatives of the aforesaid deceased respondents. He had to make enquiries through official channels. There were a number of respondents in respect of whom enquiry had to be made. In these circumstances, extension

of time was being taken from the Court for taking steps for substitution.

7. That having collected all the information through the aforesaid enquiry and after consultation with the counsel the appellant became ready for filing of a petition for substitution in place of the said deceased respondents on 30-1-1978 and accordingly the petition for substitution was filed on 31-1-1978 (sic.) (the correct date being 1-2-1978 as admitted in the memo of the Additional Standing Counsel which is kept on record)."

The time allowed by law for taking steps for substitution was long over. Therefore, the obligation to apply for substitution had to be discharged immediately after the fact of death was known. The appellant, therefore, had to explain the entire period of eleven and half months from the date of knowledge to the date of making of the application. The explanation for this period of about a year is as indicated in the three paragraphs referred to above. Having given our anxious consideration to the matter, we are of the view that the appellant is not entitled to any indulgence. While dealing with a situation like this, it must be borne in mind that on account of the negligence of one side to the litigation to comply with the mandatory requirements of the procedural law, rights have accrued to others and to disturb such rights without any cogent or valid reason would be indiscreet and would also not be sound exercise of judicial discretion. If such a long period of delay had to be explained away, it was necessary for the appellant to put on record through affidavits as to how, by whom and in what manner, the enquiry for ascertaining the names of the legal representatives was being conducted. It was not open to the appellant also to wait till the entire information was received as it is a duty to apply for substitution as and when information in regard to any particular respondent was obtained. We are aware of the fact that the State has certain difficulties as also advantages in pursuing litigation. That, however, cannot be a ground to excuse a gross delay of about a year. The State has to exhibit ideal conduct in order that the citizen may adopt it and, therefore, in all the litigations carried by the State, the conduct should not only be fair and prompt, but it should exhibit co-operation and full attention. For what we have said above, the prayer for substi-

tution as also for leave to add the legal representatives of one of the respondents is rejected.

6. The appeal in these circumstances must be taken to have abated as against the eight respondents. The effect of such abatement on the entire appeal will have to be taken into consideration when the appeal is set down for hearing. We direct that attention of the Bench hearing the matter be drawn to today's order at that point of time.

Order accordingly.

AIR 1982 ORISSA 203

B. N. MISRA, J.

Chhotabhai and another, Petitioners v. Iswaribhai, Opposite Party.

Civil Revn. No. 614 of 1978, D/- 16-4-1982.*

Civil P. C. (5 of 1908), O. 17, R. 2 Explanation, O. 9, R. 13 — Applicability — Evidence on the side of plaintiffs recorded — No evidence recorded on the side of defendant — Defendant not present on the day of adjourned hearing — Held, O. 9, R. 13 and not Explanation to O. 17, R. 2 was applicable. (Para 3)

S. C. Mohapatra, for Petitioners.

ORDER:— This revision is directed against the order dated 10-11-78 passed by the learned Subordinate Judge, Sambalpur, in Misc. Case No. 93 of 74 allowing the application under O. IX, R. 13, C. P. C. filed by the defendant-opposite party.

2. The facts may be briefly stated. Petitioners as plaintiffs have filed Money Suit No. 6 of 63 in the court of the learned Subordinate Judge Sambalpur, for recovery of Rs. 92750/- from the defendant-opposite party with pendente lite and future interest at 9 per cent per annum. The defendant had appeared in the trial court and filed his written statement on 14-12-63. The suit was posted for the first time for hearing to 10-4-64. After several adjournments and examination and cross-examination of six witnesses for the plaintiffs the suit was posted to 24-9-74 for hearing. On that date the plaintiffs were present with three witnesses, but the defendant did not take any steps and neither he nor his Advocate was present when the case

was called. The court set the defendant ex parte and posted the case to 25-9-1974 for further hearing. On 25-9-1974 the evidence of PWs 1 to 6 recorded by the Commissioner as well as the exhibits marked by him were directed to be treated as evidence, plaintiff No. 1 was examined as PW 7, some more documents on the say of plaintiffs were marked as exhibits, the evidence on the side of the plaintiffs was closed, the learned Advocate for the plaintiffs was heard and the suit was posted to 30-9-1974 for judgment. After three adjournments the judgment was finally delivered on 9-10-1974. The plaintiffs' suit was decreed with costs and pendente lite and future interest were awarded at the rate of 6 per cent per annum. The decree was sealed and signed on 17-10-1974. On 5-11-1974 the defendant-opposite party filed a petition under O. IX, R. 13, C. P. C. to set aside the judgment and decree passed against him in the suit. The defendant pleaded that he was ill and bedridden from 18-9-1974 till the first week of October and as such could not attend the hearing of the suit on 24-9-1974 and 25-9-1974. The plaintiff-petitioners filed a counter denying the plea of illness of the defendant. According to the plaintiffs, the defendant was quite hale and hearty in September and the story of his illness was false. The defendant examined himself and his doctor in support of his case while the plaintiffs did not examine any witness. The defendant also filed a medical certificate in support of his plea of illness. After hearing both sides the learned Subordinate Judge by his order dated 10-11-1978 held that illness had prevented the defendant from appearing in court on 24-9-1974 and 25-9-1974. Accordingly the defendant's petition was allowed and the ex parte decree passed against him was set aside subject to payment of Rs. 300/- as costs by the defendant to the plaintiffs.

3. Learned counsel appearing for the plaintiffs has assailed the aforesaid order of the learned Subordinate Judge mainly on the ground that in the facts of this case the provisions contained in O. IX, R. 13, C. P. C. were not attracted and that the judgment and decree in the suit must be held to have been passed under the Explanation of O. XVII, R. 2, C. P. C. Before examining this question it would be proper to recall that at the stage of hearing of the Money Suit, evi-

*From order of K. C. Mohapatra, Sub. J. Sambalpur, D/- 10-11-1978

dence on the plaintiffs' side had been recorded and closed before the ex parte judgment was pronounced, but no evidence, oral or documentary, on the side of the defendant had been recorded by the court. Order XVII, Rule 2, C. P. C. provides as follows:—

"Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by O. IX or make such other order as it thinks fit.

Explanation.— Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion proceed with the case as if such party were present."

A plain reading of the explanation makes it clear that the Court is empowered to proceed with a case even in the absence of a party provided that the evidence or a substantial portion of the evidence of that party has already been recorded. In the present case the evidence on the side of the plaintiffs had been recorded. No evidence had been recorded on the side of the defendant and on 24-9-1974 and 25-9-1974 the defendant was absent, not the plaintiffs. Therefore, the explanation cannot have any application to the facts of this case. On going through the order-sheets dated 24-9-1974 and 25-9-1974 I find that the court proceeded with the suit according to the provisions contained in O. IX, C. P. C. and, hence I must hold that O. IX, R. 13, C. P. C. is applicable to the facts of this case.

4. Further, on going through the impugned order I find that the learned Subordinate Judge has considered the respective cases of the parties and has come to hold that the defendant had been prevented by sufficient cause from appearing in court on 24-9-1974 and 25-9-1974. This finding of fact does not call for any interference.

5. In the result, this revision is dismissed and the order of the learned Subordinate Judge is confirmed. There shall be no order as to costs.

Revision dismissed.

AIR 1982 ORISSA 204

R. C. PATNAIK, J.

Madhu Sethi and another, Petitioners v. Bishnu Sethi and others, Opposite Parties.

Civil Revn. No. 562 of 1979, D/- 19-4-1982.*

Civil P. C. (5 of 1908), Ss. 151, 152, 11 — Correction of decree — Application for — Rejection of first application — Order becoming final — Subsequent application would not be maintainable.

The plaintiff had originally filed a suit for declaration of title. Subsequently by way of amendment of plaint, he sought the relief for recovery of possession and was granted leave to amend the plaint. For months together no steps were taken by the plaintiff to carry out the amendment. The decree was passed granting reliefs as per the prayer in the original plaint, which did not contain the relief of recovery of possession. The plaintiff filed an application under S. 152, for correction of the judgment and the decree by inserting the relief of "recovery of possession after evicting the defendant". The application was rejected by trial court. This order was not questioned before the superior Court and was allowed to become final. The plaintiff then filed a fresh application under Ss. 151, 152 for correction of judgment and decree.

Held, the first application having already been rejected the subsequent application was not maintainable and the trial court rightly held that it was not a case of correcting arithmetical or clerical error. Case law discussed.

(Para 7)

Cases Referred : Chronological Paras

AIR 1974 SC 130 : 1974 Lab IC 149	6
AIR 1973 Orissa 235	4
(1972) 2 Cut WR 1428 : ILR (1972) Cut 987	4
AIR 1964 SC 993	7

S. C. Mohapatra, M. R. Mohanty and P. K. Ray, for Petitioners; H. B. Swain and S. S. Swain, for Opposite Parties.

ORDER:— This is a plaintiff's revision directed against rejection of his application filed under S. 152 read with S. 151 of the Civil P. C. for correction of the judgment and decree.

*From order of C. P. Panda, Sub. J., Sonepur, D/- 19-9-1979.

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2. The original petitioner instituted Title Suit No. 70/89 of 1971-73 in the Court of the Subordinate Judge, Sonapur for declaration of title and that he was entitled to possess the suit property. During the pendency of the suit, a proceeding under Sec. 145 of the Criminal P. C. terminated in favour of the original opposite party declaring the possession of the opposite party on the day of the preliminary decree. So, the original petitioner was obliged to seek recovery of possession by way of amendment of the plaint. His prayer for amendment was allowed by order dated 2-7-1974 and the original petitioner was directed to pay additional court fee on the relief of recovery of possession and he paid the additional court-fee. On 27-2-1975 the suit was decreed.

3. It was discovered later on that though leave had been granted to amend the plaint, the petitioner did not carry out the amendment and the decree that was passed granted the reliefs as per the prayer in the original plaint, which did not contain the relief of recovery of possession (rightly so as the amendment had not been carried out). An application was filed on 18-6-1975 under Section 152, Civil P. C. for correction of the judgment and the decree by inserting the relief of "recovery of possession after evicting the defendant". It was submitted that the amendment was not carried out due to clerical mistake. The learned Subordinate Judge rejected the application negating the petitioner's contention by order dated 9-3-1976. This order was not questioned before the superior court and was allowed to become final. A fresh application was filed on 10-5-1976 under S. 151, Civil P. C. for correction of the judgment and the decree which was registered as M. J. C. No. 20 of 1976. The said application was dismissed for default on 21-3-1977. As application for restoration registered as M. J. C. No. 8 of 1977 was rejected on 23-11-1977. On 19-7-1978, the petitioner again filed an application under S. 152, Civil P. C. for correction of the judgment and the decree. By order dated 19-9-1979, the learned Subordinate Judge rejected the application holding that in view of the rejection of an earlier application for identical relief by order dated 9-3-1976, the present application for the selfsame relief was not maintainable especially when the order dated 9-3-1976 had been allowed to stand.

4. The learned counsel for the petitioners in this revision relied upon a decision of this Court in *Dandapani Goudo v. Khetrabasi Goudo* reported in (1972) 2 Cut WR 1428 and submitted that the failure to amend was due to inadvertence and in the interest of justice, the trial court should have allowed the prayer and corrected the judgment and decree. In *Dandapani's* case though leave to amend had been granted, the amendment was not carried out within the prescribed time; but the appellate court before which the suit was pending was moved for extension of time to carry out the amendment. As the suit was pending before the appellate court, this Court in the facts and circumstances of the case accepted the prayer and granted the plaintiff extension of time for carrying out the amendment. The vital difference between facts of that case and the case on hand is that the suit was pending in *Dandapani's* case, before the appellate court and the appellate court thought it proper to grant time for carrying out the amendment. In the present case, the suit had been disposed of and the provisions contained in O. 6, R. 18 of the C. P. C. on the expiry of the period took its toll and the plaintiff "shall not be permitted to amend". The counsel for the petitioner further relied upon *Papu Khan v. Fatima Babi* (AIR 1973 Orissa 235). In this case, the final decree was not in conformity with the preliminary decree. So, the plaintiff's application under S. 151, C. P. C. for amendment of the final decree was directed to be treated as an application for review of the final decree and disposed of on merits. The ruling is not an apt one. There was no embargo like the one contained in O. 6, R. 18 of the Civil P. C.

5. Mr. Sudhansu Sekhar Swain, learned counsel for the opposite parties, submitted that the correction sought for was not a formal one. The amendment had far-reaching consequences so far as the defendant was concerned. If the amendment had been carried out, his client would have got an opportunity for filing additional written statement in which event, depending on the pleas taken in defence, certain additional/fresh issues might arise for adjudication. The correction of the judgment and the decree would deprive his client of valuable right by skipping over the intermediate process as aforesaid. He further submit-

ted that the application dated 19-7-1978 giving rise to the impugned order was the third in point of time and the dismissal of the first application on merits foreclosed the reopening of the question.

6. The aforesaid submissions of Mr. Swain are formidable. He relied upon a decision of the Supreme Court in *Dilbagh Rai Jerry v. Union of India* (AIR 1974 SC 130). That case arose out of an application filed by Jerry under the Payment of Wages Act. He claimed certain amount as his wages. He further claimed certain amount as travelling allowance. During the pendency of the application, he sought amendment of the application by replacing "travelling allowance" by "running allowance". The prayer was granted but the same was not carried out and the prescribed authority did not allow running allowance. It was argued before the Supreme Court that the provisions contained in O. 6, R. 18, Civil P. C. did not apply to proceedings under the Payment of Wages Act. So the failure to carry out the amendment could not deprive Jerry as leave to amend had been granted. In that context the Supreme Court observed (para 22):—

"The contention is untenable. While it is true that Rr. 17 and 18 of O. 6 of the Code do not, in terms, apply to amendment of an application under S. 15 (2), the Authority is competent to devise, consistently with the provisions of the Act, and the Rules made thereunder, its own procedure based on general principles of justice, equity and good conscience. One of such principles is that delay defeats equity. The Authority found that the applicant was guilty of gross negligence. He took no steps whatever to carry out the amendment for several months after the order permitting the amendment, and thereafter, when the case was at the final stage, he suddenly woke up, as it were, from slumber and sought to amend his application. In the circumstances, the Authority rightly refused to put a premium on this delay and laxity on the part of the appellant....."

7. The rule laid down in *Arjun Singh v. Mohindra Kumar* (AIR 1964 SC 993) precludes resuscitation of the selfsame issue (see paragraph 13). An application having already been rejected by order dated 9-3-1976, the selfsame application dated 19-7-1978 was not maintainable,

ignoring the application filed on 10-5-1976, which was dismissed for default; and the trial court in his order dated 9-3-1976 rightly held that it was not a case of correcting arithmetical or clerical error. Right or wrong, the order was allowed to stand and became final and binding. Hence, the application dated 19-7-1978 was not maintainable.

On 2-7-1974 leave to amend had been granted. For months no step was taken and the suit was disposed of in February, 1975. The party, it appears, has been grossly negligent and acceding to his request now would be putting a premium on his laxity.

In the result, the revision has no merit and is accordingly dismissed. In the circumstances, there would be no order as to costs.

Revision dismissed.

AIR 1982 ORISSA 206

R. N. MISRA, C. J. AND
B. K. BEHERA, J.

V. Appa Rao and etc., Petitioners v. Revenue Officer, Chatrapur and others, Opposite Parties.

O. J. Cs. Nos. 108 to 110 of 1981, D/- 23-3-1982.

Orissa Land Reforms Act (16 of 1960), S. 47 — Compensation for ceiling surplus land — Value of trees standing on the surplus land determined — Order not challenged — It becomes final and cannot be reviewed subsequently, on circular being issued by Board of Revenue indicating guidelines for determining value of trees. (Para 5)

Y. S. N. Murty, for N. V. Ramdas, for Petitioners; Addl. Govt. Advocate, for Opposite Parties.

R. N. MISRA, C. J.:— Three landholders are petitioners in these applications, each one being by one such landholder. Ceiling areas were carved out in the proceedings under the provisions of the Orissa Land Reforms Act. Steps were taken by the Revenue Officer to fix up compensation for the ceiling surplus land as provided under Sec. 47 of the Act. In these cases we are concerned with the valuation of standing trees on lands. Section 47 (2) (b) has a statutory formula for determining market value of trees standing on the surplus lands and an Explanation attached to the sec-

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tion indicates that in determining the market value, the Revenue Officer shall as far as practicable be guided by the provisions contained in sub-sec. (1) of Sec. 23 of the Land Acquisition Act of 1894. Keeping the aforesaid provisions of the statute in view, the Revenue Officer by his order dated 28-11-1978 determined the quantum of compensation admissible under S. 47 (2) (c) of the Act. About a year after the finalisation under Annexure-1 emanated a circular in the form of a letter from the office of the Land Reforms Commissioner in the Board of Revenue dated 23-11-1979 (Annexure-6) purporting to indicate a guideline for fixation of the compensation. Para 3 of the Circular indicated:—

"The cases pending for want of rates of fruit bearing trees may please be finalised accordingly."

On the basis of this circular letter, the Revenue Officer called the petitioners again by notice dated 19-1-1980 and scaled down the compensation which had once been finally determined. Petitioners challenged the order of scaling down in appeals before the Sub-Divisional Officer and having lost have filed these writ applications.

2. Counsel for the petitioner in each of these applications challenges the validity of the circular by saying that once statutory guidelines have been indicated, there can be no straight jacket formula evolved as in Annexure-6 and in each case the matter had to be left to be determined in accordance with law. Alternatively, he contended that in view of what had been stated in para 3 of the letter, it must have been found by the Revenue Officer that cases which had been finalised were not intended to be reopened by way of review and since petitioners' cases had been determined a year before the circular was issued, the Revenue Officer had no foundation for reopening the matters which had become final.

3. No counter affidavit has been filed. In the facts of the case we are inclined to think that no counter affidavit was really necessary.

4. Though there is much to be said in respect of the first contention, in view of the fact that the applications can be disposed of by accepting the second contention canvassed on behalf of the petitioners, we do not propose to examine the tenability of the first contention.

5. When provision has been made conferring power of appeal and revision against particular orders, it must be assumed that every order which finally adjudicates a matter assumes finality unless there be appeal or revision by the aggrieved party. When the Revenue Officer made his orders on 28-11-1978 such finality must be attached to his order unless the same were challenged in appeal or in revision or otherwise disputed in accordance with law. When the order became final and particularly in the absence of a power of review conferred on the Revenue Officer to reopen such a final order, the subsequent order of scaling down seems to be wholly misconceived and without jurisdiction. No support from the language of Annexure-6, particularly para 3 thereof, is available for the action of the Revenue Officer. We accordingly quash the order of the Revenue Officer dated 1-2-1980 (Annexure-4 in each of the applications) as also the appellate order affirming his action and direct that the order dated 28-11-1978 fixing the quantum of compensation for standing trees under S. 47 (2) (b) of the Act be given effect to.

6. Each of the writ applications in the circumstances is allowed. Both parties will bear their own costs of the proceeding. The records be returned to the Revenue Officer for giving effect to the direction.

BEHERA, J.:— I agree.

Petitions allowed.

AIR 1982 ORISSA 207

R. C. PATNAIK, J.

Abhimanyu Jee, Appellant v. Dr. Gayaprasad and others, Respondents.

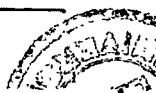
Second Appeal No. 95 of 1978, D/- 21-6-1982.*

Orissa House Rent Control Act (4 of 1968), Ss. 14, 7 — Relationship of landlord and tenant — Determination by Rent Controller — Operates as res judicata and cannot subsequently be challenged and adjudicated in Civil Court in view of specific bar under S. 14. (Civil P. C. (1908), Ss. 9, 11).

The finding of the Rent Controller in the House Rent Control proceeding that there is no relationship of landlord and

*From decision of M. V. Gangaraju, Addl. Dist. J., Cuttack, D/- 17-11-1977.

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tenant between the parties operates as *res judicata* and the said finding is not available to be re-adjudicated in the civil court. The decision of the Tribunal under the Act is not liable to be questioned in civil courts. Section 14 expressly ousts the jurisdiction of the civil courts. Also, the principle that *res judicata* is not attracted in case of incidental issues is not applicable in this case. A question of relationship of landlord and tenant in a proceeding under the Act is not incidental to any substantial issue. That question has to be confronted at a threshold as preliminary state of facts, upon determination of which the further questions would hinge. The finding on the said question, though jurisdictional, is final. (Paras 8, 10, 11)

Cases Referred : Chronological Paras

AIR 1982 SC 20	10
AIR 1971 Orissa 140 : (1970) 1 Cut WR 224	7
(1971) 37 Cut LT 456 : 1971 Ren CJ 540	9
AIR 1964 SC 807	6
AIR 1963 Pat 79 (FB)	4, 5
AIR 1951 SC 115 : 1951 All LJ 5	5, 6
AIR 1940 PC 105	7
(1888) 21 QBD 313 : 36 WR 776, The Queen v. Commrs. for Special Purposes of Income-tax	4, 6
(1874) LR 5 PC 417 : 43 LJPC 39 : 30 LT 237 (PC), Colonial Bank of Australasia v. Willan	6

U. N. Sahoo and S. Mohanty, for Appellant; A. K. Rao, M. K. C. Rao, D. S. Nanda, F. A. Khan and Miss G. Lakshamma, for Respondents.

JUDGMENT:— The plaintiff's suit for permanent injunction having been dismissed and the decree passed by the trial court in his favour having been reversed by the lower appellate court, this second appeal has been filed.

2. The appellant (hereinafter described as the plaintiff) asserted that the disputed house located in Nimchouri, Cuttack belonged to one Durga Prasad Bhagat, the father of respondents 1 and 2 (hereinafter described as defendants 1 and 2). Durga Prasad had let out one room from the western side to the plaintiff on a monthly rental of Rs. 8/-. After the death of Durga Prasad, defendants 1 and 2 acknowledged the plaintiff as tenant and received rent from him. Bhikari Charan Behera, defendant No. 3, took on rent from Durga Prasad the room on the eastern side and at his own

cost constructed a shed. Defendants 1 and 2 instituted H. R. C. Case No. 78 of 1969 against Bhikari Charan Behera for his eviction. The proceeding was in respect of the entire house (the rooms both on the eastern and western sides). Defendants 1 and 2 obtained an order for eviction of defendant No. 3 in the said proceeding and filed Execution Case No. 175 of 1971 for possession. The plaintiff asserted that he was a tenant in respect of the western side room and without a proceeding for eviction under the Orissa House Rent Control Act, 1967 and an order for his eviction passed under the provisions of the said Act, he was not liable to be evicted, and defendants 1 and 2 should be restrained by permanent injunction from executing the order of eviction obtained by them in H. R. C. Case No. 78 of 1969.

3. Defendants 1 and 2 opposed the suit mainly on the ground of *res judicata*. Their case was that the plaintiff is the Godson of defendant No. 3, Bhikari Charan Behera. In the year 1957-58 though the plaintiff had taken the disputed western side room on rent, he quit the same and after some time defendant No. 3 took the entire house, i.e. both the eastern side and the western side rooms on rent from Durga Prasad and was paying rent to him. There was no relationship of landlord and tenant between the plaintiff and late Durga Prasad or defendants 1 and 2. When defendant No. 3 committed default in payment of rent, proceeding under the Orissa House Rent Control Act was initiated and an order for eviction was passed against him, H. R. C. Appeal No. 105 of 1970 filed by defendant No. 3 was dismissed. They further averred that in respect of the disputed room, the plaintiff had filed H. R. C. Case No. 152 of 1969 for fixation of fair rent alleging that he was a tenant in respect of the said room. The said case was dismissed on a finding that there was no relationship of landlord and tenant between the plaintiff and defendants 1 and 2. Against the said judgment, the plaintiff filed H. R. C. Appeal No. 106 of 1970 which was sought to be withdrawn and was dismissed as not pressed. The present suit, they alleged, was filed with a view to delay the execution proceeding. The trial Judge held that the suit was not barred by *res judicata* and the plaintiff was the tenant under defendants 1 and 2 in respect of the disputed house. So

holding, the trial Judge granted a decree in favour of the plaintiff restraining defendants 1 and 2 from proceeding with the execution case. In appeal, the finding on the question of res judicata was reversed and it was held that the decision in the H. R. C. proceeding to the effect that the plaintiff was not a tenant under defendants 1 and 2 operated as res judicata and the self-same issue was not available to be re-adjudicated in the suit. The further finding, though not expressly stated, which can be inferred from his discussions in paragraphs 9 and 10 of the judgment, is that the plaintiff was not a tenant.

4. It has been strenuously urged by Mr. Sanjit Mohanty, the learned counsel for the appellant, that the finding of the House Rent Controller in H.R.C. case No. 152 of 1969 that the plaintiff was not a tenant would not operate as res judicata. His trump-card is the decision of a Full Bench of the Patna High Court in *Kishun Sah v. Harinandan Prasad Sah*, AIR 1963 Pat 79. Their Lordships observed as follows (at p. 80):—

"It is well settled that, unless the legislature expressly confers upon a tribunal of limited jurisdiction the exclusive power to decide facts upon which it can assume jurisdiction to do a certain act or to pass a certain type of order, it has no jurisdiction to decide those preliminary or jurisdictional facts finally. While it has necessarily to come to its own conclusions on those facts in order to exercise its jurisdiction relating to matters within its exclusive jurisdiction, its decision on those facts is liable to be challenged in the Civil Court. A tribunal of limited jurisdiction cannot have unlimited power to determine the limit and to assume jurisdiction or, in other words, it cannot usurp jurisdiction on a wrong decision relating to jurisdictional facts."

To reach the aforesaid ratio, their Lordships referred to the observations of Lord Esher, M. R. which have become locus classicus, in the *Queen v. Commrs. for Special Purposes of Income-tax*, (1888) 21 QBD 313, and held that a decision of the tribunal on the question of existence of the relationship of landlord and tenant belonged to the first type described by Lord Esher and the decision of the Collector as to existence of the relationship of landlord and tenant between the parties is not final and the

correctness is liable to be examined by the Civil Court.

5. However, after going through various authorities cited above, and the decision of the Supreme Court in *Rai Brij Raj Krishna v. S. K. Shaw and Brothers*, AIR 1951 SC 115, which their Lordships of the Patna High Court distinguished, I am, with respect, of the view that the ratio in *Kishun Sah's* case (AIR 1963 Pat 79) (FB) has no application to a case arising under the Orissa House Rent Control Act.

6. In the *Queen v. Commrs. for Special Purposes of Income-tax*, Lord Esher, M. R. said:—

"When an inferior court or tribunal or body, which has to exercise the power of deciding facts is first established by Act of Parliament, the legislature has to consider what powers it will give to that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may entrust the tribunal or body with a jurisdiction which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends; and if they were given jurisdiction so to decide, without any appeal being given, there is

no appeal from such exercise of their jurisdiction."

In *Rai Brij Raj Krishna* case (AIR 1951 SC 115), a suit had been filed for declaration that the order of the Controller was illegal and without jurisdiction. The suit was dismissed by the trial court and the lower appellate court. But the High Court decreed the suit holding that the order of the Controller was without jurisdiction. *Fazal Ali, J.* after referring to the provisions in the Bihar Act, which provided that the decision of the Controller was final and not liable to be questioned in any court of law observed (at p. 117):

"The Act thus sets up a complete machinery for the investigation of those matters upon which the jurisdiction of the Controller to order eviction of a tenant depends, and it expressly makes his order final and subject only to the decision of the Commissioner."

and after referring to the observations of Lord Esher, M. R. and the observation of Sir James Colville in *Colonial Bank of Australasia v. Willan*, (1874) LR 5 PC 417, to the effect:—

"Accordingly, the authorities establish that an adjudication by a Judge having jurisdiction over the subject-matter is, if no defects appears on the face of it, to be taken as conclusive of the facts stated therein:"

"There can be no doubt that the present case falls within the second category mentioned by Lord Esher, because here the Act has entrusted the Controller with a jurisdiction, which includes the jurisdiction to determine whether there is non-payment of rent or not, as well as the jurisdiction, on finding that there is non-payment of rent, to order eviction of a tenant. Therefore, even if the Controller may be assumed to have wrongly decided the question of non-payment of rent, which by no means is clear, his order cannot be questioned in a civil court."

In *Addanki Tiruvankata Thata Desika Charyulu v. State of Andhra Pradesh*, AIR 1964 SC 807, the question whether an Inam village was an Inam estate, was exclusively within the jurisdiction of the Settlement Officer and the Tribunal in appeal; or the civil courts had jurisdiction to determine over again the question in controversy.

7. Under the Madras Estates (Ryotwari) Act, there is no provision in terms debarring the civil courts from enter-

taining suits for declaration that the estate was not an Inam estate. Section 9 (4) (c) of the Madras Act provided that the decision of the tribunal was final and not liable to be questioned in any court of law and S. 9 (6) declared that the decision of the tribunal and subject to such decision, every decision of the Settlement Officer shall be binding on all persons claiming any interest in any land in the village etc. *Ayyangar, J.* for the Five-Judge Bench, observed (at p. 816 of AIR 1964 SC):—

"The very provision setting up an hierarchy of judicial tribunals for the determination of the question on which the applicability of the Act depends, is sufficient in most cases for inferring that the jurisdiction of the Civil Courts to try the same matter is barred. In addition we have the provision in S. 9 (4) (c) read with S. 9 (6) to which we have adverted. In these circumstances, we have no hesitation in holding that to the extent of the question stated in Section 9 (1), the jurisdiction of the Settlement Officer and of the Tribunal are exclusive and that the Civil Courts are barred from trying or re-trying the same question. We, should, however, hasten to add that this exclusion of jurisdiction would be subject to two limitations. First is the reservation made by Lord Thankerton in *Secretary of State v. Mask and Co.*, 67 Ind App 222 at p. 236 : (AIR 1940 PC 105 at p. 110) where after holding that the provisions of the Sea Customs Act setting up a special machinery for the adjudication of the correct duty leviable under the Act barred recourse to the Civil Courts to question the correctness of the decisions of the Authorities, acting under that enactment added :

"It is also well settled that even if jurisdiction is so excluded, the civil courts have jurisdiction to, examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."

In *Choudhury Krishna Chandra v. Srimati Hemamani Biswal*, (1970) 1 Cut WR 224 : (AIR 1971 Orissa 140), the question was if Sec. 39 of the Orissa Estates Abolition Act, 1951 ousted the jurisdiction of the civil court in regard to matters specified in the said section. It was held that the jurisdiction of the Orissa Estates Abolition Collector was of

the second type, referred to by Lord Esher, M. R.

8. Section 7 of the Orissa House Rent Control Act makes provision for eviction of a tenant. Section 7 (1) reads as hereunder:—

"A landlord who seeks to evict his tenant shall apply to the Controller for a direction in that behalf."

Denial of title of the landlord has been made a ground for eviction under S. 7 (2) (iv). It is, therefore, clear that the legislature has entrusted the tribunal with jurisdiction to determine whether parties stand in the relationship of landlord and tenant and upon determination of this preliminary state of facts, to proceed further. Section 14 reads as hereunder:

"All orders passed by the Controller shall, subject to the decision, if any, made in an appeal, be final and shall not be called in question in any Court of law."

The observations of Lord Esher, M. R. and the observations of their Lordships of the Supreme Court make it clear that the decision of the Controller or of the appellate authority falls in the second category enumerated by Lord Esher, M. R. and the decision of the tribunal under the Orissa House Rent Control Act is not liable to be questioned in civil courts. Section 14 expressly ousts the jurisdiction of the civil courts.

9. In *Smt. Dei v. Badyadhar Pradhan* (1971) 37 Cut LT 456, a Division Bench of this Court observed:—

"Law is well settled that an authority or a Court of limited jurisdiction has the power to determine its initial jurisdiction. If it comes to the conclusion that there is such relationship, it can proceed to decide whether grounds for eviction exist. If, on the other hand, it determines that there is no relationship of landlord and tenant then it will stay its hand from examining the grounds of eviction. The decision of a Court of limited jurisdiction as to the existence of that relationship can however, be challenged in a civil court unless the civil court's jurisdiction is either expressly or impliedly barred by the special statute itself." (Emphasis added).

This decision relied upon by the counsel for the appellant does not lend any assistance, because S. 14 of the Orissa House-Rent Control Act expressly for-

bids exercise of jurisdiction by the civil courts.

10. Reliance has also been placed by Mr. Mohanty on *Smt. Gangabai v. Smt. Chhabubai*, AIR 1982 SC 20. The Supreme Court held therein that a finding as to title to immovable property rendered by a Court of Small Causes does not operate as *res judicata* in a subsequent regular suit for the determination or enforcement of any right or interest in immovable property. The reason for the said view being (para 9):—

"A question of title in a Small Cause suit can be regarded as incidental only to the substantial issue in the suit and cannot operate as *res judicata* in a subsequent suit in which the question of title is directly raised."

This decision, in my humble opinion, is distinguishable. A question of relationship of landlord and tenant in a proceeding under the Orissa House Rent Control Act is not incidental to any substantial issue. That question has to be confronted at a threshold as preliminary state of facts, upon determination of which the further questions would hinge. The finding on the said question, though jurisdictional, is final. Having regard to the purpose of the statute, the general scheme and especially S. 14 of the Act, it is clear that the legislature has given the Controller the jurisdiction to determine all the facts, including the existence of preliminary facts on which the further exercise of that jurisdiction depends and there is no appeal from that decision to the civil court.

11. I am, therefore, of the opinion that the finding in the House Rent Control proceeding that there was no relationship of landlord and tenant between the plaintiff and defendants 1 and 2 operated as *res judicata* and the said finding was not available to be re-adjudicated in the civil court. The suit was, therefore, not maintainable and has been rightly dismissed.

12. In the result, the appeal has no merit and is dismissed with costs.

Appeal dismissed.

AIR 1982 ORISSA 212

Dr. B. N. MISRA, J.

Orissa Supply Agency and others, Appellants v. Mirza Jaliludin and others, Respondents.

Misc. Appeal No. 95 of 1979, D/- 14-5-1982.*

(A) Civil P. C. (5 of 1908), O. 9, R. 13 — Ex parte decree — Setting aside of — Petition therefore maintainable even without co-defendants being impleaded. AIR 1953 Hyd 191, Foll. (Para 4)

(B) Civil P. C. (5 of 1908), O. 9, R. 13; O. 17, R. 2 — Petition for setting aside ex parte decree under O. 9, R. 13 — Maintainable even in respect of final decree passed ex parte under O. 17, R. 2. (Para 5)

(C) Civil P. C. (5 of 1908), O. 17, R. 2; O. 9, Rr. 6, 8 — Non-appearance of parties to the suit — Expression "or make such other order as it thinks fit" — Interpretation — Court not empowered to dispose of suit on merits — It can dismiss the suit or pass ex parte decree under O. 9, R. 8 or 6 respectively. AIR 1980 Cal 148 Not followed in view of AIR 1970 All 257 (FB) and AIR 1977 Madh Pra 222 (FB). (Para 6)

Cases Referred : Chronological Paras

AIR 1980 Cal 148 6

AIR 1977 Madh Pra 222 (FB) 6

AIR 1972 Orissa 177 : (1971) 2 Cut WR 672 5

AIR 1972 Patna 310 5

AIR 1970 All 257 : 1969 All LJ 329 (FB) 6

AIR 1962 Mys 21 5

AIR 1959 Cal 389 : 63 Cal WN 300 6

AIR 1953 Hyd 191 4

AIR 1952 Nag 177 5

AIR 1944 Nag 181 5

R. Ch. Mohanty, for Appellants; S. C. Mohapatra and A. K. Sahoo, for Respondent No. 1.

JUDGMENT:— This appeal under O. XLIII, R. 1 (d) of Civil P. C. is directed against the order dated 24-1-1979 made by the learned Second Additional Subordinate Judge of Cuttack refusing to vacate the ex parte decree dated 13-2-1978 made in Money Suit No. 151 of 1971.

2. Orissa Supply Agency was a registered partnership firm of which

*From order of B. K. Patnaik, 2nd Addl. Sub. J., Cuttack, D/- 24-1-1979.

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plaintiff and defendants 2, 3 and 4 were partners. The money suit was filed by Mirza Jaliludin, one of the partners, for a declaration that the firm stood dissolved with effect from 1-4-1968 upon plaintiff's retirement and plaintiff was entitled to his share in the firm with interest at six per cent per annum thereupon. The suit was decreed on contest on 21-6-1974. It was declared that the plaintiff and defendants 2, 3 and 4 had each one-fourth share in the firm and it had been dissolved with effect from 1-4-1968 when plaintiff retired from the partnership firm. Defendants were directed to render accounts till dissolution and the claim of the plaintiff was allowed to be determined by a pleader commissioner on the basis of examination of the accounts. At the instance of the plaintiff, a pleader commissioner was appointed on 20th of Sept. 1974 and he submitted his report on 4-8-1975. On 20th of April, 1976, the pleader commissioner was examined and cross-examined and his report was marked as Ext. 1. The commissioner's report was accepted as a part of the evidence for the final decree proceeding. Leave was granted to have two money receipts examined by a handwriting expert at defendants' cost. On 8-9-1976, the handwriting expert's report was received in Court. The final decree proceeding suffered several adjournments at the instance of the parties as also on account of pre-occupation of the Court. On 27-1-1978, the Court made the following order:—

"Both parties file haziras. Heard. No time today being engaged in hearing part-heard arguments in T. A. 40 of 1975. Case is fixed to 13-2-1978 to adduce evidence, if any."

On that day, the plaintiff's advocate was present while the contesting defendants were not represented by advocates. The Court directed:—

".....The only way open to the defendants is to prove that payments of Rs. 28,646.16 as mentioned above have been made to the plaintiff. The defendants took several times to adduce the evidence to prove the payment of Rupees 28,646.16. But till now they are not able to produce any witness to that effect. Hence, the hearing on Commissioner's report stands closed when the defendants failed to adduce any evidence. Therefore, the report of the Pleader Commissioner being accepted is to be worked out. Hence, the plaintiff is

to recover Rs. 38,613.02 from the defendants. Therefore, the decree is made final".

On 14-3-1978, defendants applied under O. IX, R. 13 of Civil P. C. for reopening the matter. The second defendant's name was shown in the application though he was admittedly dead on 9th of March, 1978. On 10-5-1978, an application was made on behalf of the defendants for impleading the legal representatives of the second defendant. On 4-9-1978, the learned trial Judge made the following order:—

"..... The petition dated 9-5-1978 of the petitioners in Misc. Case to delete the name of deceased petitioner No. 2 from the category of the petitioner and to implead his legal representatives as described in the schedule of the petition as pro forma opposite parties from 2 to 7 is put up. Perused the counter filed by the opposite party. Heard counsel from both the sides. At the outset the learned counsel for the opposite party Mirza Zaliludin urged that there cannot be any substitution of petitioner No. 2 who died on 9-3-1978 and the present miscellaneous case was filed on 14-3-1978, since the miscellaneous case was not pending on the date of death of petitioner No. 2. The learned counsel for the petitioners resorts to the provision of O. 22 of the C. P. C. I find on a bare reading of the provisions of O. 22, C. P. C. that the provisions refer to pending suits. Therefore, the petitioners cannot resort to O. 22, C. P. C. for substitution. Alternatively, the learned counsel for the petitioners urged that he may be allowed to amend the miscellaneous petition by way of an amendment incorporating the facts given in schedule of the petition dated 9-5-1978. In the premises, since the petition bears a composite character of substitution and amendment it shall not be entertained for consideration unless a regular petition for amendment is filed if so advised which shall be disposed of on merits after hearing objection from the opposite party....."

On 18-9-1978, a formal application for adding the legal representatives of the original defendant No. 2 as pro forma opposite parties 2 to 7 was filed. On 8-1-1979, the learned trial Judge allowed the application and directed the legal representatives of the defendant No. 2 to be added as pro forma opposite parties. On 24-1-1979, by the impugned order,

the learned trial Judge rejected the application under O. IX, R. 13 of the Code on the ground that it was barred by limitation in view of the fact that the legal representatives of the original defendant No. 2 were added after expiry of the period of limitation. This order is assailed.

3. In view of the submissions advanced during hearing of the appeal at the Bar, three questions arise for consideration —

(i) Whether the defendants could rely upon the provisions of O. I, R. 10, Civil P. C., in the facts of the case?

(ii) Whether the application under O. IX, R. 13 of Civil P. C. was maintainable and

(iii) In case such an application lay, whether there was sufficient cause for vacating the ex parte order making the preliminary decree final?

4. The order making the preliminary decree final was made on 13-2-1978 and the second defendant had died on 9-3-1978. The application under O. IX, Rule 13, C. P. C. was filed on 14th of March, 1978, but it purported to be also on behalf of the second defendant who was since dead. When this fact was realised, on 10-5-1978 prayer to delete the name of the second defendant and to bring his legal representatives on record was made. On 4-9-1978, the learned trial Judge refused to delete the name of the second defendant and bring the legal representatives on record on the ground that composite prayers have been made in the application. The application dated 10th of May, 1978, made on behalf of the defendants actually asked for one relief, namely to delete the name of the second defendant from the category of petitioners and to bring the legal representatives of the said deleted defendant on record as opposite parties. The trial Court went wrong in rejecting the application by saying that two prayers had been made in one common application. Yet, pursuant to the Court's observation, an application to add the legal representatives of the second defendant as pro forma opposite parties was made on 18-9-1978 and that application was allowed on 8-1-1979. The following order was made that day:—

"Both parties file haziras. The amendment petition of the dated 18-9-78 is put up. Perused the counter. The petitioner by the amendment wants to add the O.P.

Nos. 2 to 7 who are the L.Rs. of deceased petitioner No. 2. The learned counsel for the O.P. submits that (so far as) the point of limitation regarding addition of parties is concerned, (the same) be reserved for decision in the misc. case and amendment be allowed. Carry out the amendment. Add O.P. Nos. 2 to 7 in the cause title in the misc. petition....."

Order XXII necessarily relates to pending proceedings. Admittedly, on 9th of March, 1978, when the second defendant died, no proceeding was pending where the need to substitute the legal representatives would have arisen. On 14th of March, 1978, i.e. five days after the death, in the application under O. IX, R. 13 of the Code, the second defendant's name had featured. This required deletion of the name of the deceased defendant No. 2 and bringing on record all his legal representatives. That was exactly what was prayed for on 10-5-1978. The reason to reject that application as found in the order dated 4-9-1978 is not acceptable. As already pointed out, a single prayer was made to delete one of the added parties and to bring the legal representatives on record as pro forma opposite parties. Prayer for substitution as such was not maintainable, but the application could be treated as one under O. 1, R. 10 of the Code, the principles of which well covered the situation. Sub-rule (1) provides:—

"Where a suit has been instituted in the name of wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just."

The fact of death of the second defendant was overlooked and the application purported to be by the defendants. When the mistake was known, but the legal representatives of the second defendant were not available to join as petitioners, they were asked to be impleaded as opposite parties.

An application under O. IX, R. 13 of the Code was maintainable even without the co-defendants being impleaded. (See Sultan Husain Khan v. Satnarain Lal, AIR 1953 Hyd 191). That being the position, even with the deletion of the

accord (second) defendant and the legal representatives being absent from the cause title of the miscellaneous application, there could be no difficulty in entertaining the matter. In such a situation when the application under O. I, R. 10 of the Code had been made, the same should not have been rejected. It was more with a view to making the record complete than making the application maintainable that the move seems to have been taken.

5. Law is fairly well settled that O. IX, R. 13 of the Code applies to final decree proceedings. (See Dolagobinda Sahu v. Nityananda Sahu, (1971) 2 Cut WR 672: (AIR 1972 Orissa 177) and Mst. Nagina Devi v. Brijnandan Pd. Sinha, (AIR 1972 Patna 310). It has been contended that the application of O. IX, R. 13 of the Code stood excluded in view of the provisions of Order XVII. On the facts in this case, R. 3 of O. XVII had no application. The question for consideration is if R. 2 applied, R. 2 provides:—

"Where, on any day to which the hearing of the suit is adjourned the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.

Explanation.— Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion proceed with the case as if such party were present."

As already taken note of, on 13-2-1978, the plaintiff was present and neither the defendants nor their advocate, however, appeared before the Court. In the final decree proceeding evidence as such had not been taken. On an earlier occasion, the Commissioner's report had, however, been accepted by overruling the objection and the said report was directed to be taken as a piece of evidence to be considered in due course. By 13-2-1978, the evidence or a substantial portion of the evidence had not already been recorded. At any rate, if the Commissioner's report formed evidence on the plaintiff's side, the default on that day was not on his side but was of the defendants. Therefore, the situation contemplated by the Explanation added to

the Code by amendment in 1976, was not satisfied.

Even if O. XVII, R. 2 of the Code applied that did not exclude the application of O. IX, R. 13 of the Code. Vivian Bose, J., as the learned Judge then was, pointed out in the case of Raghbir Prasad v. Pyarelal Amarchand Kalar, AIR 1944 Nag 181, even to a final decree passed ex parte under C. XVII, R. 2 of the Code, the provisions of O. IX, R. 13 of the Code were applicable. That view has been approved by a Division Bench of the same Court in the case of Hirekhan Motikhan v. Mt. Narbada Bai, AIR 1952 Nag 177 and a decision of the Mysore High Court in the case of Subbanna Naik Krishna Naik v. Prahlad Ramanna Naik, AIR 1962 Mys 21.

6. It is pertinent at this stage to refer to a single Judge decision of the Calcutta High Court in the case of Lalit Chandra Das v. Sushil Chandra Guha, AIR 1980 Cal 148 (at p. 150), where it has been observed:—

"On the 25th July, 1975, which was the date fixed for hearing, on the prayer of the defendant-petitioner, only the plaintiff-opposite parties were present. So, the case is not covered by the provisions of the amended R. 3 (a) of O. 17. The case is covered by the provisions of clause (b) thereof. That clause empowers the Court to proceed according to the provisions of R. 2.

The Explanation to Rule 2 has no application because on the 25th July, 1975, the plaintiff-opposite parties were present. Consequently, according to the provisions of Rule 2, the Court was enjoined to dispose of the suit in one of the modes prescribed by O. IX of the Code or to "make such order as it thinks fit." The effect of those words read with the aforesaid Bench decision of this Court is that if there were materials on the record, the Court could pass a decree. In fact, this was done by the learned Munsif because, as already pointed out, on the 11th Dec., 1974, three P.Ws. were examined. Since there were materials on the record, the Court rightly proceeded to decide it on the merits."

Before the learned single Judge, two Full Bench decisions one of the Allahabad High Court in the case of Munna Lal v. Jai Prakash, AIR 1970 All 257 (FB) and the other of the Madhya Pradesh High Court in the case of Rama Rao v. Shantibai, AIR 1977 Madh Pra 222 (FB) had been cited, where the words

in R. 2 "or make such other order as it thinks fit" were construed not to empower the Court to dispose of the suit on the merits but only to grant a further adjournment and if the Court did not propose to adjourn the suit, it was held that it could proceed under O. IX, of Civil P. C. and dismiss the suit under O. IX, R. 8, if the plaintiff did not appear and pass an ex parte decree under O. IX, R. 6, if the defendant did not appear. The learned single Judge preferred to follow a Bench decision of his own Court in the case of Tulsi Ram v. Sitaram Sri Gopal, (1959) 63 Cal WN 360: (AIR 1959 Cal 389), as being bound by it in preference to the two Full Bench decisions. As would appear from the Objects and Reasons for the incorporation of the Explanation in R. 2 of O. XVII, the Explanation was incorporated to avoid the varied interpretations by different High Courts of the phrase "make such other order as it thinks fit". With the Explanation in the statute book, it must follow that unless the situation contemplated in the Explanation was available, the position would be as had been interpreted by the two Full Bench decisions. O. IX, R. 13 of Civil P. C., therefore, would be applicable and the application made thereunder was, therefore, maintainable.

7. The only other question left for consideration is whether the defendant had been able to establish existence of sufficient cause for non-appearance on 13-2-1978. This aspect of the case has received insufficient treatment in the Court below. The evidence adduced by the parties has not been discussed in the impugned order. The matter has not at all been properly considered. I am of the view that the matter should go back for a fresh decision by the trial Court. In case parties want further evidence to be laid about the existence of sufficient cause it should be in the discretion of the trial Court to permit such evidence to be laid by both sides in accordance with law.

8. The net result, therefore, is that the Misc. Appeal is allowed and the impugned order is vacated. The matter is remitted to the trial Court for fresh disposal of Misc. Case No. 19 of 1978 in accordance with law keeping the observations made above in view. Costs shall abide the event. 28th June, 1982 is fixed for appearance of the parties before the

lower Court for the purpose of receiving directions of that Court as to further proceedings in the misc. case.

Appeal allowed.

AIR 1982 ORISSA 216

R. C. PATNAIK, J.

Municipal Council, Jeypore Municipality, Appellant v. Ghansyam Das Tirth Das, Respondent.

Second Appeal No. 317 of 1977. D/- 16-3-1982.*

Orissa Municipal Act (23 of 1950), Section 377 (2) — Jeypore Municipal Council Octroi Bye-laws (1974), Bye-laws 22 and 23 (1) — Bar of suits u/s. 377 (2) — Goods brought within limits of Municipality re-exported within 15 days entitling party to refund of octroi duty under bye-laws 22 and 23 (1) — Claim for refund refuted by Municipality — Suit for adjudication of claim — Is not barred by S. 377 (2); (Civil P. C. (1908, S. 9).

The provisions contained in Bye-laws 22 and 23 (1) are that when goods brought within the limits of the Municipality are re-exported within 15 days, an application for refund can be made to the Executive Officer. There is no provision in the Bye-laws providing adjudication of controversy arising when a claim is made by a party and refutation is made by the Municipality, nor is there any provision for appeal from the decision of the Executive Officer of the Municipal Council. The Act, the rules or the Bye-laws provide no machinery for adjudication of the claim for refund. No special machinery for enquiring into and adjudicating upon a claim or challenge having been provided, the jurisdiction of Civil Court is not ousted. AIR 1969 SC 78, Rel. on; AIR 1976 SC 1446, Refd.; AIR 1977 SC 955 and AIR 1979 SC 1250, Disting. (Paras 6, 9)

Cases Referred: Chronological Paras
AIR 1976 SC 1446 7, 9
AIR 1979 SC 1250: 1979 Tax LR 871 10
AIR 1977 SC 955 10
AIR 1976 SC 1446 7, 9
AIR 1969 SC 78 8, 9
AIR 1968 SC 906 7

*From decision of D. Hota, Dist. J., Koraput-Jeypore, D/- 27-9-1977.

DZ/FZ/B676/82/HR/RSK

S. C. Mohapatra and M. R. Mohanty, for Appellant; Y. S. N. Murty, for Respondent.

JUDGMENT:— The courts below having granted concurrently a decree for Rs. 868.94, the Municipal Council, Jeypore Municipality, the defendant, has filed this second appeal.

2. The plaintiff carrying on business under the name and style of "Ghansyam Das Tirthadas" filed a suit for recovery of Rs. 4,496.48 from the Municipality by way of refund of octroi paid. The plaintiff urged that he was the sole distributor in the district of Koraput for batteries, torch lights, bulbs etc. manufactured by the Union Carbide India Ltd. under the trade name of 'Eveready'. Goods were consigned to Jeypore and distribution to various parts of the district used to be made as per demand. Goods intended for sale, use and consumption are chargeable with octroi. Such goods which were later on re-exported by way of distribution to various parts of the district of Koraput outside Jeypore were not liable to octroi and octroi which was collected in respect of such goods by the Municipality at the time of entry into the limits of the Municipality was available to be refunded upon re-export. The plaintiff alleged that in 1974, the Executive Officer refused to refund the amount claimed in suit though in the past such refund had been allowed. This controversy gave rise to the suit.

3. The stand of the Municipality was that it was not liable to refund the amount as the destination of the goods was Jeypore, that is within the limits of defendant-Municipality. A further stand was taken that the suit was not maintainable having regard to the provisions of the Act and the Bye-laws.

4. The courts below have granted the decree for Rs. 868.94 holding the rest to have been barred.

5. At the time of hearing of the appeal, the quantum was not disputed. The only question raised by the defendant-appellant was that the suit seeking refund was not maintainable, in view of S. 377 of the Orissa Municipal Act and the provisions contained in the Bye-laws framed by the Municipality called "Jeypore Municipal Council Octroi Bye-laws, 1974."

6. S. 377 (2) of the Orissa Municipal Act reads as follows:—

"(2) No suit shall be brought in any Court to recover any sum of money collected under the authority of this Act or to recover damages on account of any assessment or collection of money made under the said authority :—

Provided that the provisions of this Act have been in substance and effect complied with." The relevant provisions of the Bye-laws are :—

"22. In case goods are brought within limits and part of the same is taken outside the Municipality, the owner of such goods shall pay the entire octroi on goods actually brought and if within the period of 15 days any portion of the goods brought in is taken out, a refund will be allowed to that extent on claim."

"23 (1). Any person claiming any refund of octroi paid in respect of articles or goods brought by him may apply in Form 'E' to the Executive Officer within 15 days of payment of octroi. The Municipal Council shall where it is liable to refund the octroi paid, make the refund within 15 days from the date of such a claim, failing which interest at the rate of 6% shall be payable."

The provisions contained in the aforesaid Bye-laws are clear that when goods brought within the limits of the Municipality are re-exported within 15 days, an application for refund can be made to the Executive Officer. There is no provision in the Bye-laws providing adjudication of controversy arising when a claim is made by the party and refutation is made by the Municipality, nor is there any provision for appeal from the decision of the Executive Officer of the Municipal Council. Learned counsel for the appellant Municipality, therefore, stands on S. 377 (2) which has been extracted above. The said provision ousts the jurisdiction of the civil court in regard to suits for recovery of any sum collected on account of any assessment or collection made under the authority of the Act. The proviso adds that such assessment or collection must have been made by complying with the provisions of the Act in substance and effect.

7. The courts below have found that goods worth Rs. 868.94 were re-exported within 15 days and the plaintiff was entitled to refund as per the provisions contained in Bye-laws 22 and 23. In my opinion, S. 377 (2) has no application to the facts of the present case. The Sup-

reme Court in the case of *M/s. Hiralal Thakorlal Dalal v. Broach Municipality* (AIR 1976 SC 1446) followed its earlier decision in *Burmah Shell's case* (AIR 1963 SC 906) and held that a party was not liable to octroi in respect of goods which it brought into the local area and which were re-exported.

8. Regarding the jurisdiction of the civil court, the parties referred to a good many decisions and I only refer to a few of them. *Hidayatullah, C. J.* formulated seven propositions in *Dhulabhai v. State of Madhya Pradesh* (AIR 1969 SC 78) :

"1. Where the statute gives a finality to the orders of the special tribunals the civil courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the civil court would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

2. Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court. Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intent becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.

3. Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.

4. When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if

the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.

5. Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected, a suit lies.

6. Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case, the scheme of the particular Act must be examined because it is a relevant enquiry.

7. An exclusion of jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply."

9. On the finding that the party was not liable to pay octroi when the goods which were re-exported, retention of the money by the Municipality amounts to collection in excess of constitutional limits or an illegal collection, the foundation justifying collection having been knocked off. The Act, the rules or the Bye-laws provide no machinery for adjudication of the claim for refund. So, the case comes within the fifth proposition formulated in Dhulabhai's case (AIR 1969 SC 78). No special machinery for enquiring into an adjudicating upon a claim or challenge having been provided, the jurisdiction of civil court is not ousted. In this connection reference may be made to M/s. Hiralal Thakorlal's case (AIR 1976 SC 1446).

10. Mr. Mohapatra for the Municipality referred to Bata Shoe Co. Ltd. v. Jabalpur Corporation (AIR 1977 SC 955). In that case, the Act and the rules contained provisions enabling the aggrieved party effectively to challenge an illegal assessment or levy. It was held that S. 84 (3) of the C. P. & Berar Municipalities Act excluded the ordinary remedy by way of a suit.

In Munshi Ram v. Municipal Committee (AIR 1979 SC 1250), S. 84 provided the remedy by way of an appeal, to a party aggrieved by an assessment or levy. In that context it was held that the remedy must be sought in the specified forum, in the specified way and all other forums and modes were excluded.

11. There being no provision for adjudication or remedy by way of an ap-

peal, the rule-laid down in those cases has no application. The bar ceases to apply once the foundation is knocked off and collection ceases to be one under the authority of the Act.

12. The courts below have rightly held that the suit was maintainable. I see no merit in the second appeal which is accordingly dismissed. No costs.

Appeal dismissed.

AIR 1982 ORISSA 218

DR. B. N. MISRA, J.

Prasanna Mali and others, Appellants v. Raghumani Misra, Respondent.

Second Appeal No. 189 of 1977, D/- 5-4-1982.*

Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act (21 of 1972), S. 4 (4) — A claiming suit transaction to be usufructuary mortgage — 'B' denying such assertion and claiming that transaction was an outright sale — Rival claims involving rights and interest in suit land — Such claims should be put forward before Consolidation Authorities for proper determination — Held, suit and appeal arising therefrom must be held to have abated in view of provisions contained in S. 4 (4). (1980) 49 Cut LT 297, Disting. (Para 6)

Cases Referred: Chronological Paras
(1980) 49 Cut LT 297: ILR (1980) 1 Cut 79

AIR 1973 SC 2451: 1975 All LJ 175 6

AIR 1968 SC 714: 1968 All LJ 46 6

P. K. Misra, for Appellants; S. C. Mohapatra, for Respondent.

JUDGMENT:— The defendants have filed this appeal against the affirming decision of the learned Subordinate Judge, Sonapur. Plaintiff's case is that the suit lands were recorded in his name and in the names of his brothers in the Fourth Settlement of village Arigaon in Sonapur. In the partition between the plaintiff and his brothers the suit lands had fallen to the share of the plaintiff. In the year 1943, the plaintiff's father took a loan of Rs. 30 from the original defendant, the late Baikuntha alias Beda Mali (the present defendants are the legal representatives of the late Baikuntha), and executed a deed of mortgage in respect of the suit lands. The father of the

*From order of B. N. Goud, Sub-J., Sonapur, D/- 9-2-1977.

plaintiff and the late Baikuntha had agreed that the mortgage debt would be repaid out of the usufruct of the suit lands. The late Baikuntha had been in possession of the suit lands since 1943 and though the entire mortgage debt had been paid off several years ago, he was not vacating possession of the suit lands in spite of demands by the plaintiff. The mortgage stands discharged after expiration of fifteen years from the date of the mortgage, yet the late Baikuntha was not giving up possession. The plaintiff was therefore compelled to file the present suit for redemption and return of the mortgage bond, for a declaration that the suit lands were released from the mortgage debt and for recovery of possession through Court.

2. The written statement filed by the late Baikuntha has been adopted by the present defendants. According to the written statement, the father of the plaintiff had not executed a mortgage bond for Rs. 30 in respect of the suit lands, but he had executed a deed of sale on 12-1-1943 in respect of the suit lands in favour of the late Baikuntha for a consideration of Rs. 30. The father of the plaintiff had put the late Baikuntha in possession of the suit lands on the strength of the deed of sale and since then the latter went into possession of the suit lands on his own right, title and interest. In the Bhogra Conversion proceeding of village Arigaon occupancy rights were conferred on the late Baikuntha by the Collector after due enquiry. The defendants have denied that the relationship between the father of the plaintiff and the late Baikuntha was that of mortgagor and mortgagee. It is also denied that there was any agreement between the plaintiff's father and the late Baikuntha that the mortgage debt was to be repaid out of the usufruct of the suit lands. The other allegations contained in the plaint have also been denied and the defendants have prayed for dismissal of the suit.

3. The learned Munsif who tried the suit found that the plaintiff's father had not sold the suit lands to the late Baikuntha, that the latter was in possession of the suit land as a usufructuary mortgagee even after the statutory discharge of the mortgage, that occupancy rights in respect of the suit lands had not been conferred on the late Baikuntha by the Collector and that the defendants have not acquired title

over the suit lands by adverse possession. The plaintiff's suit was accordingly decreed for redemption and the defendants were directed to deliver possession of the suit lands to the plaintiff and to return the mortgage deed within three months and in case of default, the plaintiff was to recover possession through Court. The appeal filed by the defendants having been dismissed, they have filed the present second appeal.

4. On the basis of submission made by the learned counsel for appellants, the substantial question of law which was formulated by this Court on 16-11-1977 is whether the plaintiff whose claim is based on statutory discharge of the usufructuary mortgage could have filed a suit for redemption instead of filing a suit for recovery of possession. This question does not arise as on going through the plaint I find that in addition to redemption the plaintiff has prayed for recovery of possession through Court.

5. The main question for consideration is whether the suit and the appeals arising out of the suit have abated in view of the provisions contained in Section 4 (4) of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 (hereinafter referred to as the Act). I find from the records that while this appeal was pending in this Court, on 18-6-1979 the plaintiff-respondent filed a petition praying for a declaration that this appeal has abated. In the petition it is stated that the present suit filed by the plaintiff is for declaration of his full right and interest over plot No. 683 of village Arigaon and that by Notification No. 69036-R dated 21-10-1978 under S. 3 of the Act village Arigaon has come under consolidation operation. However, at the hearing of this appeal learned counsel for the plaintiff-respondent did not press this petition. In any event since it is admitted on both sides that village Arigaon where the suit lands are situated has been brought under consolidation operations by virtue of the aforesaid notification of the State Government, a decision is necessary on the question as to whether the present suit and the appeals have abated by virtue of the provisions contained in S. 4 (4) of the Act.

6. Learned counsel for the appellants relies upon AIR 1968 SC 714 (Ram Adhar Singh v. Ramroop Singh) and AIR 1973 SC 2451 (Gorakh Nath Dube v. Hari

Narain Singh) in support of his contention that the present suit must abate after the Government Notification under S. 3 (1) of the Act. In the former case the question which arose for consideration was whether a suit for possession of agricultural land under S. 209 of the U. P. Zamindari Abolition and Land Reforms Act, 1950, filed by the plaintiff who claimed to be a bhumidar would abate under S. 5 of the U.P. Consolidation of Holdings Act, 1953, when the aforesaid S. 5 after amendment did not directly refer to "suits for possession of land". The Supreme Court held (at p. 716):—

"..... 'Suits for possession', as such, has not been expressly referred to, in the new S. 5, but, in our opinion, the expression 'every suit and proceeding in respect of declaration of rights or interest in any land..... are comprehensive enough to take in suits for possession of land, because, before a claim for possession is accepted, the Court will have necessarily to adjudicate upon the right or interest of the plaintiff, in respect of the disputed property, taking into account the claim of the opposite party. Therefore, in our opinion, the suit, instituted by the respondent, is covered by the amended S. 5 of the Act. (Emphasis added).'"

In the latter case the Supreme Court held (at p. 2453):—

"..... We think that a distinction can be made between cases where a document is wholly or partially invalid so that it can be disregarded by any court or authority and one where it has to be actually set aside before it can cease to have legal effect. An alienation made in excess of power to transfer would be, to the extent of the excess of power, invalid. An adjudication on the effect of such a purported alienation would be necessarily implied in the decision of a dispute involving conflicting claims to rights or interests in land which are the subject matter of consolidation proceedings. The existence and quantum of rights claimed or denied will have to be declared by the consolidation authorities which would be deemed to be invested with jurisdiction, by the necessary implication of their statutory powers to adjudicate upon such rights and interests in land, to declare such documents effective or ineffective, but, where there is a

document the legal effect of which can only be taken away by setting it aside or its cancellation, it could be urged that the consolidation authorities have no power to cancel the deed, and, therefore, it must be held to be binding on them so long as it is not cancelled by a court having the power to cancel it. In the case before us, the plaintiff's claim is that the sale of his half share by his uncle was invalid, inoperative, and void. Such a claim could be adjudicated upon by consolidation courts....."

In the present suit the plaintiff's case is that the deed in question was a deed of usufructuary mortgage and that it has been statutorily discharged by virtue of the provisions contained in S. 17 of the Orissa Money-Lenders' Act. On the other hand, according to the defendants, that deed was not a deed of mortgage but a deed of sale executed by the father of the plaintiff in favour of the late Baikuntha. It is submitted by learned counsel for the appellants that in these circumstances intervention of the Civil Court is not necessary and that the consolidation authorities are competent to adjudicate upon the rival claims of the parties. Learned counsel for the respondent has urged that the plaintiff's claim for recovery of possession is based upon statutory discharge of the mortgage and once it is held that there has been a statutory discharge of the mortgage, there is no further question of declaration of any right or interest in the suit lands and as such the bar of S. 4 (4) of the Act should not apply to the present case. In support of this contention reliance is placed on a decision of this Court reported in (1980) 49 Cut LT 297 (Abas Ali Khan v. Sahabuddin Khan). On going through the decision I find that the facts of that case are clearly distinguishable from the facts of this case. In that case there was no dispute that the main transaction between the parties was a mortgage and it was held that the mortgage having been discharged on payment or offer of payment no question of declaration of any right or interest in land was involved in the suit and therefore S. 4 (4) of the Act was not applicable. In the present case, as already noted, while the plaintiff claims the suit transaction to be a usufructuary mortgage, the defendants deny this assertion and claim that the transaction is an outright sale. Therefore the aforesaid decision cannot have any application to

the facts of this case. Since the plaintiff and the defendants adversely claim title to the suit lands, the rival claims involving rights and interest in the suit lands should be put forward before the consolidation authorities for a proper determination of the same. The suit is clearly covered by the provisions of S. 4 (4) of the Act. The suit and the appeals arising therefrom must therefore be held to have abated.

7. This appeal is accordingly allowed. The judgments and decrees of both the Courts below are hereby set aside. In the circumstances of this case, parties will bear their own costs throughout.

Appeal allowed.

AIR 1982 ORISSA 221

J. K. MOHANTY, J.

Mayadhar Nayak, Petitioner v. Sub-Divisional Officer, Jajpur and others, Respondents.

Election Petn. No. 2 of 1950, D/- 13-1-1982.

(A) Representation of the People Act (43 of 1951), Ss. 32, 36 (2) and 100 — Constitution of India, Art. 173 (b) — Election petition challenging election on ground that returned candidate was below 25 years and thus disqualified — Burden of proving that respondent was below age is on petitioner — It is only after *prima facie* evidence is led by petitioner that burden shifts on the shoulder of respondent. Case law discussed. (Evidence Act (1872), Ss. 101-104). (Para 6)

(B) Representation of the People Act (43 of 1951), Ss. 32, 36, (2) and 100 — Election petition — Disqualification of returned candidate on ground that he was less than 25 years alleged — Proof of age — College Register — Admissibility.

The Board of Secondary Education, Orissa, is a statutory body and it conducts the H. S. C. Examinations of the students and regularly maintains the details of the candidates and marks obtained by them. It functions under the Board of Secondary Education Act and the Regulations made thereunder. Therefore, the registers maintained by the statutory Board are admissible in evidence. (Para 8)

(C) Representation of the People Act (43 of 1951), Ss. 32, 36 and 100 — Constitution of India, Art. 173 (b) — Nomination paper for election — Objection as to age by other candidates — Decision of Returning Officer is not final.

The position of law is well settled that even if a decision is rendered on a matter by the Returning Officer, that decision is not final and it is open to examination by the Election Tribunal when an Election Petition is filed. (Para 8-A)

(D) Representation of the People Act (43 of 1951), Ss. 32, 36 (2) and 100 — Constitution of India, Art. 173 (b) — Election petition — Disqualification of returned candidate on ground that he was less than 25 years alleged — Proof of age — Entries in School admission registers — Admissibility.

Much reliance cannot be placed on entries in the school admission registers which are not proved to have been made on the basis of the statement made by a person, i.e. the father of the boy, who knew the true date of his birth. It is well settled that it would depend entirely on the totality of evidence offered by the rival parties as to what value can be properly attached to them and no hard and fast rule can be laid down as to whether the one kind of evidence should prevail or the other. This must depend on the facts and circumstances of each case. Each case must depend upon its own facts and circumstances and must be decided on the net balance of the various counts of proof offered therein. (1958) 14 Ele LR 386 (Bom), Rel. on. (Para 13)

In the instant case the election petition depended solely on the entries in the school and college records to prove the date of birth of respondent to be 25-4-1957. However, there is no oral evidence to support his case. On the other hand there is overwhelming evidence — both oral and documentary — on behalf of respondent to prove his date of birth to be 30-1-1951. In view of the overwhelming evidence — both oral and documentary — adduced on behalf of respondent it can be held that it has been clearly established that the date of birth of respondent is 30-1-1951 and the claim of the petitioner that the date of birth of respondent is 25-4-1957 cannot be accepted. As such respondent was more than twenty-five years of age at the time of filing the nomination. Consequently the respondents election is valid. (Para 15)

Cases Referred: Chronological Paras

AIR 1976 SC 2566	: 1976 Cri LJ 1987	8
AIR 1975 Punj & Har	198	8
AIR 1973 Gauh	90	10
AIR 1973 Mad	421	10
AIR 1972 Punj & Har	199	2-A
AIR 1971 SC	1348	10
AIR 1971 J & K	62	8
AIR 1971 Punj & Har	65	9, 11, 14

AIR 1970 SC 326 : 1970 Cri LJ 496 8-A
 AIR 1970 Mys 305 : 1970 Cri LJ 1584 8-A

AIR 1968 Pat 481 8-A
 (1967) 31 Ele LR 401 (Mad) 6, 8-A,

AIR 1966 SC 1931 8

AIR 1965 SC 282 6, 9, 11, 14

AIR 1964 Punj 231 9

AIR 1964 Raj 126 10

AIR 1963 SC 1088 : 1963 (2) Cri LJ 173 8

AIR 1960 SC 1049 9

(1958) 14 Ele LR 386 (Bom) 6, 9, 11, 13, 14

AIR 1954 SC 520 9

AIR 1927 Oudh 310 8-A

AIR 1927 Pat 271 9

Dr. S. C. Dash, S. K. Achary and B. K. Patnaik, for Petitioner; Standing Counsel, (Mr. I. Ray), B. Misra, R. Mohanty, K. Patnaik and Bidyadhar Mishra, for Respondents.

ORDER :— This petition has been filed by Shri Mayadhar Nayak, the unsuccessful candidate who contested the election to the Orissa Legislative Assembly from 23-Sukinda Assembly constituency in Cuttack District. The election was held on 31-5-1980. The petitioner stood as a candidate of S. U. C. I. party and secured 15,718 votes while the third respondent Sarat Rout, who stood on Congress (I) ticket, was declared elected securing 22,640 votes. The other candidates, namely, Prafulla Chandra Ghareli (respondent No. 2), Sarat Chandra Patra (respondent No. 4), Sarangdhar Muduli (respondent No. 5), Haladhar Dhir (respondent No. 6) and Hrushikesh Rout (respondent No. 7) secured 8385, 3603, 630, 434 and 1957 votes respectively. The total number of valid votes polled was 53,367.

2. According to the petitioner, the nominations to fill up the seat from 23-Sukinda Assembly constituency were invited by the Returning Officer, Jaipur, on the basis of notification (Ext. 4) issued by the Government of Orissa calling upon the electors to elect a member. The nomination papers were to be filed between 25-4-1980 and 2-5-1980 and the date for scrutiny by the Returning Officer was on 3-5-1980. The last date for withdrawal of nomination papers was 5-5-1980. Eight candidates, i.e., the petitioner and respondents Nos. 2 to 8, filed nomination papers. On the date of scrutiny, i.e., 3-5-1980, respondent No. 8 Sanatan Deo (who died during the pendency of this election petition) filed objection before the Returning Officer against the candidature of Sarat Rout (respondent No. 3) on the ground that he did not satisfy the constitutional requirements of Art. 173 (b) of the Constitu-

tion as he was less than twenty-five years of age and the Returning Officer was under obligation under S. 36 (2) of the Representation of the People Act, 1951 (hereinafter referred to as the 'Act') to reject his nomination. This was because, as is evident from the particulars of Matriculates provided by the Board of Secondary Education, Orissa, Sarat Kumar Rout son of Purna Chandra Rout was born on 25-4-1957 and on the date of scrutiny he was less than twenty-five years of age. Sarat Kumar Rout passed the Annual H. S. C. Examination in 1971 and he had filled up the form for appearing in the said examination in his own hand. He had the H. S. C. Examination certificate in his possession and with the full knowledge of his date of birth, misled the Returning Officer by offering his candidature and giving a false information. He has also appeared at Intermediate and Degree Examinations of Utkal University as a student of Angul College and must have filled up his date of birth in those forms. He has even got a wrong age recorded in the electoral roll. According to the petitioner, Sanatan Deo was called upon by the Returning Officer by his letter No. 457 dated 3-5-1980 to adduce evidence on 5-5-1980 at 11.00 a. m. in support of his contention that Sarat Kumar Rout was below twenty-five years of age. He did not call upon respondent No. 3 to adduce evidence in his support. Sri Deo's contention was, however, rejected by the Returning Officer and the nomination of Sarat Rout, whose name as per documents is Sarat Kumar Rout, was accepted as valid. Sanatan Deo withdrew his nomination on 5-5-1980 and did not contest the election. According to the petitioner Sarat Rout was not a valid candidate in the eyes of law and the Constitution and the votes polled in his favour should be presumed to be those cast in favour of a non-existent candidate. Hence those votes should be treated as not polled at all. The petitioner received the highest number of votes from among the valid candidates; but for the votes obtained by the returned candidate by corrupt practices by way of misrepresentation of his age in the nomination, he would have been declared elected to represent the constituency. The election has been materially affected by the candidature of Sarat Rout (respondent No. 3), who in the eyes of law and the Constitution is not a candidate. With these averments it has been prayed that the candidature and subsequent election of Sarat Rout as M. L. A. from 23-Sukinda Assembly constituency be set aside and the petitioner be declared as the validly elected candidate from the said constituency.

3. In this case only Sarat Rout (respondent No. 3) filed written statement. The Returning Officer (respondent No. 1), though did not file any written statement, appeared through his lawyer. The other respondents, namely, respondents Nos. 2, 4, 5, 6 and 7 were set ex parte. Sanatan Deo (respondent No. 8) died during the pendency of this Election Petition and his name has been deleted.

In his written statement respondent No. 3 has stated that the election petition is not maintainable due to non-compliance of Sections 81, 82 and 117 of the Act and is also liable to be dismissed under Section 86 (1) of the Act. Also Rule 4 (iii) of the Rules framed by this Court under the Act has not been complied with and as such the petition is not maintainable. The election petition has not been properly presented and the cost has not been deposited in accordance with the rules of this Court. According to respondent No. 3 it is not true to say that he did not satisfy the constitutional requirement of Art. 173 (b) and it is false to say that he was less than twenty-five years of age on the date of filing the nomination papers. It is equally false to say that on the date of scrutiny he was in possession of the H. S. C. Examination certificate and with the full knowledge of his date of birth, misled the Returning Officer by offering his candidature. It is nothing but white lie to say that he has got a wrong age recorded in the electoral roll. On the date of scrutiny, i. e., 3-5-1980, late Sanatan Deo filed an application before the Returning Officer alleging inter alia that he was the only official party nominee of the Congress (I) party and as this respondent was under age, his official symbol had to be assigned to him (Sanatan Deo). Mr. Deo was called upon to substantiate his claim on 5-5-1980. It is stated that conceding for the sake of argument and admitting that in the H. S. C. Examination certificate of respondent No. 3 and in some other documents his date of birth has been recorded as 25-4-1957, the same is wholly erroneous and incorrect as the correct date of birth of this respondent is 30-1-1951. (It may be mentioned here that this sentence was added by way of amendment which was allowed by Order No. 35 dated 2-11-1981). This respondent filed his reply challenging the petition of Sanatan Deo and successfully established his case that he was above twenty-five years of age on the date of filing his nomination and as such the requirement of Art. 173 (b) of the Constitution was fulfilled. According to this respondent his candidature was valid and was

in no way hit by any provisions of law and he having been successfully won the election is the genuine candidate to represent and has been rightly declared to be elected as a valid candidate securing the largest number of valid votes. He submitted that the election petition is devoid of any merit and as such is liable to be dismissed with costs.

4. On the pleadings of the parties the following issues were framed.

ISSUES.

1. Is the petition maintainable as laid?
2. Is the petition barred by limitation?
3. Does the application comply with the provisions of Ss. 81, 82, 100 and 117 of the Act and Rule 4 (iii) of Chapter VIII of the Rules framed by the Hon'ble High Court?
4. Did respondent No. 3 satisfy the requirements as laid down under Art. 173 (b) of the Constitution at the time of filing nomination to contest from 23-Sukinda Assembly Constituency?
5. Did respondent No. 3 complete twenty-five years of age at the time of filing nomination as required under the Act and Rules?
6. To what relief, if any, the petitioner is entitled?

Issue Nos. 1, 2 and 3 (regarding the maintainability of the election petition) were taken up first and were heard on 31-3-1981. Orders were delivered on 17-4-1981. The issues were answered against respondent No. 3 and the election petition was held to be maintainable. The other issues are to be decided in this judgment.

5. Issues Nos. 4 and 5:— The question that arises for consideration is whether respondent No. 3 had completed twenty-five years of age on the relevant date, i. e., on the date of filing the nomination papers. Article 173 of the Constitution provides that a person shall not be qualified to be chosen to fill the seat in the Legislature of a State unless he is, in the case of a seat in the Legislative Assembly, not less than twenty-five years of age. Section 32 of the Representation of the People Act, 1951 provides that any person may be nominated as a candidate for election to fill a seat if he is qualified to be chosen to fill that seat under the provisions of the Constitution and this Act. Section 36 (2) of the Act empowers the Returning Officer to reject any nomination on the ground that on the date fixed for the scrutiny of the nominations, the candidate is not qualified to fill the seat under Art. 173 of the Constitution. So, from the provisions of Art. 173 of the Constitution and Ss. 32 and 36 (2) of the Act, it is clear that a nomi-

nation of a candidate is liable to be rejected, if on the date of nomination he had not completed the age of twenty-five years. Section 100 (1) of the Act provides that when the High Court is of the opinion that on the date of his election a returned candidate was not qualified or was disqualified to be chosen to fill the seat under the Constitution or the Act, or when the result of the election in so far as it concerns a returned candidate has been materially affected by the improper acceptance of a nomination, the Court shall declare the election of the returned candidate to be void.

6. The nomination filed by respondent No. 3 was objected to by late Sanatan Deo, but the objection was overruled and the Returning Officer held that respondent No. 3 was not below twenty-five years of age on the relevant date and accepted the nomination papers filed by respondent No. 3. This would be evident from the nomination papers (Exts. G, G/1, G/2 and G/3) and the orders passed thereon (Exts. G/4, G/5, G/6 and G/7). As has been held by the Supreme Court in the case of Brij Mohan Singh v. Priya Brat Narain Sinha, (AIR 1965 SC 282), by the Madras High Court in the case of K. Paramalai v. (1) I. M. Alangaram, (2) R. Krishnamurthi, (1967-31 Ele LR 401) and by the Bombay High Court in the case of Krishna Rao Maharaj Patil v. Onkar Narayan Wagh, (1958-14 Ele LR 386) the burden of proving that the age of respondent No. 3 was below twenty-five years on the date of filing the nomination is on the petitioner. It is only after prima facie evidence is led by the petitioner that the burden shifts on to the shoulder of respondent No. 3. It is, therefore, to be considered whether the petitioner has discharged his burden and has established that the age of respondent No. 3 was below twenty-five years on the relevant date.

7. According to the petitioner, respondent No. 3 was born on 25-4-1957. This the petitioner seeks to establish on the basis of the Tabulation Register (Ext. 8) of the H. S. C. Examination of the year 1971 and the entry (Ext. 8/1) made therein with respect to one Sarat Kumar Rout, the entry in the admission register of Revenshaw Collegiate School, the application form submitted for admission into the 2nd Year Degree Class of Angul College, the application form for appearing in the Final B. A. Examination of 1975, the entry in the admission register of 1st Year Degree Course of the year 1972-73 of Revenshaw Evening College and the extract (Ext. 2) of the general register of cases cognizable by the police wherein respondent has been shown

to have been released under Section 3 of the Probation of Offenders Act. The petitioner has examined himself as P. W. 1 and has also examined seven other witnesses, who are official witnesses, in order to prove the documents produced on his behalf.

On the other hand, respondent No. 3 has asserted that he was above twenty-five years of age on the date of filing nomination, his date of birth being 30-1-1951. On the side of respondent No. 3 the documents on which reliance has been placed for proving the age are the electoral roll (Ext. A) published in 1975 and the entry (Ext. A/1) therein with respect to respondent No. 3 where his age has been mentioned as twenty-three years, the electoral roll (Ext. B) published in 1980 and the entry (Ext. B/1) therein where his age has been mentioned as twenty-eight years, the horoscope (Ext. C), copy of the birth certificate (Ext. D), prescriptions (Exts. E and E/1) dated 10-10-1965 and 15-5-1965 granted by the Doctor (R. W. 5), the affidavit (Ext. L/2) filed by his mother before the Returning Officer and his own affidavit (Ext. L) filed before the Returning Officer. Respondent No. 3 examined nine witnesses including his father (R. W. 7), maternal uncle (R. W. 6), the priest (R. W. 2) who performed his Ekosisia Puja (twenty-first day ceremony), the son of the horoscope maker (R. W. 3) and the Doctor (R. W. 5) who granted the prescriptions (Exts. E and E/1) to prove his age. He himself could not be examined as he was ill. It may be mentioned here that respondent No. 3 had filed the attested copy of birth certificate, extract of the electoral rolls of 1975 and 1980, the affidavit of his mother and his own affidavit before the Returning Officer.

8. Now from the evidence on record it is to be considered how far the petitioner has been able to prove his case. P. W. 1 is the petitioner himself. He has narrated as to how objections were raised by late Sanatan Deo regarding the age of respondent No. 3 and how ultimately the Returning Officer accepted the nomination papers of respondent No. 3 holding that he was above twenty-five years of age. He has produced a copy of the Magistrate's General Register in C. S. No. 24 dated 31-7-1973 which has been marked as Ext. 2. From this it transpires that one Sarat Ch. Rout was convicted under S. 323, I. P. C. along with one Ghanasyam Bal, Baidhar Naik and Dolagobinda Bal. While Ghanasyam Bal and Baidhar Naik were sentenced to pay a fine of Rs. 50/- each, in default to undergo S. I. for fifteen days each, Sarat Ch. Rout and Dolagobinda Bal were released under Section 3 of the Probation of

Offenders Act. From this the petitioner wants to make out that Sarat Ch. Rout as mentioned in Ext. 2 is none else but respondent No. 3 who has been released under S. 3 of the Probation of Offenders Act as he was below twenty-one years of age on 30-3-1978. But this submission has no force. Apart from the fact that the person released was Sarat Ch. Rout and not Sarat Rout or Sarat Kumar Rout, the provisions of the Probation of Offenders Act do not say that a person released under any provision of this Act must be below twenty-one years of age. Section 3 of the said Act says that any person will be released; he need not be a person below twenty-one years.

Dr. Dash, learned counsel appearing for the petitioner, relied on decisions reported in AIR 1963 SC 1088 (Ramji Missar v. State of Bihar) and AIR 1976 SC 2566 (Musa-khan v. State of Maharashtra) and argued that Probation of Offenders Act is a social legislation which is meant to reform juvenile offenders so as to prevent them from becoming hardened criminals by providing an educative and reformatory treatment to them by the Government. As respondent No. 3 was released under the provisions of this Act, he must be below twenty-one years in the year 1978. These decisions do not say that the Probation of Offenders Act only applies to persons below twenty-one years of age.

P. W. 1 has no personal knowledge about the age of respondent No. 3. In cross-examination he has stated:

"I have no personal knowledge about the date of birth of Sarat Rout (R-3)."

He has also stated that he has not raised any objection to the electoral roll published in 1975 wherein the age of respondent No. 3 has been mentioned as twenty-three years and to the electoral roll published in 1980 wherein the age has been mentioned as twenty-eight years. P. W. 2 is the Assistant Secretary of the Board of Secondary Education, Orissa. He was asked to produce the application form submitted by respondent No. 3 for appearing in the H. S. C. Examination of 1971. He has stated that the form is not available in the office as the same has been destroyed after being preserved for one year. He was unable to say whether Annexure 1 (particulars of candidate) to the Election Petition (marked X for identification) was issued from his office or not. P. W. 3 is an L. D. Assistant of Ravenshaw Collegiate School. He appeared on behalf of the Headmaster of that school who was asked to pro-

duce the application form of Sarat Rout for appearing in the H. S. C. Examination of 1971. This witness said that the application form is not available. On the other hand he produced the result sheets (marked Z/7 for identification). Objection was raised on behalf of respondent No. 3 that this document should not be allowed to be produced. However, permission was accorded to produce this document. The examination of this witness was deferred and, he was asked to produce the admission register of the school for the year 1969-70. He produced the admission register for the year 1969-70 which was marked as Z/10 for identification. Serial No. 18 of the said register relates to one Sarat Kumar Rout whose date of birth has been mentioned as 25-4-1957 and he was admitted to Class X in the year 1969. This witness admitted in cross-examination that he joined in his post in the school in 1979. He could not say who made the entries in the register.

Dr. Dash argued that Ravenshaw Collegiate School is a Government school and the register has been maintained by Government servants in discharge of official duties in the regular course of official business. He relied on a decision reported in AIR 1966 SC 1931, (Maharaja Pratap Singh Bahadur v. Thakur Manmohan Dey) and argued that the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. He also relied on a decision reported in AIR 1971 J & K 62 (Radha Krishan Tickoo v. Bhusan Lal Tickoo) and submitted that an entry in any record of even a private school as to the age of any student may be admissible if the school is run under the Education Code framed by and under the authority of any Government of any State. He also relied on a decision reported in AIR 1975 Punj & Har 198 (Anant Ram v. State of Punjab) and submitted that the entries in the Government school registers are admissible in evidence.

On the other hand Mr. Mohanty, learned counsel appearing for respondent No. 3, submitted that these documents cannot be taken into consideration as it has not been proved that Sarat Kumar Rout as mentioned in the documents relates to respondent No. 3. No evidence has been led that respondent No. 3 was admitted to Ravenshaw Collegiate School in 1969.

P. W. 4 is the Principal of Angul College. He was asked to produce the application form of Sarat Rout (respondent No. 3) for admission to Pre-University Class. But he produced an application form of one Sarat Rout son of Purnachandra Rout for admission into 2nd Year B. A. Class. This document has been marked as Z/8 for identification. Production of this document was objected to on behalf the respondent No. 3 on the ground that this document was not called for and the same should not be admitted in evidence. However, the document was allowed to be produced. This witness joined in Angul College on 24-8-1981 and he has no personal knowledge about the document or its contents. He has stated that he does not know the signature of the person in the document.

Dr. Dash argued that the document marked Z/8 for identification is a statutory form and it should be looked into. But this argument cannot be accepted as the document has not been formally proved.

P. W. 5 is the District Election Officer, Cuttack. He is a formal witness and has proved the notification (Ext. 4) issued by the Governor calling upon all the Assembly constituencies in the State to elect members, the notification (Ext. 5) issued by the Returning Officer of 23-Sukinda Assembly constituency inviting nomination and fixing the date of nomination and scrutiny, office copy of the letter (Ext. 6) of the Returning Officer addressed to the Secretary, Orissa Legislative Assembly, forwarding six acknowledgement receipts of certificate of election, attested copy of the acknowledgement receipt (Ext. 6/1) granted by Sarat Rout regarding receipt of election certificate and the return of election (Ext. 7) showing number of valid votes and number of votes secured by different candidates. P. W. 6 is the Registrar of Utkal University. He was asked to produce the application forms of respondent No. 3 for appearing in the Pre-University Examination 1972 and First Year Degree Examination 1973. But he stated that the said forms are not available and they have been destroyed. He produced the application form of one Sarat Kumar Rout for admission into B. A. Examination of 1975 as a collegiate candidate from Angul College. He stated that one Sarat Kumar Rout has signed the form, but he does not know the handwriting of the applicant. The form is marked as Z/9 for identification. Production of the document was objected to on behalf of respondent No. 3 on the ground that this document should not be looked into as it has not been proved in accordance with law. This

witness has frankly stated that he is not acquainted with the handwriting and signature appearing in the document.

Dr. Dash argued that the document marked Z/9 for identification is a statutory form and it should be taken into consideration without being formally proved. In my view this argument is not correct and it cannot be accepted.

P. W. 7 is the Lecturer in English and also the Administrative Bursar of Ravenshaw College, Cuttack, who appeared on behalf of the Principal of the said College. This witness produced the admission register of First Year Degree Arts Class of Ravenshaw Evening College for the year 1972-73. The relevant entry was marked as Z/11 for identification. But this document is of no use to the petitioner as there is no mention of the date of birth against the name of Sarat Kumar Rout. This witness was cross-examined by learned counsel for the petitioner, but nothing substantial has been brought out from him. P. W. 8 is the Assistant Secretary of Board of Secondary Education, Orissa. He was earlier examined as P. W. 2 and was directed to produce the Tabulation Register of H. S. C. Examination of 1971. The register has been marked as Ext. 8 and the entry with respect of Roll No. 13613 (Sarat Kumar Rout) has been marked as Ext. 8/1. The date of birth of Sarat Kumar Rout has been mentioned as 25-4-1957. In cross-examination P. W. 8 has stated that he has no personal knowledge about Ext. 8 and the entries made therein. He has stated that the result sheets (marked Z/7 for identification) have not been signed by anybody. He has also stated that there is no indication in Ext. 8 that the date of birth of the candidate has been extracted from his application form. On seeing the Regulations of the Board of Secondary Education, Orissa, he did not find any provision for maintenance of registers like Ext. 8. Learned counsel for respondent No. 3 objected to the production of this document and submitted that it should not be looked into as it has not been formally proved. This argument does not hold good. Board of Secondary Education, Orissa, is a statutory body and it conducts the H. S. C. Examinations of the students and regularly maintains the details of the candidates and marks obtained by them. It functions under the Board of Secondary Education Act and the Regulations made thereunder. So the objection on behalf of respondent No. 3 cannot be accepted.

8A. On behalf of respondent No. 3, the District Election Officer (P. W. 1) proved the

electoral roll published in 1975 (Ext. A) and the entry (Ext. A/1) in serial No. 9 (Sarat Kumar Rout at page 274), and the electoral roll published in 1980 (Ext. E) and the entry (Ext. B/1) in serial No. 522 (Sarat Rout at page 124). In Ext. A/1 the age of Sarat Kumar Rout has been shown as twenty-three years and in Ext. B/1 it has been shown as twenty-eight years. R. W. 2 is the family priest of respondent No. 3. He has stated that about thirty-two years back (this witness was examined on 23-11-1981), Purnachandra Rout (father of respondent No. 3) was married. One year and three months after the marriage this witness performed the twenty-first day ceremony of Sarat Kumar Rout who is the first child of Purnachandra Rout. Nothing substantial has been brought out in cross-examination of this witness. However, Dr. Dash argued that this witness has not stated that the date of birth of respondent No. 3 is 30-1-1951. He also argued that though R. W. 2 is a priest, he could not correctly say what is Saptapadi. R. W. 3 is an astrologer. According to him his father Nidhi Naik was also an astrologer who prepared the horoscope of Sarat Rout. He proved the horoscope (Ext. C) to be in the handwriting of his father. In cross-examination nothing substantial has been brought out from this witness. A suggestion was made to this witness that Ext. C has been prepared by one Madhabananda Tripathy, but he stoutly denied the same. R. W. 4 is a Clerk in the office of the Health Officer of Vital Statistics, Cuttack Municipality. He proved the birth certificate (Ext. D) issued by the Registrar of Births and Death-cum-Health Officer, Cuttack Municipality. He has further stated that the certificate is an extract of the register of births and deaths maintained in Cuttack Municipality. In cross-examination suggestion was made to this witness that Ext. D is a false certificate and the name of Sarat Kumar Rout has not been mentioned in the register. But he denied the same. R. W. 5 is a Doctor. He was the Assistant Surgeon of Gobardhanpur Dispensary (the village of respondent No. 3) for the period from 1958 to 1966. He was the family physician of Purnachandra Rout (father of respondent No. 3). This witness has stated that he has treated Sarat Kumar Rout for his ailments several times. He has proved two prescriptions (Exts. E and E/1) — one dated 10-10-1965 and the other dated 15-5-1965, prepared in his hand and signature for Sarat Kumar Rout. In these prescriptions the age of respondent No. 3 has been recorded as fourteen years. In cross-examination he has stated

that the age of respondent No. 3 has been mentioned in Exts. E and E/1 on his mother's statement.

Dr. Dash submitted that Exts. E and E/1 should not be accepted in evidence as they have been produced late. Besides, R. W. 5 has not produced any document or register to show that he has actually treated this patient. He relied on a decision reported in AIR 1927 Oudh 310 (D'Cruz, F. A. v. Mrs. W. E. D'Cruz) and submitted that the prescription register maintained by a Government compounder in a Government dispensary is only admissible. But this decision is of no avail to him as it has been held therein that the entries in a prescription register maintained by a Government compounder in a Government dispensary are admissible under Section 35, although the particular compounder or compounders who made these entries have not been called as witnesses to prove their handwriting. In this case the Doctor has made it clear that he treated Sarat Rout for his ailments in his private capacity and he has proved the prescriptions (Exts. E and E/1). He is a respectable witness and nothing has been brought out in his cross-examination to discredit his version.

R. W. 6 is the maternal uncle of respondent No. 3. According to him Purnachandra Rout married his sister in the year 1949 and respondent No. 3 was born in the year 1951 at Cuttack. His sister was kept in a house at Jagannathballav in Cuttack Town where she gave birth to respondent No. 3 on 30-1-1951. The birth of the child was intimated to the Municipal Office on 5-2-1951. According to him at the time of twenty-first day ceremony of the child he himself, his father and brothers, Anant Charan Hota (R. W. 2) and Nidhi Naik astrologer (the father of R. W. 3) were present. Many questions were put to this witness in cross-examination. But nothing has been brought out from him to disbelieve his statement. R. W. 7 is the father of respondent No. 3. According to him Sarat Kumar Rout is his first child who was born on 30-1-1951. He is also known as Sarat Rout. This witness corroborated R. W. 6 in material particulars and stated that he and R. W. 6 went to the Municipal Officer to report the birth of the child. He also corroborated R. W. 3 that the horoscope (Ext. C) was prepared by Nidhi Naik, the family astrologer. He was cross-examined at length. In cross-examination he has stated that he has not intimated about the date of birth of Sarat Kumar Rout at the time of his admission in schools and colleges. He has also stated that he does not

remember the date of birth of Sarat Kumar Rout as per the H. S. C. Examination certificate.

Dr. Dash argued that R. Ws. 6 and 7 are interested witnesses and their evidence should not be accepted. But this argument cannot be accepted as nothing substantial has been brought out from these witnesses to discredit their testimony. They are also the most competent witnesses to depose about the date of birth of respondent No. 3.

R. W. 8 is the Office Superintendent of Cuttack Municipality. He has been serving in the Municipality since 1966. According to him the register of births and deaths was being maintained in Cuttack Municipality under the provisions of Bihar and Orissa Municipal Act, 1922 and the register has been maintained since 1922. Under the Registration of Births and Deaths Act, 1969, the Health Officer has been declared as the Registrar of Births and Deaths and he is the custodian of the register of births and deaths. The Health Officer is granting certificates regarding births and deaths since 1969. In cross-examination he has stated that under Section 344 of the Bihar and Orissa Municipal Act, 1922, the register of births and deaths is being maintained by Cuttack Municipality. He could not say when the Cuttack Municipality by resolution decided to maintain such registers. He could not show any document that prior to 1969 the Health Officer was the Registrar of Births and Deaths, but from the practice followed he came to know that the Health Officer was acting as the Registrar of Births and Deaths. Prior to 1969 the register of births and deaths was being kept in custody of the Health Officer and after 1969 also it is being kept in his custody. He stated that he has no personal knowledge whether Ext. D is the exact copy from the register of births and deaths, but usually such certificates are granted on the basis of the entries made in the register.

Dr. Dash argued that Ext. D should not be taken into consideration as the original register has not been produced. It may be mentioned here that though Ext. D was obtained on 3-5-1980 and the attested copy was produced before the Returning Officer, the petitioner did not take any steps for calling for the original register. However, an application was filed during the course of arguments that the original register should be called for as the petitioner has reasons to believe that there might be interpolations. As the petitioner was not diligent in calling for the document and only made the applica-

tion at a belated stage, the prayer was rejected by order dated 14-12-1981.

So the existence of the register of births and deaths has not been disputed by the petitioner. Dr. Dash argued that nothing has been shown that the register of births and deaths has been maintained according to Municipal Act and Rules and the resolution of the Cuttack Municipality to maintain the register has not been produced and in absence of all these Ext. D should not be taken into consideration. He relied on a decision reported in AIR 1970 SC 326 (Ram Prasad Sharma v. State of Bihar) and argued that no proof has been led in this case as to who made the entry in the birth register and whether the entry was made in discharge of official duty. He also relied on a decision reported in AIR 1972 Punj & Har 199 (Sham Lal v. Munilal) and submitted that the register of births and deaths must be shown to have been maintained in accordance with the Municipal Act and Rules. As already mentioned, R. W. 7 has stated that the register of births and deaths has been maintained under Section 344 of the Bihar and Orissa Municipal Act, 1922 and such register has been maintained by Cuttack Municipality since 1922.

Mr. Mohanty learned counsel appearing for respondent No. 3, submitted that as per S. 344 of the Bihar and Orissa Municipal Act, 1922, the register of births and deaths within the limits of Municipality has been maintained in accordance with the provisions of the Bengal Births and Deaths Registration Act, 1873 and after coming into force of the Registration of Births and Deaths Act, 1969, maintenance of this register by the Health Officer has been continued. This is also clear from the evidence of R. W. 7. Section 11 of the Bengal Births and Deaths Registration Act, 1873 provides that in any place to which the District Municipal Improvement Act shall have been extended, the Municipal Commissioner may, if at a meeting specially convened for considering such questions they shall so determine, arrange for keeping a register of all births or of all deaths or of all births and deaths, occurring within the municipality. In this case R. W. 8 has stated that the register of births and deaths has been maintained under Section 344 of the Bihar and Orissa Municipal Act as required under the provisions of the Bengal Births and Deaths Registration Act, 1873, which was also applicable to Orissa. According to Mr. Mohanty, an entry in any public or other official book, register or record, stating a fact in issue or relevant fact, and made by a pub-

lic servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself a relevant fact. He also contended that the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public or private business, in their relation to the facts of the particular case. Under Illustration (e) of S. 114 of the Evidence Act, the Court may presume that judicial and official acts have been regularly performed. He further argued that from the evidence of R. Ws. 6 and 7 it is clear that they have reported the births of respondent No. 3 in Cuttack Municipality. Mr. Mohanty relied on a decision reported in AIR 1968 Pat 481 (Biswanath Gosain v. Dulhin Lal-muni) wherein it has been held (para 11) :—

“The entries in Birth and Death registers are public documents and are admissible under Section 35 of the Evidence Act and it is not necessary to prove who made the entries and what was the source of his information. The register being a public document, presumption of correctness attaches to it and heavy onus lies on the party who wants dispute the presumption.”

He also relied on the decision reported in (1967) 31 Ele LR 401 (Mad) wherein it has been held :

“An extract from the birth register is a public document and a certified copy of such an extract is admissible in evidence.”

Mr. Mohanty also cited another decision reported in AIR 1970 Mys 305 (Smt. Vanajakshamma v. P. Gopala Krishna) wherein it has been held that the register of births is a public document and certified copy of its extract is admissible to prove the contents of such document. After hearing the argument of both sides I see no reason as to why Ext. D should not be taken into consideration.

R. W. 9 is the Returning Officer. He has proved the nomination papers of respondent No. 3 marked Exts. G, G/1, G/2 and G/3 and the orders passed thereon marked Exts. G/4, G/5, G/6 and G/7. He has stated that late Sanatan Deo filed his objection (Ext. H) before him. He issued notice to Sanatan Deo to produce evidence in support of his objection, but Sri Deo did not produce any evidence. However, respondent No. 3 produced the attested copy of the birth certificate, electoral rolls of 1975 and 1980, and the affidavit of his mother and his own affidavit stating that his date of birth is 30-1-1951. After considering all these he came to the conclu-

sion that respondent No. 3 was above twenty-five years of age on the date of filing nomination and so he accepted the nomination papers of respondent No. 3. The position of law is well settled that even if a decision is rendered on this matter by the Returning Officer, that decision is not final and it is open to examination by the Election Tribunal when an Election Petition is filed. This position is not disputed.

8-B. From a consideration of the above evidence it emerges that while the petitioner in order to prove that the date of birth of respondent No. 3 is 25-4-1957 wants to place reliance on the Tabulation Register (Ext. 8) of the Board of Secondary Education, the entry in the admission register of Ravenshaw Collegiate School of the year 1969-70, the application form for admission to 2nd Year Degree Course of Angul College and the application form to appear in the Annual B. A. Examination of 1975, respondent No. 3 wants to prove his date of birth to be 30-1-1951 by relying on the electoral rolls of 1975 and 1980 (Exts. A and B) and the entries (Exts. A/1 and B/1) made therein with respect to respondent No. 3, the horoscope (Ext. C), birth certificate (Ext. D), prescriptions (Exts. E and E/1) and the affidavit of his mother, Ext. L/2. Besides, respondent No. 3 also relies on the oral evidence of his maternal uncle (R. W. 6), father (R. W. 7) and the family priest (R. W. 2). The petitioner has not produced any oral evidence in support of his case that the date of birth of respondent No. 3 is 25-4-1957.

9. Mr. Mohanty, learned counsel appearing for respondent No. 3, relied on decisions reported in AIR 1965 SC 282, (1967) 31 ELR 401 (Mad), (1958) 14 ELR 386 (Bom), AIR 1971 Punj and Har 65 : 42 Ele LR 439, (Bhagwan Das Singla v. Harchand Singh) and AIR 1964 Punj 231 (Bansi Ram Naru Ram v. Jit Ram Gehru Ram) and submitted that the entries in school registers should not be relied on as a conclusive proof of the age of a person. In the decision reported in AIR 1965 SC 282 it has been held :

“In actual life it often happens that persons give false age of the boy at the time of his admission to a school so that later in life he would have an advantage when seeking public service for which a minimum age for eligibility is often prescribed. The Court of fact cannot ignore this fact while assessing the value of the entry and it would be improper for the Court to base any conclusion on the basis of the entry, when it is alleged that the entry was made upon false information supplied with the above motive.”

In the decision reported in (1967) 31 Ele LR 401 (Mad) it has been held :

"The date of birth as given in the School Certificate is not conclusive as proving the age of a person. When there is conflict between the age as given in the School registers and the birth extract, if the birth extract is proved to relate to the person concerned, it is safe to rely on the age as given in the birth extract."

In the decision reported in (1958) 14 Ele LR 386 (Bom) it has been held :

"Much reliance cannot be placed on entries in school admission registers which are not proved to have been made on the basis of statements made by a person, e. g., the father of the boy, who knew the true date of his birth."

In AIR 1971 Punj & Har 65 it has been held that the entry in the school register is relevant piece of evidence, but slight evidence to the contrary may displace it. In the decision reported in AIR 1964 Punj 231 it has been held (at p. 235) :

"... the evidentiary value of entries in records of educational institutions have seldom been considered to be great. As against the evidence as to age in birth registers the entry in school records have generally been considered to be inferior quality. The entry in birth register is usually much more contemporaneous than the entry in school registers and, therefore, more reliable. ... The entry in a birth register would, normally speaking, inspire greater confidence than an entry in the record of educational institutions, and the former is by and large supposed to be a more reliable piece of evidence than the latter."

Mr. Mohanty submitted that the extract of the birth register is the conclusive proof of the age of respondent No. 3. To add to this, the prescriptions (Exts. E and E/1) granted by the Doctor (R. W. 5) go to show that in the year 1965 respondent No. 3 was fourteen years old. This fits in with the case of respondent No. 3 that his date of birth is 30-1-1951. R. W. 5 is a respectable witness and his evidence has not been shaken in cross-examination. Nothing has been brought forward by the petitioner that the age as mentioned in the school and college registers, Tabulation Register and the application forms was recorded on the basis of the statement made by the father of respondent No. 3. On the other hand, the father has categorically denied to have given the date of birth of respondent No. 3 as 25-4-1957 to the school and college authorities.

Mr. Mohanty then submitted that the entry in the electoral roll is the conclusive proof that the age of the person whose name is entered in it is twenty-one years at least. This will be evident from S. 36 (7) of the Act. In support of his contention Mr. Mohanty cited decisions reported in AIR 1960 SC 1049 (Brajendralal Gupta v. Jwala-prasad), AIR 1954 SC 520 (Durga Shankar Mehta v. Raghuraj Singh) and AIR 1971 Punj and Har 65 : 42 Ele LR 439. In decision reported in AIR 1960 SC 1049 it has been held (at pp. 12 and 15) :

"Under S. 36 (7) a certified copy of the entry in the electoral roll shall be conclusive evidence of the fact that the person referred to in that entry is an elector for that constituency. ... Section 19 read with S. 36 (7) shows that when a presumption is raised under Section 36 (7) it may mean prima facie that the person concerned is not less than twenty-one years of age. ... In the decision reported in AIR 1954 SC 520 it has been held (para 8) :

"... the electoral roll is conclusive as to the qualification of the elector except where a disqualification is expressly alleged or proved ..."

In the decision reported in AIR 1971 Punj and Har 65 : 42 Ele LR 439 it has been held :

"The entry in electoral roll is conclusive to prove that age of a person whose name is entered is 21 years at least and where nomination paper was rejected ignoring S. 36 (7) of the Representation of the People Act, 1951, such rejection was held improper." It has been further held (para 18 of AIR 1971 Punj and Har 65) :

"It would thus appear that the true legal position is that the entry of a person in the electoral roll on the qualifying date is a conclusive proof of the fact that he is more than 21 years of age. But a candidate has to possess the constitutional qualification that he is 25 years of age. In order that the nomination paper of such a candidate is rejected for want of the constitutional qualification, there must be prima facie evidence that he does not possess the qualification as to age; and even if a decision is rendered on this matter by the Returning Officer, that decision is not final and it is open to examination by the Election Tribunal when an election petition is filed."

Mr. Mohanty submitted that the entry (Ext. A/1) in the electoral roll of 1975 (Exhibit A) conclusively shows that respondent No. 3 was twenty-three years of age in the year 1975. In the year 1980 he was twenty-

eight years old, as would be evident from the entry (Ext. B/1) in the electoral roll of 1980 (Ext. B). The contention of Mr. Mohanty is that the age given in the electoral rolls fits in with the case of respondent No. 3 that he was born on 30-1-1951.

Mr. Mohanty further submitted that the horoscope (Ext. C), which has not been challenged, is a strong piece of evidence in favour of respondent No. 3. In support of his contention he relied on a decision reported in AIR 1927 Pat 271 (Ganganand Singh v. Rameshwar Singh Bahadur) wherein it has been held:

"Where the statement in the horoscope as to the date of birth is the statement of a person who is dead and who had special means of knowledge as to the date of birth, the horoscope is admissible and is valuable evidence as to the date of birth."

From the above discussion Mr. Mohanty submitted that there is overwhelming evidence, both oral and documentary, in support of the case of respondent No. 3 that he was born on 30-1-1951. He was not below twenty-five years of age on the date of filing nomination and was a qualified candidate and his nomination has been rightly accepted by the Returning Officer.

10. Dr. Dash, learned counsel for the petitioner, submitted that free and fair elections are the very foundation of democratic institutions and just as it is said that justice must not only be done, must also seem to be done similarly elections should not only be fairly and properly held but should also seem to be so conducted as to inspire confidence in the minds of the electors that everything has been aboveboard and has been done to ensure free elections. In support of his contention he relied on a decision reported in AIR 1971 SC 1348 (Pampakavi Ravappa Belegali v. B. D. Jatti). He further submitted that respondent No. 3 avoided to examine himself and on a false pretext he did not come to the witness box and, therefore, adverse inference should be drawn against him. In support of his contention he placed reliance on decisions reported in AIR 1973 Gau 90 (Mst. Jurmati Bewa v. Anwar Rasul) and AIR 1973 Mad 421 (Iruçayam Ammal v. Salayath Mary). According to him it would have been proper for respondent No. 3 to enter the witness box and take the Court into confidence about the true state of affairs. It is, therefore, legitimate to raise a presumption that respondent No. 3 deliberately avoided to examine himself. Dr. Dash submitted that had respondent No. 3 been ex-

amined, the application forms (marked Z/8 and Z/9 for identification) could have been confronted to him so as to elicit the true state of affairs that his date of birth is 25-4-1957 as recorded in these documents. He placed reliance on a decision reported in AIR 1964 Raj 126 (Shiv Ram v. Shiv Charan Singh) and submitted that this decision has full application to the facts and circumstances of the present case. In the above decision it has been held (para 43 of AIR 1964 Raj):

"... No rule of thumb can be laid down that entries of age in school registers have little or no evidentiary value. Each case must depend upon its own facts and circumstances and must be decided on the net balance of the various counts of proof offered therein."

It has been also held (para 24 of 1964 Raj):

"There is nothing in Section 36 (7) of the Representation of the People Act of 1951 or Section 30 of the Act of 1950 or in any other provisions of the said Acts to hold that the age of the candidate as mentioned in the previous electoral roll should be accepted to be conclusive at an election dispute where his election is challenged on the ground that the said candidate was not qualified to stand at the election of Legislative Assembly because he lacked one of the essential conditions provided under Article 173 of the Constitution viz., that he was less than 25 years of age at the material time."

XX XX XX

Under S. 36 (7) of the R. P. Act of 1951 a certified copy of an entry in an electoral roll shall be conclusive evidence of the fact that the individual referred to in that entry is registered as "an elector" for the constituency. This, in other words means at the highest that his status as an elector for that constituency cannot be challenged before the Returning Officer. The conclusiveness of the presumption created by Section 36 (7) does not and cannot extend any farther so as to bar an inquiry.

It would depend entirely on the kind of the totality of evidence offered at the enquiry by the rival parties as to what value can be properly attached to the entries made as to age in the electoral rolls as compared with the other proofs offered at the trial, and no hard and fast rule can be laid down as to whether the one kind of evidence should prevail or the other. That must depend on the facts and circumstances of each case. It cannot be said that the entries regarding age in electoral rolls should always be assigned a greater value than like entries in educational

records any more than the latter should prevail over the former.

xx xx xx

The failure to raise an objection either at the stage of the making of the entry as to age in the relevant electoral roll or at the time of the scrutiny of the nomination paper cannot in any manner adversely affect the conclusion, for there can be no estoppel against the statute and therefore even if such an objection may not have been raised earlier, it can legitimately be raised before the Election Tribunal under the scheme of the election law."

It has been further held :

"Where Section 35 properly comes into play, an entry made by a public servant in any public or official book in the discharge of his official duty (Entry as to age of student in school register of Govt. school) becomes relevant by itself, and no other proof of such entry is required as a matter of law by Evidence Act: but this does not exclude the possibility that such an entry may become admissible otherwise if it is properly proved to have been made by a person ordinarily competent to make it."

Regarding the burden of proof, it has been held in the same decision :

"Although the initial burden of proving the allegations that the candidate was not qualified to be chosen as a member of the State Assembly for want of qualifying age would rest upon the election petitioner, the burden is not as heavy as in the case of an election petition in which the election of a candidate is sought to be set aside on the ground of a corrupt practice as defined in S. 123 of the Act of 1951, as a charge like that is in the nature of the imputation of a criminal offence.

After good prima facie evidence has been led by the election petitioner as regards the former's age, the burden is bound to shift on to the shoulders of the candidate himself which he must meet and he cannot merely sit on the fence and do nothing. Where both parties have had a fair and full opportunity of leading evidence and have availed themselves of the same, the question of burden of proof is merely of an academic nature and cannot possibly enter into the final verdict where it is possible to arrive at a definite conclusion one way or the other on the totality of the evidence led by both the parties."

11. In reply, Mr. Mohanty submitted that in the above decision the question was whether the date of birth appearing in the

electoral roll would be taken as conclusive proof of the age of the elected candidate or the date of birth in the school register which was admittedly supplied by the father would be taken as true. He submitted that in the above case the entry in the electoral roll was changed to suit the purposes of the elected candidate and the date of birth appearing in the school register was supplied by his father. He referred to the observation made by the Honourable Judges in the aforesaid case which is as follows :

"An entry in birth and/or death register as to age would be excellent evidence and may have to be preferred to entries in records of educational institutions."

Mr. Mohanty pointed out that in this case apart from the electoral roll, respondent No. 3 has produced overwhelming documentary evidence, i.e. the horoscope, entry in the birth register and prescriptions of the Doctor etc., in support of his age. Besides, there is oral evidence in support of his case which has not been shaken. So this case stands on a different footing and the decisions reported in AIR 1965 SC 282, (1967) 31 Ele LR 401 (Mad), (1958) 14 Ele LR 386 (Bom) and AIR 1971 Punj and Har 65:42 Ele LR 439 will apply in full force to the present case. He further submitted that no adverse inference can be drawn for non-examination of respondent No. 3 as he is not a competent witness to depose about his date of birth.

12. Considering the argument advanced by the parties and the evidence on record the position that emerges in that:—

In order to prove the date of birth of respondent No. 3 to be 25-4-1957 the petitioner relies on the Tabulation Register (Ext. 8) of the Board of Secondary Education and the entry (Ext. 8/1) made therein with respect to Sarat Kumar Rout, the entry in the admission register of Ravenshaw Collegiate School of 1969-70 (marked Z/10 for identification), the application form to appear in the Annual B. A. Examination of 1975 (marked Z/9 for identification), the application form for admission into 2nd Year Degree Class of Angul College (marked Z/8 for identification) and the particular of candidates appearing in the H. S. C. Examination (marked X for identification which is the extract of Ext. 8/1). In the above documents the date of birth of Sarat Kumar Rout has been mentioned as 25-4-1957. Of course the documents marked X, Z/8, Z/9 and Z/10 could not be proved according to law. There is also no evidence that the entries in the above documents in-

cluding Ext. 8 are with respect to respondent No. 3. No oral evidence has been led to connect respondent No. 3 with the aforesaid entries. Dr. Dash argued that adverse inference should be drawn against respondent No. 3 as he avoided the witness box. Had he been examined these documents could have been confronted to him and he would have been forced to admit that the entries relate to him. Assuming that the aforesaid entries are with respect to respondent No. 3, the position is that in the admission register of Ravenshaw Collegiate School the date of birth of respondent No. 3 has been mentioned as 25-4-1957 and this date has been necessarily carried forward to the Tabulation Register (Ext. 8) and subsequently to the application forms (marked Z/8 and Z/9). No oral evidence has been adduced by the petitioner that the date of birth of respondent No. 3 is 25-4-1957 and the date has been given by a competent person like the father of respondent No. 3 to the school authorities.

On the other hand, on behalf of respondent No. 3, in order to prove his age to be more than twenty-five years, reliance has been placed on the electoral roll (Ext. A) of 1975 and the entry (Ext. A/1) made therein with respect to respondent No. 3 where his age has been mentioned as twenty-three years, the electoral roll (Ext. B) of 1980 and the entry (Ext. B/1) therein where the age has been mentioned as twenty-eight years, the horoscope (Ext. C) and the extract of birth register (Ext. D) where the date of birth has been mentioned as 30-1-1951 and the prescriptions (Exts. E and E/1) granted by the Doctor (R. W. 5) in the year 1965 where the age of respondent No. 3 has been mentioned as fourteen years. The oral evidence of the maternal uncle (R. W. 6), father (R. W. 7) and the family priest (R. W. 2) is also there in support of the case of respondent No. 3 which has been discussed earlier.

13. As held in (1958) 14 Ele LR 386 (Bom), much reliance cannot be placed on entries in the school admission registers which are not proved to have been made on the basis of the statement made by a person, e.g. the father of the boy, who knew the true date of his birth. It is well settled that it would depend entirely on the totality of evidence offered by the rival parties as to what value can be properly attached to them and no hard and fast rule can be laid down as to whether the one kind of evidence should prevail or the other. This must depend on the facts and circumstances of each case.

Each case must depend upon its own facts and circumstances and must be decided on the net balance of the various counts of proof offered therein. In this case the petitioner depends solely on the entries in the school and college records (even assuming that the documents marked Z/8, Z/9 and Z/10 are to be taken into consideration) to prove the date of birth of respondent No. 3 to be 25-4-1957. However, there is no oral evidence to support his case. On the other hand there is overwhelming evidence — both oral and documentary — on behalf of respondent No. 3 to prove his date of birth to be 30-1-1951.

14. On behalf of respondent No. 3, much reliance has been placed on the decision reported in AIR 1965 SC 282. In that case the respondent (who had filed the election petition) was the defeated candidate and in order to prove the age of the appellant to be less than twenty-five years he placed reliance on the entry in the admission register of the school (Ext. 2), application made by the appellant for the post of Sub-Inspector of Police (Ext. 8) and the certificate issued by the Bihar School Examination Board (Exhibit 18). In these documents the date of birth of the appellant was mentioned as 15-10-1937. On the other hand, the appellant placed reliance on the Hath Chitha book kept at the time of birth wherein his date of birth was mentioned as 15-10-1935. While deciding the case the Hon'ble Supreme Court relied on the Hath Chitha book regarding proof of the age of the appellant and did not place reliance on the documents produced on behalf of the petitioner-respondent. The Court observed (at p. 287) :—

“... once this wrong entry was made in the admission register it was necessarily carried forward to the Matriculation Certificate and was also adhered to in the application for the post of a Sub-Inspector of Police.

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However much one may condemn such an act of making a false statement of age with a view to secure an advantage in getting public service, a judge of facts cannot ignore the position that in actual life this happens not infrequently. We find it impossible to say that the Election Tribunal was wrong in accepting the appellant's explanation. Taking all the circumstances into consideration we are of opinion that the explanation may very well be true and so it will not be proper for the Court to base any conclusion about the appellant's age on the entries in these three documents, viz., Ex. 2, Ex. 8 and Ex. 18.”

Reliance has also been placed on (1967) 31 Ele LR 401 (Mad), (1958) 14 Ele LR 386 (Bom) and AIR 1971 Punj and Har 65 which have been referred to earlier. These decisions apply in full force to the facts and circumstances of this case.

15. In view of the overwhelming evidence — both oral and documentary — adduced on behalf of respondent No. 3, I am of the opinion that it has been clearly established that the date of birth of respondent No. 3 is 30-1-1951 and the claim of the petitioner that the date of birth of respondent No. 3 is 25-4-1957 cannot be accepted. As such respondent No. 3 was more than twenty-five years of age at the time of filing the nomination. So these issues are answered against the petitioner and in favour of respondent No. 3.

16. Issue No. 6:— In view of the aforesaid finding that the date of birth of respondent No. 3 is 30-1-1951, the petitioner is not entitled to any relief. His prayer that he should be declared elected is not tenable.

17. In the result, therefore, the election petition fails and is hereby dismissed with costs which are assessed at Rs. 250/-.

Petition dismissed.

AIR 1982 ORISSA 234

P. K. MOHANTI, Ag. C. J.

Damodar Das, Petitioner v. Gadadhar Mallik and others, Opposite Parties.

Civil Revn. No. 286 of 1979, D/- 3-8-1982.*

Civil P. C. (5 of 1908), S. 11, S. 47 and O. 21, R. 90 — Res judicata — Execution proceedings — Execution sale confirmed and possession given — Subsequent objection that property was not liable to sale — Held barred by res judicata — S. 47 is inapplicable where sale is voidable and not void.

In a suit for money against A, B and C based on a hand note executed by A as the manager of a joint family, an ex parte decree was passed. In its execution certain property was put to sale which was subsequently confirmed and possession handed over. B's application under O. 9, R. 13 to set aside the ex parte decree on the ground of fraudulent suppression of summons was dismissed. He then came up with the present application under S. 47 challenging the validity

of the sale and for recovery of possession. He alleged that there was fraudulent suppression of the summons, notices and other processes and that the property sold was his personal property and hence not liable to sale.

Held that the applicant could have raised the objections on the issue of a show cause notice under O. 21, R. 22 or when the Court directed attachment under O. 21, R. 54 or at the time of the proclamation of the sale or the sale itself or its confirmation; but he failed to do so. Hence it must be deemed that the Court decided that the property was liable to sale and it should proceed. The objection was, therefore, barred by res judicata. (Para 5)

Section 47, C.P.C. can be invoked only in cases where the sale is void and not merely voidable. Non-proclamation of sale does not affect the Court's jurisdiction so as to render the sale null and void. If a person feels aggrieved by an execution sale on the ground of material irregularity causing substantial injury to him, then he has to file an application under Order 21, Rule 90, C.P.C. and not an application under Section 47, C.P.C. AIR 1977 Orissa 51, Rel. on.

(Para 6)

Cases Referred: Chronological Paras
AIR 1977 Orissa 51 6

M. Patra and B. K. Dagara, for Petitioner; P. K. Dhal, S. C. Sahoo and R. Ch. Mohanty, for Opposite Parties.

ORDER:— This Civil Revision is directed against an order of the Executing Court allowing the judgment-debtor's objection under Section 47 of the Code of Civil Procedure.

2. The facts giving rise to this Civil Revision may be briefly stated as follows:

The petitioner as plaintiff brought Money Suit No. 231 of 1970 for recovery of money on the foot of a hand-note executed by O.P. No. 2 Pitambar Mallick as karta and manager of a joint family consisting of himself and his two brothers Gadadhar and Dusasan (O.P. Nos. 1 and 3 respectively). Pitambar, Gadadhar and Dusasan were impleaded in the suit as defendants 1, 2 and 3 respectively. On 28-10-70, defendant No. 1 entered appearance in the suit and prayed for time to file his written statement. After taking several adjournments, he did not file any written statement and was set ex parte. Defendants 2 and 3 did

*From order of S. P. Acharya, Munsif, Kendrapara, D/- 29-3-1979.

not enter appearance despite service of notice. The suit was decreed *ex parte* on 23-7-71. Defendant No. 1 filed an application under Order 9, Rule 13, C.P.C. which was dismissed on 22-7-72. An appeal carried against the order of dismissal was dismissed on 25-7-73. A Civil Revision was carried against the appellate order and it was dismissed on 27-11-1973. The petitioner-decree-holder had levied execution of the decree in Execution Case No. 65/72. Notices under O. 21, Rule 22, C.P.C. were served, attachment made, sale proclamation followed and sale held on 15-9-73 was confirmed on 29-10-73. On 23-12-73, a writ of delivery of possession was issued under Order 21, Rule 95, C.P.C. and on 31-12-73 possession was delivered.

3. On 10th January, 1974, defendant No. 2 (O.P. No. 1 here) filed an application under Order 9, Rule 13, C.P.C. for setting aside the *ex parte* decree on the ground of fraudulent suppression of suit summons. The application was allowed on 4-3-76 and the decree was set aside. The petitioner carried a Civil Revision which was allowed on 27-1-77 and the order of the learned Munsif allowing the application under Order 9, R. 13, C.P.C. was set aside. Then defendant No. 3 filed Title Suit No. 72/77 to set aside the decree and the same was dismissed. Thereafter on 11-5-77, defendant No. 2 (O.P. No. 1 here) came up with an application under Section 47, C.P.C. challenging the sale as null and void and praying for confirmation of his possession or in the alternative recovery of possession. His allegations were that there was fraudulent suppression of summons, notices and other processes in the original suit and the execution case and that he was totally ignorant about the suit and the execution proceeding till 12-4-77 when the petitioner threatened to dispossess him from his lands. It was alleged that the properties sold in execution of the decree were his self-acquired properties and defendant No. 1 who executed the suit hand-note had no interest therein. The petitioner filed counter-contending that the objection under Section 47, C.P.C. was barred by *res judicata*. The executing Court having allowed the application under Section 47, C.P.C. the petitioner has come up in revision.

4. It is urged on behalf of the petitioner that the objection under Sec. 47, C.P.C. was barred by *res judicata*.

5. Explanation VII to Section 11, C.P.C., as inserted by C.P.C. Amendment Act, 1976, specifically enacts that the rule of *res judicata* applies to execution proceedings. Even before this amendment the principle of *res judicata* was applicable to execution proceedings. In a proceeding for execution of a money decree by attachment and sale of the judgment-debtor's immovable properties, a notice under Order 21, R. 22, C.P.C. is issued to the judgment-debtor requiring him to show cause why the decree should not be executed against him. On receiving the notice the judgment-debtor has to raise all his objections to the executability of the decree. If at this stage, he fails to raise any objection which he might and ought to have raised the Court in passing the orders for execution of the decree is deemed to have decided the objection against him. Next stage is one when the Court directs attachment of the judgment-debtor's properties under Order 21, Rule 54, C.P.C. Any objection on the ground of non-saleability of the properties must be raised at that stage. If no such objection is raised, the Court must be deemed to have decided it against the judgment-debtor by passing an order for sale of the properties. The next stages are proclamation of sale, sale and confirmation of sale. O.P. No. 1 did not file objection at any stage of the execution proceedings. About three and half years after the Court delivered possession of the properties to the decree-holder, he filed the objection under Section 47, C.P.C. In the circumstances stated above, it must be held that the Court had decided that the execution case should proceed against the judgment-debtor and that the properties were liable to attachment and sale. After delivery of possession of the properties a judgment-debtor cannot be heard to say that the properties attached and brought to sale were not liable to attachment and sale. As indicated earlier, O.P. No. 1 failed in his attempts to get the *ex parte* decree set aside. He was fully aware of the execution proceedings started against him. Fraudulent suppression of sale-proclamation would be a ground for assailing the sale under Order 21, Rule 90, C.P.C. It was alleged that the properties sold in execution of the decree were the self-acquired properties of O.P. No. 1 and they are not liable to attachment and sale for realisation of the decretal

dues. This is a ground which should have been taken before the sale was held. No such objections were taken till after the Court delivered possession of the properties to the decree-holder-auction purchaser. The objection under Section 47, C.P.C. made after delivery of possession is clearly barred by *res judicata*.

6. Section 47, C.P.C. can be invoked only in cases where the sale is void and not merely voidable. Non-proclamation of sale is a material irregularity in the conduct of sale and does not affect the Court's jurisdiction in the matter so as to render the sale null and void. If a person feels aggrieved by an execution sale on the ground of material irregularity causing substantial injury to him, then he has to file an application under Order 21, Rule 90, C.P.C. and not an application under Section 47, C.P.C. This view is fortified by a decision of this Court in the case of *Bhagaban Devata v. Mahadev Devata*, AIR 1977 Orissa 51. The executing Court acted in illegal exercise of its jurisdiction by allowing the objections of the present nature in a proceeding under Section 47, C.P.C.

7. The result, therefore, is that the Civil Revision is allowed with costs and the impugned order is set aside.

Revision allowed.

AIR 1982 ORISSA 236

R. N. MISRA, C. J. AND B. K. BEHERA, J.

Benjamin Mohanty, Petitioner v. State of Orissa and another, Opposite Parties.

Original Jurn. Case No. 189 of 1982, D/- 24-6-1982.

(A) Urban Land (Ceiling and Regulation) Act (33 of 1976), S. 2 (g) (i) — Vacant land with no construction — Benefit under S. 2 (g) (i) is not available.

(Para 7)

(B) Urban Land (Ceiling and Regulation) Act (33 of 1976), S. 2 (q) (i) — Vacant land — Computation — Portion of it declared unfit for construction by local authority and portion which is to be kept vacant under rules of local authorities are to be excluded.

The portion of vacant land possessed by the owner on which no construction was permitted by the local authority i.e. Improvement Trust and Municipal Cor-

poration, and the portion which is to be kept vacant as per Building Rules of such authorities cannot be taken into consideration while calculating the surplus vacant land of the owner and same are available to be exempted under Section 2 (q) (i). (Para 9)

Cases Referred: Chronological Paras

AIR 1982 Madh Pra 49

7

AIR 1981 Cal 126

8

Jayant Das; Y. Das; T. Hafiz and M S. Haque, for Petitioner; Addl. Standing Counsel, for Opposite Parties.

R. N. MISRA, C. J.:— This application under Article 226 of the Constitution seeks to challenge the order of the Competent Authority in a proceeding under the Urban Land (Ceiling and Regulation) Act, 1976 (Act No. 33 of 1976) (hereinafter referred to as the 'Act') and the appellate decision rendered by the Member, Board of Revenue against the order of the Competent Authority.

2. The short facts relevant for the matter are these:—

The petitioner owns a vacant land within the Cuttack municipal area. Cuttack has been notified as an urban agglomeration within category 'D' as would appear from the Schedule appended to the Act. Under Section 4 (1) (d) of the Act, the ceiling limit is 2000 square metres.

The petitioner filed a voluntary statement under Section 6 of the Act before the Competent Authority and Case No. 8 of 1978 was registered by the Competent Authority on the basis of such statement. Though the petitioner had filed a statement, at the time of hearing he took the stand that he was not possessed of a vacant site beyond the statutory limit and as such he was not governed by the Statute. Two pointed contentions were raised by him:—

(1) His entire area of 917 decimals came to 3668 square metres. The entire area once upon a time was a tank. Bulk of it had been filled up and had been rendered suitable for construction, but a part of it being nearly 100 decimals still continued to be a ditch where water was standing and such land was not fit for building. The land was not fit for construction of a building under the Building Regulations prescribed under the Orissa Municipal Act. As the land was located within the Cuttack town, no construction was also possible without appropriate permission of the Greater

Cuttack Improvement Trust set up under the provisions of the Orissa Town Planning and Improvement Trust Act 10 of 1957.

(2) In the permission granted by the Trust, 1709.84 square metres were directed to be kept vacant. If that was to be excluded from calculation of the ceiling as required by law, the petitioner did not possess vacant land beyond 2000 square metres.

3. The Competent Authority took the view that the entire land was fit for building and, at any rate, even if water accumulated in a part of the land which was in the nature of a ditch, since it was not fit for pisciculture, the same was not available for exemption. There was no definite finding in regard to the other aspect and the draft statement was made final by holding that the land in excess of 2000 square metres was surplus.

4. The petitioner appealed against the order of the Competent Authority and raised two contentions:—

(1) In view of the condition indicated by the Trust in the permission granted to the petitioner that no construction should be raised on 1709.84 square metres, the same should have been exempted from calculation while computing the ceiling.

(2) That part of the land where water stood was not fit for building purpose and, therefore, should have been excluded. There was no necessity to establish that the land was fit for pisciculture.

The appellate authority in the impugned decision stated:—

"Appellant has relied on AIR 1981 Calcutta 126 wherein it has been held that lands where water seeps from underground and which are unfit for house construction cannot be treated as vacant land. Obviously, tanks suitable for pisciculture alone are not to be excluded as vacant land. The Competent Authority has, therefore, erred in holding that this is a ditch not suitable for pisciculture and as such should not be excluded."

With reference to the other aspect relating to the permission granted by the Trust, the appellate authority relied upon the definition of "land appurtenant" in Section 2 (g) and the maximum limit indicated in clause (i). Though as a fact it was found that the permission clearly indicated that there should be no construction on 1709.84 square metres, in

view of the upper limit of 500 square metres provided under the Act the petitioner was entitled to exemption to that extent. The appellate authority, therefore, allowed the petitioner's appeal in part and directed that from the surplus area found by the Competent Authority 500 square metres should be deducted. He accordingly determined the surplus area of 1168 square metre.

5. This determination is assailed and it has been contended before us that clause (i) of the definition of "vacant land" in Section 2 (q) of the Act authorises exemption of the entire land on which construction has not been permitted. Once that area is excluded, the petitioner must be found not to be in possession of surplus land.

6. A counter affidavit has been filed by the Administrative Officer, Urban Ceiling, Cuttack. In paragraph 5 thereof it has been stated that the petitioner's total land is 906 decimals in extent which worked out at 3668 square metres. As no building was standing on the property and was yet to be constructed, the benefit under Section 2 (g) was not available.

7. Claim advanced by the petitioner has been on two counts:—

(1) Exclusion of 1709.84 square metres in terms of Section 2 (g) (i) of the Act; and

(2) Exclusion of 100 decimals which is equivalent to a little more than 400 square metres (see paragraph 2 of the counter-affidavit) on the ground that it was not permissible under the Building Regulations to raise construction on that land as provided under Section 2 (1) (i) of the Act.

Counsel for the petitioner has advanced alternative contentions. According to him the appellate authority should have held that the Building Regulations, both under the Orissa Municipal Act as also under the Improvement Trust Act, were applicable. Under the Municipal Building Regulations as provided in R. 530 (b) (iv), no construction is permitted where the soil is saturated with water in consequence of which there is likely to be dampness of floor and walls of the building. Under Rule 534-B, where the building on a site exceeding 1400 square yards was to be raised, the maximum permissible plinth area was to be one-fourth of the site or 400 square yards (whichever was more).

The Trust had similar powers under the Act and its Building Regulations. In exercise of that power, the Trust had directed that no construction would be permitted on 1709.84 square metres. The contention, therefore, is that in regard to both the items upon which the petitioner had relied, Section 2 (f) applied. It was not a case where Section 2 (g) of the Act should have been invoked. Admittedly, there was no construction on the land yet and the petitioner had only obtained permission for construction "Land appurtenant" in Section 2 (g) of the Act to our mind seems to be a provision for determining surplus land with reference to standing buildings while "vacant land" in Section 2 (q) is intended to cover cases where there is no construction and, therefore, exclusion has been provided in clause (2) of that subsection. In view of the fact that the petitioner does not have any standing construction, he is not entitled to the benefit under Section 2 (g) (i), which has been allowed to him by the appellate authority. Some support is available from the observations of the Division Bench of the Madhya Pradesh High Court in *Surendra Kumar v. Lilawati*, AIR 1982 Madh Pra 49, for this view. We are of the opinion that land set apart in the permission to be vacant site cannot be taken to be covered by Section 2 (g) of the Act. The appellate authority went wrong in invoking that provision and allowing the benefit of deduction of 500 square metres in the matter of calculation of the ceiling limit. Ordinarily, that part of the order being in favour of the petitioner would not have been open to challenge in the absence of a writ application from the side of the Competent Authority, but as the petitioner himself is aggrieved by that method of calculation, we have allowed the contention to be advanced.

8. As we have already pointed out, it is the contention of the petitioner that he is entitled to deduction of both 1709.84 square metres as also roughly 400 square metres on the ground that the first item is available in view of the condition in the building permission and the second item is available on account of unsuitability of the same for building purpose. We shall presently consider the tenability of this submission.

There is a clear finding by the appellate authority that the 100 decimals of land equivalent to about 400 square

metres out of the plot continues to be water-logged though the same may not be suitable for pisciculture. We agree with the appellate authority that the test of 'pisciculture' applied by the Competent Authority was wholly unwarranted. Rule 530 (b) (iv) of the Orissa Municipal Rules provides that no land shall be used as site for erection or re-erection of masonry building if the soil or sub-soil is saturated with water in consequence of which there is likely to be dampness of floor and walls of the building. The Bench decision of the Calcutta High Court in *Srila Moitra v. State*, AIR 1981 Cal 126 does support this view. It has been held by the Division Bench that a tank is not a vacant land and such land would be exempted under Section 2 (q) (i) of the Act. Endorsing the view expressed by the Division Bench of the Calcutta High Court, we hold that land on which construction of building would not be permitted to be raised under the Building Regulations would be excluded from the operation of the Act. Accordingly, the 400 square metres corresponding to 100 decimals of the vacant site is not to be taken into consideration at all for purposes of the Act. It must be borne in mind that the scheme of the Act is to take into account vacant site fit for building. That is why, suitable exemption has been provided in regard to agricultural land as also land which is not suitable for building purpose. In our view, therefore, the petitioner is entitled to exemption of the 100 decimals of land which correspond to near about 400 square metres.

9. We may now refer to Rule 534-B of the Municipal Rules. Admittedly, the petitioner's land is located in a residential area and Rule 534-B of the Municipal Rules is applicable. Clause (e) thereof provides that in a residential area on a site exceeding 1,400 square yards the maximum permissible plinth area shall be one-fourth of the site area or 400 square yards whichever is more. Under the Improvement Trust Act, the Trust has also a set of regulations and while granting permission to the petitioner, the restriction of not building on 1709.84 square metres has been imposed. In the background of these restrictive provisions in the Building Regulations, it follows that on the entire area of 1709.84 square metres it was not permissible under the Building Regulations to con-

struct any building. Therefore, this also came under clause (i) of Section 2 (q) of the Act and in calculating the ceiling the same was available to be exempted. If both these items are excepted, the balance that is left out is certainly within the permissible area and no statement under the Act was required to be filed. The law being new and the situation being uncertain, the petitioner seems to have filed a statement with a view to avoiding the liabilities arising out of default and wanted a determination by the Competent Authority as to his claim of exclusion. If as a fact the petitioner was not liable on admitted facts, his filing of a statement voluntarily would not make the Act applicable. We are inclined to agree with Mr. Das for the petitioner that both the items have to be excluded and the determination of the statutory authorities has to be quashed.

10. We allow the writ application, quash the orders of the Competent Authority and the appellate authority and hold that the petitioner is not possessed of urban land in excess of the ceiling limit.

Parties are directed to bear their own costs.

BEHERA, J.— I agree with my Lord the Chief Justice.

Petition allowed.

AIR 1982 ORISSA 239

J. K. MOHANTY, J.

State and others, Petitioners v. Dandasi Sahoo, Opposite Party.

Civil Revn. No. 699 of 1981, D/- 29-4-1982.*

Arbitration Act (10 of 1940), Ss. 41 (a), 11 and 12 — Civil P. C. (1908), Section 114 and O. 47, R. 1 — Order appointing arbitrator under S. 12 — Review petition — Court when justified in exercising power of review.

When dispute arose between contractor and Executive Engineer, Minor Irrigation Division, the Chief Engineer appointed the Superintending Engineer N as arbitrator. On contractor's application under Ss. 5, 11 and 12 of the Act, Court revoked the authority of N and directed both parties to submit list of names to be appointed as arbitrators. The names of P, B and some others were mention-

ed in the lists submitted by parties. Court appointed P as arbitrator. When contractor filed petition for review of order appointing P as arbitrator on ground that P was connected with work in dispute, Court revoked P's authority and in his place appointed B as arbitrator. It was admitted by Irrigation department that P was appointed as Superintending Engineer for some time while work was in progress.

Held that as the Court was satisfied that P being connected with work might prejudice the interests of the contractor, it was justified in revoking authority of P and in appointing B, whose name has also been submitted by department, as arbitrator, in exercise of its power of review, in view of S. 41 of the Act.

(Para 4)

Addl. Standing Counsel, for Petitioner; J. Das, V. Das and T. Hafiz, for Opposite Party.

ORDER:— The opposite party-contractor was entrusted with the work 'construction of distribution system of Ramguda M. I. P. in Kakudakhandi Block' as per agreement No. 4 F-2 of 1973-74, executed between him and the Executive Engineer (petitioner No. 3), Minor Irrigation Division, Berhampur, Ganjam District, on behalf of the Government of Orissa. As dispute arose between the parties, the Chief Engineer (petitioner No. 2) appointed Shri A. N. Nanda, Superintending Engineer, as Arbitrator. The opposite party filed M. J. C. No. 211/80 in the court of Subordinate Judge, Berhampur, u/ss. 5, 11 and 12 of the Arbitration Act for revoking the authority of Shri Nanda and to appoint another Arbitrator. The Subordinate Judge by his order dated 17-3-1981 revoked the authority of Shri Nanda and directed both parties to furnish list of names to be appointed as Arbitrators. Both parties submitted their lists of names and the Subordinate Judge by his order dated 16-4-1981 appointed Shri Dhaneswar Patra, Superintending Engineer, as Arbitrator in place of Shri Nanda. Thereafter the opposite party filed M. J. C. No. 115/81 for review of the order dated 16-4-1981 appointing Shri Dhaneswar Patra as Arbitrator alleging that Shri Patra was concerned with the work previously and was ill-disposed towards him. The Subordinate Judge reviewed his earlier order and by his order dated 29-8-1981 revoked the authority of Shri Patra and in his

*From decision of S. R. Rath, Sub. J., Berhampur, D/- 29-8-1981.

place appointed Shri Banabasi Patnaik, Superintending Engineer, as Arbitrator. Against the aforesaid order, the State Government (petitioner No. 1) and the two officers — the Chief Engineer (petitioner No. 2) and the Executive Engineer (petitioner No. 3) — have come up in revision.

2. The grounds on which the order dated 29-8-1981 is challenged are as follows:—

That the Subordinate Judge acted illegally in reviewing the order dated 16-4-1981 appointing Shri Patra as Arbitrator; that Shri Patra was selected as Arbitrator from among the names submitted by the parties and if there was any allegation against him, the opposite party could have pointed out the same to the learned Subordinate Judge at the stage when his name was submitted; that the plea of the opposite party that Shri Patra was concerned with the work and was ill disposed towards him is nothing but an afterthought; and that it was not a fit case for review.

On the other hand, learned counsel for the opposite party submitted that on 16-4-1981 a panel of names was submitted by the petitioners and the opposite party also submitted a panel of names. The opposite party had no occasion to know as to the names mentioned in the list submitted by the petitioners. Having come to know that Dhaneswar Patra has been appointed as Arbitrator, on the next day, i.e. 17-4-1981, the opposite party filed the review petition on the grounds that Dhaneswar Patra was concerned with the work previously and it would be prejudicial to the interests of the opposite party if Dhaneswar Patra was appointed as Arbitrator. It is also submitted that in paragraph 3 (grounds) of the revision petition, the petitioners have admitted that Dhaneswar Patra was appointed as the Superintending Engineer of the circle while the work was in progress.

3. Section 41 of the Arbitration Act is as follows:—

"41. Subject to the provisions of this Act and of rules made thereunder —

(a) the provisions of the Code of Civil Procedure, 1908, shall apply to all proceedings before the Court and to all appeals, under this Act, and

(b) the Court shall have, for the purpose of, and in relation to, arbitration proceedings, the same power of making orders in respect of any of the matters

set out in the Second Schedule as it has for the purpose of, and in relation to, any proceedings before the Court:

Provided that nothing in cl. (b) shall be taken to prejudice any power which may be vested in an arbitrator or umpire for making orders with respect to any such matters."

So, the omnibus nature of Clause (a) of S. 41 of the Arbitration Act makes all the provisions of the Code of Civil Procedure including those of review comprised in S. 114 and O. 47 applicable to the arbitration proceedings, subject, of course, to the overriding proviso that the provisions of the Code are not in conflict with the provisions of the Act and the rules made thereunder. A plain reading of clause (a) of S. 41 would indicate that the Legislature meant to apply all the provisions of the Code to the arbitration proceedings subject only to one proviso, namely, that the provision of the Code sought to be availed of by a party to an arbitration proceeding was not in conflict with any provision of the Act or the rules made thereunder.

4. It is to be considered whether the Court was justified in exercising its power of review. In this case the ground taken by the opposite party is that as Dhaneswar Patra was connected with the work, he could not have been appointed as Arbitrator. The petitioners have admitted that Dhaneswar Patra was appointed as the Superintending Engineer of the circle while the work was in progress. So, he had something to do with the work though it is stated that he had no direct knowledge about the work. The names of Dhaneswar Patra along with Banabasi Patnaik, who has now been appointed as Arbitrator, and some others was submitted by the petitioners for appointment of Arbitrator from amongst them. When it came to light that Dhaneswar Patra was concerned with the work, on the application of the opposite party, the Subordinate Judge appointed Shri Banabasi Patnaik as the Arbitrator in place of Shri Patra. As the Court was satisfied that Shri Patra was for some time the Superintending Engineer when the work was in progress and his appointment as Arbitrator might prejudice the interests of the opposite party, Shri Banabasi Patnaik, whose name was also submitted by the petitioners, was appointed as the Arbitrator.

5. After hearing the argument of both sides and considering the facts and

circumstances of the case I see no reason to interfere with the order of the learned Subordinate Judge. The revision is, therefore, dismissed. In the circumstances, there would be no order as to costs.

Revision dismissed.

AIR 1982 ORISSA 241

R. N. MISRA, C. J. AND

B. K. BEHERA, J.

Bhagirathi Kar and another, Petitioners v. Jagannath Roul and others, Opposite Parties.

O. J. Cs. Nos. 1758, 1759 and 1760 of 1978, D/- 22-10-1981.

Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act (21 of 1972), S. 36 — Revision — Dispute between 'A' and 'B' regarding acquisition of title over property — Title not found to be in 'A' — 'A' not claiming title by adverse possession — Direction by Consolidation Commissioner for investigation into question of possession would be irrelevant. (Para 3)

S. K. Dey, Y. Mohanty and E. B. Mohapatra, for Petitioners; Addl. Standing Counsel, Sanatan Jena and S. P. Mohanty, for Opposite Parties.

R. N. MISRA, C. J.:— Challenge in these three writ applications under Article 226 of the Constitution is to the order passed by the Consolidation Commissioner in 3 separate revisions under the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act (21 of 1972). As common questions arise and one set of arguments had been advanced by common counsel appearing for the parties, we propose to dispose of all these three writ applications by a common judgment.

2. Opposite Party No. 1, Jagannath Roul, was the original owner of each item of property forming the subject-matter of the dispute in the writ applications. The petitioner in each of the writ applications acquired title to the property under a registered sale deed and maintained that following acquisition of title, possession was also obtained. In 1970 there was final publication of the Record-of-Rights wherein each of the petitioners was shown to be the owner in possession of the property ac-

quired by him under the registered deed of sale. Opposite Party No. 1 did not challenge the record so published. There was a proceeding u/s. 145, Cr. P. C. between the parties which had terminated in favour of opposite party No. 1, but that was set aside by this Court in Criminal Revision No. 87 of 1970. While matters stood thus, consolidation proceedings were initiated pursuant to a notification u/s. 3 of Orissa Act 21 of 1972. Before the Consolidation Authorities opposite party No. 1 maintained that the sales were Benami and, therefore, did not convey any title to the vendees. This stand was rejected by the Consolidation Officer and such rejection was upheld in appeal. Opposite Party No. 1, had, therefore, moved the Consolidation Commissioner in revision. By a separate order in each of the revisions but on the same line, the Commissioner did not direct recording of the property in the name of opposite party No. 1; so far as the claim of Benami was concerned, he directed parties to agitate the same in the common law court; yet he remanded the matter to the Consolidation Officer for giving a finding regarding possession and also required that such possession should be noted in the Land Register. These three writ applications assail the aforesaid direction of the Consolidation Commissioner in the three cases.

3. According to Mr. Dey for the petitioner in each of the cases, once title is found to be not in the opposite party and the opposite party does not come forward to claim title on the basis of adverse possession, the fact of possession is immaterial for the consolidation proceeding and the direction to enquire into possession and to make an entry in the Land Register with reference to such possession was irrelevant. Mr. Jena for the opposite parties is not in a position to show to us from the record that there was any claim of acquisition of title by adverse possession. In the premises, the direction for investigation into the question of possession is wholly irrelevant and would be really a futile exercise. We see no justification for the direction by the Consolidation Commissioner.

4. We would accordingly quash the order of the Commissioner by which he has required the Consolidation Officer to enquire into the question of possession and to note the same accordingly in the

Land Register. That direction having been set aside, on the basis of the other conclusions it must follow that the appellate order of the Consolidation Authority has to be sustained and if there is any real grievance, the same must be ventilated in the Civil Court by a regular suit as indicated in the order of the Commissioner.

5. Each of these writ applications is allowed and the direction for fresh investigation on the question of possession and the further direction that an entry be made in the Land Register are set aside.

Parties are directed to bear their own costs.

BEHERA, J.:— I agree.

Applications allowed.

AIR 1982 ORISSA 242

R. N. MISRA, C. J.

Gopal Debjibhai Patel, Petitioner v. Rishal Singh and another, Opposite Parties.

Civil Revn. No. 428 of 1979, D/- 24-2-1981.*

(A) Specific Relief Act (47 of 1963), Ss. 10 and 13 — Civil P. C. (1908), O. 6, R. 17 — Suit for specific performance — Specific performance of contract becoming impossible due to pendente lite conduct of defendants — Plaintiff entitled to seek damages by amending plaint — Relief of damages could not be held time barred as cause of action arose on pendente lite conduct of defendant. (Limitation Act (1963), S. 23); AIR 1952 Cal 78, Rel. on.; AIR 1979 Cal 203, Dist. (Para 3)

(B) Civil P. C. (5 of 1908), O. 6, R. 17 and O. 9, R. 13 — Order setting aside ex parte order — Effect of order on order allowing application for amendment passed while defendants were ex parte.

In the instant case the amendment of the plaint had once been allowed when the defendants were ex parte. When as a result of the application under O. 9, R. 13, Civil P. C., the ex parte decree was vacated, the suit would indeed not be relegated to the position when defendants were first set ex parte, but the stage of actual trial. Orders passed prior to trial would not automatically be wiped out.

*Against Order of Sub. J., Jeypore, D/- 23-7-1979.

CY/CY/B398/81/JDD/MVJ—H

In the present case, the time-lag was short, but there may be cases where the defendant could be set ex parte at an initial stage and after a chequered career of the suit taking years, it might be called for trial. When in such a suit on defendant's application the ex parte decree is vacated, the effect of vacation of the ex parte decree cannot affect all proceedings taken in the suit after the defendant was initially set ex parte. Those orders under which the rights of parties have been allowed to work out and which in the absence of challenge have become final cannot be set aside or treated to have been recalled as a result of the ex parte decree being vacated. Therefore the order allowing amendment of plaint would stand as it was and would not be affected by the order setting aside ex parte decree. (Para 4)

Cases Referred : Chronological Paras

AIR 1979 Cal 203

3

AIR 1952 Cal 78

3

Y. S. N. Murty, for Petitioner; B. R. Rao and B. D. N. Swamy, for Opposite Parties.

ORDER:— It is a plaintiff's application challenging the order of the learned Subordinate Judge of Jeypore refusing to allow an application under O. 6, R. 17 of the Code of Civil Procedure for amendment of the plaint.

2. Title suit No. 4 of 1973 was instituted for specific performance of an agreement dated 23-11-1971 by which defendants had undertaken to deliver a specified quantity of timber. Petitioner obtained an interim order of injunction against removal of the timber and when the interim order was rescinded, Miscellaneous Appeal No. 150 of 1973 was carried to this Court where injunction was again granted. During the pendency of the appeal, original defendant No. 1 died on 16-8-1973 and substitution was made on 22-11-1973. According to the plaintiff, notwithstanding injunction from this Court, defendants felled the standing trees, cut them into pieces, removed the logs and disposed of the same with a view to making the suit infructuous. The suit was posted for hearing to 14th Mar. 1978, when defendants were set ex parte. On 15th Mar. 1978, plaintiff applied for amendment of the plaint. The amendment was allowed and the suit was decreed ex parte on 20th Mar. 1978. On the basis of an application un-

der O. 9, R. 13 of the Civil P. C., the ex parte decree was vacated on 2-4-1979. The court ordered that a copy of the petition for amendment of the plaint should be served on the defendants and after hearing both parties rejected the application for amendment on 23-7-1979. In the application for amendment, the plaintiff had specifically pleaded that the necessity for the amendment arose on account of events that happened after the suit was filed and unless the alternate relief for compensation on the basis of the value of the timber was allowed, the suit would be rendered infructuous.

3. Mr. Murty in support of the application contends that the learned Subordinate Judge has gone wrong in accepting the plea of limitation. Plaintiff's case was that the relief for compensation became necessary to be asked for on account of events which happened during the pendency of the suit. For admitting consideration of the alternate relief, the date of institution of the suit was not material because the cause of action for the alternate relief was recent and no premium could have been attached to the pendente lite conduct of the defendants. Relying on the decision of Mukherji, J., as the learned Judge then was, in the case of *Rajendra Nath Saha v. Saraswati Press Ltd.*, AIR 1952 Cal 78, Mr. Murty argues that the original suit for specific performance could be converted by amendment into a claim for damages for breach of contract and such an amendment did not amount to altering the cause of action or the nature of the suit. In the self-same decision it was pointed out by the learned Judge that the cause of action in a suit for specific performance or damage was the breach of contract and, therefore, when in lieu of specific performance damages are asked for, the cause of action continues to be breach of contract and one relief which is impossible of performance on account of the defendant's conduct is substituted by the alternate relief asked for. The ratio of the decision reported in AIR 1952 Cal 78, is based upon an analysis of the law applicable to the facts of a case like the present one.

Mr. Swamy for the other side relied upon a later Bench decision of the Calcutta High Court in the case of *Gopi Nath Sen v. Bahadurmal Dulchand*, AIR 1979 Cal 203, where the Court held that the question of granting relief by

way of damages in lieu of or in substitution of specific performance is a matter resting entirely with the Court and parties have nothing to do with it. The plaintiff, therefore, could not be allowed to abandon the case for specific performance and yet claim damages in lieu thereof. That was a case where the plaintiff was not ready to perform his part under the contract. The latter case of the Calcutta High Court would not apply to the facts of a case of the present type. There is, therefore, no question of limitation in the present case.

4. There is another feature which must also be taken notice of. The amendment of the plaint had once been allowed when the defendants were ex parte. When as a result of the application under O. 9, R. 13, Civil P. C., the ex parte decree was vacated, the suit was indeed not relegated to the position when defendants were first set ex parte, but the stage of actual trial. Orders passed prior to trial would not automatically be wiped out. In the present case, the time-lag was short, but there may be cases where the defendant could be set ex parte at an initial stage and after a chequered career of the suit taking years, it might be called for trial. When in such a suit on defendant's application the ex parte decree is vacated, the effect of vacation of the ex parte decree cannot affect all proceedings taken in the suit after the defendant was initially set ex parte. Those orders under which the rights of parties have been allowed to work out and which in the absence of challenge have become final cannot be set aside or treated to have been recalled as a result of the ex parte decree being vacated.

5. In my opinion, the learned Subordinate Judge went wrong in refusing the prayer for amendment in the facts of the case. The Civil Revision is accordingly allowed and the impugned order is set aside. The amendment shall be carried as required by law. Defendants shall be now given an opportunity of filing additional written statement, if any, within a time to be fixed by the trial court. I call upon the parties to appear before the trial court on March 16, 1981 to which date the suit shall stand posted.

There would be no order for costs.

Revision allowed.

AIR 1982 ORISSA 244

R. N. MISRA, Actg. C. J.

AND N. K. DAS, J.

R. Satyanarayan Murty, Petitioner v. V. Raghu Ramarao and others, Opposite Parties.

Original Jurisdiction Case No. 387 of 1979, D/- 6-1-1981.

(A) Orissa Land Reforms Act (16 of 1960), S. 15 (7) — Appointment of receiver — Jurisdiction vests both in revenue officer and appellate authority as well.

Every appellate court, unless there be any restrictions in the relevant statute, has the same power as the original forum. If the Revenue Officer had the jurisdiction to appoint a receiver, the appellate authority in respect of a matter covered by S. 15 would equally have jurisdiction to appoint a receiver.

(Para 3)

(B) Orissa Land Reforms Act (16 of 1960), S. 15 (7) — Revenue Officer discharging receiver on findings reached by him in application under S. 36A — Appeal against discharge of receiver — Appellate authority ordering continuance of receiver — Order of appellate authority could not be resisted on ground that appellate authority had no power to appoint receiver since order of continuance was not in appeal on orders passed in application under S. 36A. (Para 4)

S. C. Roy and P. V. Ramdas, for Petitioner; Y. S. N. Murty and Addl. Standing Counsel, for Opposite Parties.

MISRA, Actg. C. J.:— Challenge in this application for a writ of certiorari is to the order passed by the Additional District Magistrate (opposite party No. 3) in exercise of appellate jurisdiction under the Orissa Land Reforms Act (hereinafter referred to as the 'Act'). Opposite party No. 1 claiming to be a tenant in respect of 1.60 acres of land as detailed in paragraph 2 of the writ petition moved the Revenue Officer by filing two separate applications under S. 36-A of the Act. The first application which was registered as O. L. R. Case No. 785 of 1976 related to 1.00 acre of land while the other registered as O.L.R. Case No. 1964 of 1976 was in respect of Ac.0.60 decimals of land. Pending adjudication of these two cases, the tenant-opposite party No. 1 also applied under S. 15 of

the Act before the Revenue Officer in O. L. R. Case No. 2380 of 1976 for the self-same land on the allegation that the landlord was interfering with his cultivating possession. The tenant applied in the lastly instituted case under S. 15 (5) for ad interim injunction and for the appointment of a receiver as provided under S. 15 (7) of the Act. On 4-12-1976, the Revenue Officer appointed the local Revenue Inspector as receiver of the standing crop. The petitioner took the stand that opposite party No. 1 was not his tenant and had no connection with the land. The Revenue Officer rejected both the applications under Section 36-A of the Act. Opposite Party No. 1 preferred appeals before the Additional District Magistrate challenging the rejection of the claim. The Revenue Officer thereafter rejected the application under S. 15 of the Act on the basis of his finding in the cases under S. 36-A of the Act and asked the receiver to hand over the property to the petitioner. By order dated 5-9-1978, the Additional District Magistrate directed:—

"On careful consideration of the facts as well as the law governing the matter I hold that pending final adjudication of the dispute in this court, the R. I. Bada Ramachandrapur should continue as the receiver for the lands. He is directed to lease out the lands in public auction for cultivation."

The petitioner challenged that direction in revision before the Revenue Divisional Commissioner without any success. Therefore, this writ application has been filed challenging the appellate order as sustained in revision.

2. The main contentions in support of the application are:—

(i) S. 15 (7) of the Act confers jurisdiction on the Revenue Officer only in the matter of appointment of receiver. The appellate court, therefore, had no jurisdiction to appoint or direct continuance of the appointment of receiver;

(ii) In view of the finding in the two applications under S. 36-A of the Act that there was no relationship of landlord and tenant between the parties, as long as the finding had not been vacated, it was not proper for the appellate authority to continue the appointment of receiver;

(iii) From the order of initial appointment of receiver, it is clear that the appointment was for the standing crop.

The receivership had, therefore, come to an automatic termination after the standing crop had been removed. There was, therefore, no scope for continuing the receiver by the Additional District Magistrate.

It is next contended that in a proceeding under S. 36-A of the Act, there is no scope for appointing a receiver and, therefore, the order of continuance of receiver was an act without jurisdiction.

3. None of the contentions seems to be valid. Every appellate Court, unless there be any restrictions in the relevant statute, has the same power as the original forum. If the Revenue Officer had the jurisdiction to appoint a receiver, the appellate authority in respect of a matter covered by S. 15 of the Act had equally a jurisdiction to appoint a receiver.

4. It is not disputed that in the proceedings under S. 36-A of the Act, the Revenue Officer had negated the existence of relationship of landlord and tenant, but that matter has not become final as appeals are pending challenging the orders of the Revenue Officer. When the Revenue Officer discharged the receiver, an independent appeal had been carried in O.L.R. Appeal No. 190 of 1978 in which the impugned order of continuance of receiver was passed. The Additional District Magistrate was, therefore, not exercising the power of appointment/continuance of receiver in the appeals against the orders passed under S. 36-A of the Act, but had passed the order in the appeal against the direction discharging the receiver. The second contention has, therefore, no force at all.

5. In view of the clear order of the Revenue Officer in the matter of appointment of receiver, the appointment appears to have been initially for the standing crop of 1976 and by the time the appeal came before the appellate authority, there was actually no receivership in existence. The Revenue Officer's order dated 31-7-1978 runs thus:—

"On scrutiny it is seen that the receiver was appointed only for the standing crops on 4-12-76 by the Revenue Officer, Chhatrapur. So the handing over possession is not necessary. Inform the party accordingly. Inform R.I., Bada Ramachandrapur."

The impugned order directed continuance of the receiver. Since there was no receiver by then, strictly speaking a

direction for continuance was not appropriate. We, however, do not think on that technical ground we should exercise our inherent jurisdiction and interfere in the matter. On the other hand, we are of the view that the appeal which has been pending for more than two years before the Additional District Magistrate should be disposed of along with the appeals arising out of the applications under S. 36-A of the Act. While declining to interfere in the matter, we call upon the Additional District Magistrate to dispose of all the three appeals by the end of Feb., 1981 without fail.

6. There would be no order for costs.
DAS, J.:— I agree.

Order accordingly.

AIR 1982 ORISSA 245

B. K. BEHERA, J.

State of Orissa and others, Appellants
v. Orissa Oil Industries Ltd. and others,
Respondents.

Misc. Appeal No. 263 of 1982, D/- 31-5-1982.*

(A) Evidence Act (1 of 1872), S. 114 — Statement in judgment of Court as to what happened before it — Should not ordinarily be allowed to be challenged.

Where a statement appears in the judgment of a court that a particular thing happened or did not happen before it, it ought not ordinarily be permitted to be challenged by a party unless, of course, both the parties to the litigation agree that the statement is wrong, or the court itself admits that the statement is erroneous. (Para 6)

(B) Civil P. C. (5 of 1908), O. 27, R. 9 (Orissa) and R. 8 — Suit against Govt. and its Officers — Procedure under R. 8 not followed — Govt. pleader cannot put in appearance on behalf of Govt. Officers.

As per R. 9 introduced by Orissa High Court, where the Government undertakes the defence of a suit against a public officer, the Government Pleader, upon being furnished with authority to appear and answer the plaint, shall apply to the Court, and upon such application, the Court shall cause a note of his auth-

*From order of R. K. Misra, Sub. J., Sambalpur, D/- 14-5-1982.

HZ/HZ/D461/82/SNV

ority to be entered in the register of civil suits as required by R. 8. (Para 6)

Where in a suit against the Govt. and its Officers the procedure as prescribed by R. 8 was not followed the Govt. pleader appearing before the Court could not be said to have authority to appear on behalf of the Officers of the Govt. who were also proceeded against, in the suit. AIR 1954 Cal 455, Foll. (Para 6)

(C) Civil P. C. (5 of 1908), O. 27, R. 8 — Suit against Govt. — Inference of adequate opportunity to Govt. counsel of representing Govt., if warranted.

Where the party filing the suit against the Govt. two days before commencement of summer vacation, moved the application for interim injunction with only one day to go before summer vacation and the matter was hurried through and an order of ad interim injunction covering nearly 20 pages in the order-sheet was passed. The Govt. pleader could not be said to have been given due and adequate notice regarding the institution of the suit and the moving of application for ad interim injunction and in the circumstances, in the absence of proper authority and instructions, the Government pleader could not be said to have effectively represented the case of the Govt. before the court. (Para 8)

(D) Civil P. C. (5 of 1908), S. 80 (2) — Permission under — Is a condition precedent even for suit for injunction.

Where the permission to file suit on application under S. 80 (2) was refused by the Court in a suit for injunction against the Govt. the Court could not grant interim injunction on the day the suit was admitted as the suit itself was not maintainable in the absence of notice under S. 80. (Para 10)

(E) Civil P. C. (5 of 1908), O. 39, R. 3 — Grant of interim injunction without notice to opposite party — Recording of reasons is essential. (Para 11)

(F) Civil P. C. (5 of 1908), O. 39, Rr. 3 and 4, S. 100 — Order of interim injunction without notice to opposite party (Govt.) — Closure of Court for summer vacation immediately after grant of injunction — Appeal against order is competent despite right of aggrieved party under R. 4 to have order of injunction rescinded. (Para 11)

(G) Civil P. C. (5 of 1908), O. 39, Rr. 1 and 2 — Grant of temporary injunctions — Conditions to be satisfied.

The following propositions are to be established in order to invoke the jurisdiction of the Court to get an interlocutory order of injunction under Order 39, Rules 1 and 2, Civil Procedure Code.

(i) Plaintiff has a prima facie case. (ii) If interim injunction is refused he will suffer an irreparable injury. (iii) The balance of convenience is in his favour.

Where the agreement under which a Company was granted contract by the Govt. to collect sal seeds from certain areas contained a clause which was independent, to the effect that when Forest Development Authority is constituted for any of the area out of the region for which contract was given, such area "shall automatically be deemed to have been taken out from the existing areas covered by this agreement" and, in fact, such authority was constituted for certain area that area would be deemed to have to be taken out of the areas covered by the agreement and as such, there could not be said to be any prima facie case in favour of the Company in a suit for injunction filed by the Company to restrain the Corporation and Govt. from taking possession of the area for which the Corporation was constituted. This would be so in spite of another clause in the agreement for giving area of equal potentiality to the Company. Further, when it was also appeared from the letter written by the Company to the Govt. that in the previous year before filing suit that there had been excess collection which could not be processed inside the State and for this, permission of the State Government had been sought for processing 10,000 tons of sal seeds kernels outside the State, it could not be said that any irreparable injury would be caused to the Company if interim injunction was not granted nor could it be said that balance of convenience was in favour of the Company when the Corporation had already undertaken the operations of the area for which the Corporation was constituted. (Para 17)

Cases Referred: Chronological Paras

AIR 1981 Cal 351	11
(1977) 2 Cut WR 874	7
AIR 1976 Kant 66	11
AIR 1975 SC 1967	13
AIR 1975 Bom 197	7
(1975) 41 Cut LT 697: (1975) 1 Cut WR	10
366	

(1975) 1 All ER 504; (1975) 2 WLR 316:
 1975 AC 396, American Cyanamid Co.
 v. Ethicon Ltd. 12
 (1974) 40 Cut LT 336 12
 AIR 1971 Andh Pra 380 19
 AIR 1970 Orissa 239 10
 AIR 1969 Patna 25 8
 AIR 1966 SC 1068 10
 AIR 1965 Bom 109; 1965 (2) Cri LJ 75 7
 (1965) 2 WLR 751; (1965) 1 All ER 934:
 1965 Ch 694, H. Clark (Doncaster) Ltd.
 v. Wilkinson 6
 AIR 1964 SC 377; 33 Com Cas 783 6
 (1964) 30 Cut LT (Notes) 82: ILR (1964)
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 (1962) 28 Cut LT (Notes) 114: ILR (1962)
 Cut 673 6
 AIR 1957 Ker 119 13
 AIR 1954 Cal 455 6
 AIR 1954 Mad 1008 13
 AIR 1948 PC 168 13
 AIR 1946 Patna 177 12
 (1865) 12 LT 628; 13 WR 856; (1865) 6
 New Rep 288, Wakefield v. Duke of
 Buccleuch 12

G. Das, Advocate General, B. B. Mohanty and G. B. Patnaik, for Appellants;
 R. Mohanty, B. Mohanty and A. Fattanayak, for Respondents.

ORDER:— The question for consideration before me is as to whether this Court should stay the operation of the impugned order of ad interim injunction passed by the learned Subordinate Judge, Sambalpur, in Miscellaneous Case No. 45 of 1982 arising out of Title Suit No. 37 of 1982 instituted by the respondents against the appellants in his court enjoining the appellants from giving effect to the resolutions dated 23-4-1980, 15-5-1980 and 30-5-1980 of the State Government in the Department of Forest, Fisheries and Animal Husbandry and the letter dated 7-5-1982 of the appellant No. 4 addressed to the respondent No. 2 debarring the respondent No. 2 from collecting sal seeds from out of the areas of the Similipahar Forest Development Corporation Limited and further informing that the collection and disposal of sal seeds by it from 1-10-1981 would be confined to the jurisdiction of the present Karanjia Division only, and from interfering in any manner with the exclusive right of the respondent No. 2 to collect and appropriate sal seeds from the areas described in the schedule to the application and supply the same to the respondent No. 1 for utilisation in its industry and from im-

peding in any manner the ingress or egress of the men and trucks/vehicles of the respondent No. 2 into and out of the scheduled areas or transport thereof from/out of scheduled areas and from refusing to issue necessary permits for the said purpose. In the schedule of the order had been included the entire forests of Karanjia and Baripada Forest Division including the areas/forests allotted/attempted to be allotted to Similipahar Forest Development Corporation Limited.

2. The respondent No. 2 had been granted lease by the State Government in respect of twelve forest divisions including the Baripada and Karanjia Divisions for the purpose of collection of sal seeds from which oil is extracted and used for manufacture of some commodities. The leases in question had been renewed from time to time in favour of that company. On 8-1-1979, the State Government passed a policy resolution in regard to exploitation of minor forest produce including the sal seeds. Subsequent to this policy decision of the State Government, the application of the respondent No. 2 for renewal was considered and it was granted lease for a period of ten years on the conditions laid down in the policy decision as well as on the terms and conditions of the lease executed between the parties. This lease was to continue until the year 1989.

On 22-4-1980, the respondent No. 2 was informed in a letter from the Divisional Forest Officer, Baripada, to the effect that the Similipahar Forest Development Authority had come into existence since February, 1980 and therefore, the respondent No. 2 was to abide by clause 17 (v) of the Agreement and no collection should be made in the Similipahar Reserved Forest (Annexure 17 to the plaint). Thereafter, as per Annexure 18 to the plaint, the Managing Director of the Similipahar Forest Development Corporation Limited, which is a Government of Orissa Undertaking, invited sealed tenders from interested parties for purchase of sal seeds for the year 1980 from the Project area. The respondent No. 2 unsuccessfully challenged the legality of the aforesaid letter dated 22-4-1980 from the Divisional Forest Officer, Baripada, in the Calcutta High Court, before a learned single Judge and the writ application was dismissed on 19-5-1980. Against the order

of the learned single Judge, the respondent No. 2 moved a Division Bench of the Calcutta High Court in P.H.A.T. No. 1445 of 1980 and the appeal was dismissed as per Annexure A to the memorandum of appeal presented in this Court. The respondent No. 2 then moved a petition in the Supreme Court for grant of Special Leave to Appeal in S.L.P. No. 5515 of 1980 against the judgment of the Calcutta High Court, but it was withdrawn. The respondent No. 1 then filed a writ application in this Court (O.J.C. No. 954 of 1980).

In the meantime, the respondent No. 1 made a representation to the State Government for reconsideration of the decision with respect to the lease of sal seeds in the Similipahar Forest Development area and on consideration of the representation, it was decided that the areas would be given to the respondent No. 2 for collection of sal seeds for a period of one year only, i.e., 1981. Pursuant to this order, the respondent No. 2 was permitted to collect sal seeds for the year 1981.

3. The respondents have now instituted Title Suit No. 37 of 1982 in the court of the learned Subordinate Judge, Sambalpur and have prayed for ad interim order of injunction against the appellants injuncting them from giving effect to the Government resolutions and the letter of the Divisional Forest Officer dated 7-5-1982 referred to above. The suit was instituted on 12-5-1982. The application for ad interim injunction was filed on 14-5-1982. On the same day, the impugned order was passed which the State Government could know on 17-5-1982 having received notice thereof from the court of the learned Subordinate Judge. 15-5-1982 was the last working day for the subordinate civil courts in this State and the summer vacation commenced on and from the 16th May, 1982. The last working day, i.e., the 15th May, 1982, was ordinarily to be observed as a clearance day by the court. Because of this difficulty and as the order of injunction had been passed only one day prior to the day when the civil courts were to be closed, the copy of the impugned order could not be obtained by the appellants. After obtaining an order of ad interim injunction in their favour, the petitioners in O.J.C. No. 954 of 1980 have now put in a memorandum in this Court on 17-5-1982 stating thus:

"The petitioners amongst others have already filed T. S. No. 37/1982 and Misc. Case No. 45/1982 in the Court of the learned Subordinate Judge, Sambalpur in respect of the subject matter of this Writ Petition as well as subsequent orders/actions of the opposite parties. The petitioners, therefore, do not propose to continue with this Writ Petition any longer, and accordingly seek leave of this Hon'ble Court to withdraw the same.

4. After hearing the learned counsel for both the sides, I had, on the 21st May, 1982, passed an interim order of stay and called for the record for hearing on the question of stay of the impugned order till the disposal of the appeal.

The learned Advocate-General, appearing on behalf of the appellants, has taken a number of legal and factual grounds and has contended that the impugned order could not legally be passed against the appellants. According to Mr. R. Mohanty, the learned counsel for the respondents, however, the impugned order had legally and duly been passed by the learned Subordinate Judge after hearing the respondents and the learned Government pleader for the appellants who had conceded for the grant of ad interim injunction and in view of the facts and circumstances of the case and the urgency of the matter, the learned Subordinate Judge was legally correct in passing the impugned order which could not be called in question.

5. The learned Subordinate Judge, while passing order No. 3 dated 14-5-1982, had recorded thus:

"3. The learned Advocate appearing on behalf of the plaintiff are present and the Government pleader on behalf of the State-defendants is also present. Heard the matter on the question of ad interim injunction.

4. The learned Government pleader submitted that he has got no objection if the ad interim injunction is granted, but he should be given a chance to file an objection till the next date. Put up later on for further orders."

The learned Subordinate Judge then proceeded to pass and record the impugned order and just before the operative part was recorded, the learned Subordinate Judge stated thus:

"9. As stated above a copy of the petition was served on the Government

pleader Sri S. Debata of Sambalpur District and as required under S. 80 (2), C.P.C. at the time of hearing of the petition the Government pleader Mr. Debata was present and he was also asked whether he has any reason to object in the ex parte ad interim injunction. The learned Government pleader submitted that ad interim injunction may be issued, but the right of the Government to file objection may be preserved. So, the State Government may file an objection and contest the misc. case before injunction is made absolute.

10. After perusing the plaint, the relevant documents in favour of the petitioners and going through the petition it is necessary that an ad interim injunction be issued against the defendants in the manner as prayed by them...."

The learned Subordinate Judge then directed issue of notices to the appellants to show cause by 9-7-1982 as to why the ad interim injunction passed against them should not be made absolute.

6. A serious dispute has arisen as to whether in fact, the learned Government pleader could appear and had appeared on behalf of all the appellants and had conceded for passing of an ad interim order of injunction. The learned Government pleader has sworn an affidavit in this Court enclosing a copy of his letter addressed to the District Judge, Sambalpur, making allegations against the conduct of the learned Subordinate Judge and according to him, he has not made any such submissions and his verbal prayer for an adjournment had been rejected. In either case, the matter is very grave. If the learned Government pleader had not made such a concession, the learned Subordinate Judge had no justification to record that he had so conceded. If, on the other hand, a concession had, in fact, been made, it must be taken that the learned Government pleader has now made false statements in the affidavit filed in this Court. This matter need not be gone into at this stage as the Subordinate Judge is not before this Court and no comment should be made against him without asking him to give his comments on the affidavit put in by the learned Government pleader in this Court. As has been laid down by the Supreme Court in the case of *Bank of Bihar v. Mahabir Lal* (1963) 33 Com Cas 783; (AIR 1961 SC

377), where a statement appears in the judgment of a court that a particular thing happened or did not happen before it, it ought not ordinarily be permitted to be challenged by a party unless, of course, both the parties to the litigation agree that the statement is wrong, or the court itself admits that the statement is erroneous. Similar is the principle laid down in the case of *Rama Santra v. Rani Soudamini Manjari Devi*, (1962) 28 Cut LT (Notes) 114. The learned Advocate-General has invited my attention to the observations made by Lord Denning M. R. in the case of *H. Clark (Doncaster) Ltd. v. Wilkinson*, (1965) 2 WLR 751, and has contended that a concession made by a solicitor having no ostensible or apparent authority is not binding on the party. In the instant case, it would not be necessary, in my view, to go into this question as on a perusal of the part of the order extracted above, it would be seen that although the concession said to have been made by the learned Government pleader had been referred to, it had not, in terms, been relied on while passing the order in favour of the respondents. That apart, as rightly submitted by the learned Advocate-General, the learned Government pleader could appear for the appellant No. 1 (State of Orissa), but had no authority to appear for other public officers and the Similipahar Forest Development Corporation Limited. As per the Orissa High Court amendment, by addition of a new rule as Rule 9 to Order 27 of the Code of Civil Procedure:

"In every case in which the Government pleader appears for the Government as a party on its own accounts or for the Government as undertaking, the provision of Rule 8 (1), the defence of a suit against an officer of a Government, he shall in lieu of Vakalatnama, file a memorandum of unstamped paper signed by him and stating on whose behalf he appears."

No memorandum of appearance has been put in by the learned Government pleader in this suit. As provided in O. 27, R. 8 of the Civil P. C., where the Government undertakes the defence of a suit against a public officer, the Government pleader, upon being furnished with authority to appear and answer the plaint, shall apply to the Court, and upon such application, the Court shall cause a note of his authority to be enter-

ed in the register of civil suits. There is no material that the learned Government pleader had authority from the State Government to appear on behalf of the public officers. As has been laid down by the Calcutta High Court in the case of Lutfar Rahaman Laskar Haji Kabadali Naskar v. State of West Bengal, AIR 1954 Cal 455, unless the procedure laid down in O. 27, R. 8 has been followed, the court is to proceed on the footing that there has been no appearance by the Government pleader on behalf of the public officers and the intimation filed by the Government pleader for appearance on their behalf cannot be accepted. Thus, if the learned Government pleader had authority to appear on behalf of the State Government, he had no authority to appear on behalf of the other appellants and therefore, even assuming that a concession had been made by him, in view of the provisions of O. 27, R. 8, his appearance on behalf of the public officers was to be ignored by the court and he had no authority to appear for the Similipahar Forest Development Corporation Limited (appellant No. 6).

7. The learned Advocate-General has strenuously urged relying on the provisions of Ss. 16, 19 and 20 of the Civil P. C. that the Subordinate Judge, Sambalpur, had no territorial jurisdiction to entertain the suit and the suit could only be instituted in an appropriate court having jurisdiction over the areas where the sal seeds were to be collected. Mr. R. Mohanty, however, has, in this connection, relied on the principles laid down in the cases of S. P. Gantayat v. Principal, Regional Engineering College, Warangal (A. P.), (1977) 2 Cut WR 874, Sohanlal Sukla v. Dilasukrai, (1964) 30 Cut LT (Notes) 32, Khanchand Pokardas v. Harumal D. Varma, AIR 1965 Bom 109 and State of Maharashtra v. Sarvodaya Industries, AIR 1975 Bom 197, and has submitted that as the letter dated 7-5-1982 conveying the decision of the State Government, referred to above, had been communicated to the respondent No. 2 in its address at Sambalpur and had been received at Sambalpur, the suit could be instituted in the court of the Subordinate Judge at Sambalpur. It would, not in my view, be necessary to go into this important question which is one of facts and law at this stage.

8. Before examining the other contentions raised on behalf of the appellants, it would be better to keep in mind some salient features with regard to the institution of the suit and the moving of an application for ad interim injunction. The suit was instituted on 12-5-1982 and an order was passed by the learned Subordinate Judge on that day to register the suit and put up on 14-5-1982 with office note. On 14-5-1982, the following order was passed which was recorded by the learned Subordinate Judge in his own hand:—

"Seen office note in the suit. The plaintiff has filed all the necessary requisites, necessary in the suit to be filed. Process fees, etc. have been duly filed. Admit the suit and issue summons for settlement of the issues to the defendants, fixing to 9-7-82 for service return."

It has been stated in paragraph 67 of the plaint that notices dated 12-5-1982 under Section 80 of the Code of Civil Procedure had been despatched through registered post to the Chief Secretary to the Government of Orissa, Bhubaneswar and the Secretary, Forest, Fisheries and Animal Husbandry Department, Government of Orissa, Bhubaneswar. Thus the suit had been instituted before the expiry of two months after the notices were sent. An application for leave to sue and to move the urgent application for injunction was made ready on 12-5-1982, but was filed in the court on 14-5-1982. An application under O. 39, Rr. 1 and 2 for ad interim injunction supported by an affidavit dated 14-5-1982 was sworn on that day at 8-05 a.m. as could be seen from the endorsement thereon by the Commissioner of Affidavits, and was filed on the same day. An application under O. 39, R. 3 of the Civil P. C. for passing of an ex parte order of injunction was also made ready and filed on 14-5-1982. On 13-5-1982, notice was given in writing to the learned Government pleader by the learned Advocate for the respondents that they would move the plaint and petition under O. 39 on the next day, i.e., on the 14th May, 1982. Although it has been mentioned therein that the copies of the plaint, petition under O. 39, R. 3 and petition under S. 80 had been served, the learned Government pleader had endorsed thus: "Received copies of the plaint and injunction petition."

This endorsement, strangely enough, had been signed on 13-5-1982 although an earlier pointed out by me, the application for injunction was dated 14-5-1982. There is no endorsement of the learned Government pleader on any of the applications to the effect that he had received copy of the same, apart from the endorsement dated 13-5-1982 in a separate paper referred to above. There is nothing to show that he had received the copy of the application made under O. 39, R. 3 of the Civil P. C. Apart from the statement recorded by the learned Subordinate Judge in his order dated 14-5-1982 that copy of the application made under S. 80 read with S. 151 of the Civil P. C. had duly been served on the Government pleader, there is no other record to show this and there has been no endorsement of the Government Pleader with regard to the receipt of the copy of this application, without, of course, taking into consideration the affidavit of Sanwormal Gupta on behalf of the respondents in this appeal. In the affidavit, it has been stated by him that the learned Government pleader, Sambalpur, received copies of the applications under S. 80 (2), O. 39, Rr. 1 and 2 and O. 39, R. 3 of the Civil P. C. at about 8-00 a.m. on the 14th May, 1982. The affidavits with regard to the applications under O. 39 had been sworn at 8-05 a.m. and copies of the applications could be served on the learned Government pleader some time thereafter and copies could not be served at about 8-00 a.m. Some corrections had been made in the affidavit with regard to the date of service and as to whether notice was given to the learned Government pleader that the matter would be moved on the same day or the next day. In the absence of any record of the court as to when the applications were served, there is no reason to discard the statement made by the learned Government pleader in his affidavit filed in this Court to this effect:

"That on 14-5-82 at about 10 a.m. while the deponent was in his office a copy of the plaint and a copy of the application for injunction under Order 39 filed by M/s. Orissa Oil Industries and others were served on him with the oral intimation that the matter of injunction will be taken up by the court at 11 a.m....."

According to the learned Government pleader by about 11-00 a.m., when he

reached the court, he found that the injunction matter had already been taken up and he further gathered that by the time the application for injunction was served on him, the injunction matter had already been started in the court. This part of his statement in the affidavit is disputed and as earlier indicated by me, need not be gone into at this stage by this Court. As would appear from the statement made by the learned Government pleader, he received a copy of the plaint and a copy of the application for injunction at about 10-00 a.m. on 14-5-1982. It may not be out of place to mention here that the plaint runs 54 pages and the annexures to the plaint run 111 pages. It would not, therefore, be possible on the part of a party or a pleader to effectively get instructions and oppose an application for injunction by studying the case on the same day. As has been laid down in the case of State of Bihar v. Smt. Daulat Kumari, AIR 1969 Patna 25, service of notice on the Government pleader is valid service of notice on the State Government, but in the instant case, although no written application had been made by the learned Government pleader for an adjournment, he could not possibly, placed in the circumstances in which he was, get instructions from the State Government and proceed with the matter and make submissions before the court. As a matter of fact, there is no material to indicate that he had any instructions or authority from the State Government to make submissions in the court on 14-5-1982. Prima facie, there appears to be some force in the contention raised by the learned Advocate-General that having instituted the plaint on 12-5-1982 and without taking any effective steps for moving an application for injunction immediately thereafter, the respondents chose to file and move the application for ad interim injunction with only one day to go before the Summer Vacation and the matter was hurried through and an order of ad interim injunction covering nearly 20 pages in the order-sheet was passed, although the courts were then having morning sittings from 6.30 a.m. to 12.30 p.m. But without obtaining the comments of the learned Subordinate Judge, it would not be appropriate, in my view, to express a final opinion in this regard. Suffice it to say that on the face of it, the appellants had not been given due and adequate notice

regarding the institution of the suit and the moving of an application for ad interim injunction and in the circumstances narrated above and without proper authority and instructions, the learned Government Pleader could not have effectively represented the case of the appellants before the court. It would, thus, prima facie appear to me that without reasonable opportunity being afforded to the appellants to show cause, the impugned order had been passed.

9. The suit was instituted without the expiry of two months from the date of the notice under S. 80 of the Civil P. C. An application under S. 80 (2) of the Code of Civil Procedure for leave to sue was made ready on 12-5-1982, but not filed until 14-5-1982. The learned Subordinate Judge, after perusal of the office note, admitted the plaint on 14-5-1982 and I have extracted above that part of his order. The office had pointed out in its note on the reverse of page 1 of the plaint:

"A petition praying for permitting the plaintiff to file the suit u/s. 80 (2), C.P.C." The sentence is not complete. Any way, it may be taken that the office noted that such an application had been filed. If due notice had been taken by the learned Subordinate Judge of this fact, he could not have admitted the plaint without allowing the application made under S. 80 (2) of the Code of Civil Procedure on 14-5-1982. As would prima facie appear from the order No. 3 dated 14-5-1982, he took note of this application on that day and had recorded thus:—

"An application under S. 80 read with S. 151 of the Code of Civil Procedure has been filed by the plaintiff-petitioner, copy of which has been duly served on the Government Pleader of Sambalpur district, Mr. S. Debta. It has been prayed that the petition should be allowed permitting the plaintiff to file the suit and move the court for necessary and appropriate directions by way of ad interim orders injunction/status quo. The petitioner states that the plaintiff has filed a suit in this court with a prayer to issue ad interim injunction against the defendants restraining them to prohibit the plaintiff to collect sal seeds from Karanjia and Baripada forest divisions as per the previous agreement."

10. On a perusal of the orders passed in the order-sheet, it would be clear

that the application made under S. 80 (2) of the Civil P. C. had not been allowed by the court. It would, therefore, follow that the suit could not be maintained in law and the urgent order for injunction could not, without the leave of the court, be asked for. As has been laid down in the cases of Sawai Singhai Nirmal Chand v. Union of India, AIR 1966 SC 1068 and Certificate Officer, Berhampur v. Kasturi Chand Malu, AIR 1970 Orissa 239, notice under S. 80 of the Civil P. C. is a condition precedent for maintainability of a suit even for injunction. It has been laid down in the case of Manmohan Das v. Madhunagar Powerloom Weavers' Co-operative Society, (1975) 41 Cut LT 697 that absence of notice under S. 80 touches the root of the matter and affects the jurisdiction of the court unless there is waiver. The point taken by the learned Advocate-General, in this regard, therefore, is well-grounded and unassailable. If the suit had not properly been instituted and therefore, could not lie and as in the instant case, leave to sue had not been allowed for moving the urgent application, no order of ad interim injunction could legally be passed by the court.

11. I have indicated earlier that there is nothing on record to show that the learned Government Pleader had received a copy of the application made under O. 39, R. 3 of the Civil P. C. This provision reads as follows:

"The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party:

Provided that, where it is proposed to grant an injunction without giving notice of the application to the opposite party, the Court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay, and require the applicant—

(a) to deliver to the opposite party, or to send to him by registered post, immediately after the order granting the injunction has been made, a copy of the application for injunction together with—

(i) a copy of the affidavit filed in support of the application;

(ii) a copy of the plaint; and

(iii) copies of documents on which the applicant relies, and

(b) to file, on the day on which such injunction is granted or on the day immediately following that day, an affidavit stating that the copies aforesaid have been so delivered or sent."

It may be stated at the cost of repetition that the Government Pleader could have appeared on behalf of the State Government, but not on behalf of other public officers and the Corporation. There had thus been no due notice of the application to these appellants. No order was passed by the learned Subordinate Judge on the application made under O. 39, R. 3 of the C. P. C. If it is proposed to grant injunction without giving notice of the application to the opposite party, the court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay. No such reasons have been recorded by the learned Subordinate Judge in the body of the order. In a recent decision of the Calcutta High Court in the case of *Amiya Prasad v. Bejoy Krishna Chakraborty*, AIR 1981 Cal 351 it has been laid down that to record the reasons for its opinion that the object of granting the injunction would be defeated by delay is a mandatory provision and if the reasons are not recorded, the order is to be taken as illegal. I would respectfully adopt the views of the learned Judge of the Calcutta High Court. This ground has also been well-taken by the learned Advocate-General.

That apart as provided in S. 80 (2) of the C. P. C. the leave of the court for the institution of a suit to obtain an urgent or immediate relief without serving any notice as required by sub-section (1) is necessary and further, the court shall not grant relief in the suit whether interim or otherwise, except after giving to the Government or public officer, as the case may be, a reasonable opportunity of showing cause in respect of the relief prayed for in the suit. From the facts and circumstances narrated earlier, I am prima facie satisfied that a reasonable opportunity of showing cause had not been given to the Government or the public officers in the instant case. This would again affect the legality of the impugned order. No doubt, as provided in order 39, Rule 4 of the C. P. C. and as laid down in the case of *Gurupadayya Nagayya v. Mahadu Arjun*

Nidoni, AIR 1976 Kant 66, the aggrieved party could approach the court granting injunction to rescind the order. but in this case, because of the closure of the court owing to Summer Vacation, the appellants could not have moved that court and they did exercise their right of appeal in view of the urgency.

12. It has been a settled principle of law that a party seeking injunction must satisfy the court that he has a prima facie case and that but for an order of injunction, irreparable injury would be caused to him and that the balance of convenience is in his favour. In this connection, Mr. Mohanty, the learned counsel for the respondents, has invited my attention to the principles laid down in *American Cyanamid Co. v. Ethicon Ltd.* (1975) 1 All ER 504 wherein the following observations have been made:

"The grant of an interlocutory injunction is a remedy that is both temporary and discretionary.

XX XX XX XX

The use of such expression as 'a probability', 'a prima facie case', or 'a strong prima facie case' in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.

It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages on the grant of an interlocutory injunction was that 'it aided the court in doing that which was its great object, viz. abstaining from expressing any opinion upon the merits of the case until the hearing' *Wakefield v. Duke of Buccleuch*, (1865) 12 LT 628. So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whe-

ther the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

As to that, the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason this ground to refuse an interlocutory injunction.

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the

late at which he is able to embark on a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial."

Mr. Mohanty has also invited my attention to the principles laid down in the cases of *Brajendra Nath Ghosh v. Smt. Kashi Bai*, AIR 1946 Patna 177. In the case of *Orissa State Commercial Transport Corporation Ltd. v. Satyanarayan Singh*, (1974) 40 Cut LT 336, G. K. Misra, C. J., observed:

"The following propositions are to be established in order to invoke the jurisdiction of the Court to get an interlocutory order of injunction under Order 39, Rules 1 and 2, Civil Procedure Code. (i) Plaintiff has a prima facie case, (ii) If interim injunction is refused he will suffer an irreparable injury. (iii) The balance of convenience is in his favour.....

10. In establishing a prima facie case, plaintiff need not establish his title. It would be sufficient for him to show that he has a fair question to raise as to the existence of his right and that till the question is ripe for trial a case is made out for preservation of the property in status quo.

xx xx xx xx
11. 'Irreparable injury' means such injury which cannot be adequately remedied by damages. The remedy by damages would be inadequate if the compensation ultimately payable to the plaintiff in case of success in the suit would not place him in the position in which he was before injunction was refused.

xx xx xx xx
12. 'Balance of convenience' means the comparative mischief or inconvenience to the parties. The inconvenience to the plaintiff if temporary injunction is refused would be balanced and compared with that to the defendant if it is granted. If the scale of inconvenience leans to the side of the plaintiff, then alone interlocutory injunction should be granted."

It has been submitted by the learned Advocate-General that judged in the light of the principles laid down with regard to the legal necessities before granting injunction, the materials in the instant

case were far short of the mark with regard to any of the three essentials.

13. As to the prima facie case, it has been submitted by the learned Advocate-General that it would depend on an interpretation of sub-clauses (v) and (vi) of clause 17 of the Deed of Agreement. The said two sub-clauses may be extracted:

"(v) It is hereby agreed that when the Similipahar Development Authority (Corporation) comes into existence, the portions of Karanjia and Baripada Forest Divisions coming within the jurisdiction of the aforesaid Authority (Corporation) shall automatically be deemed to have been taken out from the existing areas covered by this agreement, but the remaining portions of these two Forest Divisions covered by this agreement shall continue to remain under the licence granted to the company,

(vi) It is further agreed that in the event of the areas indicated at (v) above being taken out of the lease as aforesaid, another area having equivalent potentiality as far as possible will be made available to the Company for collection of sal seeds."

Mr. Mohanty for the respondents has referred to the principles laid down in the cases of *Beli Ram and Brothers v. Chaudri Mohammed Afzal*, AIR 1948 PC 168, *Nagarathnammal v. D. Veeraraghavan*, AIR 1954 Mad 1008 and *Krishnan Kumaran v. Mathew J. Mattom*, AIR 1957 Ker 119 with regard to the interpretation of the terms of documents and has submitted that sub-clause (v) is dependent on sub-clause (vi) and the two sub-clauses must simultaneously be given effect to. In other words, his contention is that unless another area having equivalent potentiality as far as possible is made available to the Company for collection of sal seeds, the areas coming under the jurisdiction of the Similipahar Forest Development Authority (Corporation) as mentioned in sub-clause (v) cannot be taken out. But as submitted by the learned Advocate-General, it would appear from the wordings of both the sub-clauses that sub-clause (v) is independent of and not subject to sub-clause (vi) and the words "shall automatically be deemed to have been taken out from the existing areas covered by this agreement" would show that when the Similipahar Forest Development Authority (Corporation) comes into existence,

the areas coming under that Authority would automatically be taken out from the areas covered by the agreement. While the expression "shall automatically be deemed to have been taken out" has been used in sub-clause (v), sub-clause (vi) postulates a future act by the use of the expression: "another area having equivalent potentiality as far as possible will be made available to the Company for collection of sal seeds" (the underlining is mine). It may be open to the Company, in the event of sub-clause (v) coming into operation, to claim specific performance of the contract if another area having equivalent potentiality as far as possible will not be made available to it, as submitted before me on behalf of the appellants, but it would not be reasonable to construe on a perusal of these two sub-clauses that unless the terms of sub-clause (vi) are satisfied and given effect to, the terms of sub-clause (v) cannot operate. It is admitted on all hands that the Similipahar Forest Development Authority (Corporation) has come into existence since 1980 and with its coming into existence, Baripada & Karanjia Forest Divisions coming within its jurisdiction have been taken out from the existing areas covered by the agreement. If this be the construction and it prima facie appears to be reasonable and proper to so construe, it may be said that the respondents have no prima facie case with regard to the areas under the jurisdiction of the Similipahar Forest Development Authority (Corporation) for which the suit has been instituted and the injunction had been claimed for and granted. Unfortunately as it might seem, the learned Subordinate Judge did not take care to examine this aspect before passing the impugned order. This is, of course a tentative view and the construction of the two sub-clauses which would be very material to decide the dispute between the parties is a matter which may more appropriately be gone into in details and determined at the stage of trial.

Relying on the principles laid down in the case of *Indian Aluminium Company v. Kerala State Electricity Board*, AIR 1975 SC 1967, Mr. Mohanty for the respondents has urged that contractual rights and obligations are sacrosanct and are not to be lightly interfered with. In the instant case, however, for the rea-

sons recorded above, the contention raised on behalf of the appellants seems to be fair and well-based although I would express no final opinion on it at this stage.

14. I would next come to the questions of irreparable injury and balance of convenience. It has been stated in the application for ad interim injunction that the respondent No. 2 has made substantial investments and in pursuance of the assurance for exclusive supply of the sal seeds, the respondent No. 1 has also made substantial investments to the tune of more than rupees two crores in building two extremely sophisticated and well-equipped solvent extraction plants and has entered into several long term agreements/contracts with buyers in India and overseas buyers for supply of substantial quantities of sal seed oil and oil cake and the balance of convenience is in favour of the respondents would suffer from irreparable injury and sustain heavy damages in case they are not allowed to collect sal seeds from the areas in question and it has been submitted before me that if other areas, such as, Puri and Athagarh Divisions, with much less or virtually no potentiality, are given to them in lieu of the areas in question, they would suffer heavily. In support of their case, the respondents have put in the affidavits of Shri Sanwamal Gupta, said to be the Secretary and Principal Officer of the respondent No. 1 and of Jadunath Das who is said to be the Resident Representative of the respondent No. 1. Both these persons have also, in their affidavits, made some statements as to what happened in the court of the learned Subordinate Judge on the day the order of injunction was passed. But, as submitted by the learned Advocate-General, it would be noticed from the chart at page 18 of the plaint that the respondents had under them areas with the estimated potentiality of 69,600 metric tons and after the two areas within the jurisdiction of the Development Corporation have been excluded, the respondents are still left with areas with estimated potentiality of 64,000 metric tons. The Chief Conservator of Forests has filed an affidavit in this court and I would quote an extract from the affidavit:—

"6. That the maximum annual requirement of sal seeds of the two factories of M/s. Orissa Oil Industries Ltd. one at Sasan (Dist. Sambalpur) and the other

at Rairangpur (Dist. Mayurbhanj) would be 42,000 MT per annum if the factories utilise the maximum capacity which is 70 MT per day. This calculation is based on the particulars submitted by the said M/s. Orissa Oil Industries Ltd. as well as the statistics and data prepared by the Government in the Industries Department while formulating the lease policy for collection of sal seeds for the year 1976-77.

7. That out of the 12 Divisions leased out in favour of M/s. Utkal Contractors and Joinery (P.) Ltd. excluding the area comprised in Similipahar, the estimated potentiality of collection of sal seeds per annum is nearly 64,000 MT. This estimation is based on a sample survey by the departmental authorities in 1975. This fact is admitted in para 28 of the plaint namely that the total potential including Similipahar area is, 69,600.

8. That the average annual collection of sal seeds from the portion of Baripada and Karanjia Divisions which comes within the jurisdiction of the S.F.D.C. and which forms the subject matter of dispute in the suit and the injunction as well as in the appeal is 5,167 M.T. taking into consideration the figures of collection during the 5 years ending 1979.

9. That the actual collection of sal seeds from Athagarh and Puri divisions which were offered to M/s. Utkal Contractors and Joinery (P.) Ltd. in accordance with clause 17 (vi) of the agreement was 2,190 M.T. during the year 1981.

10. That the aforesaid data and figures would conclusively establish that the submission of the plaintiffs-respondents that the two factories will be starved if the area covered within the jurisdiction of the S.F.D.C. is not given to it is wholly baseless. The data further reveal that the offered area namely Athagarh and Puri Divisions would come within the concept of area of equivalent potentiality as far as possible within the ambit of clause 17 (vi) of the Agreement."

15. The Managing Director of the Similipahar Forest Development Corporation has also put in an affidavit in support of the case of the appellants in this Court. According to him, steps have been taken by the Corporation for the construction of all-weather roads so that the maximum collection of sal seeds

would be made and the Corporation has so far spent about Rs. 40 lakhs for the development of the infra-structure. He has further stated thus:

"5. That in case where private parties are granted licence to collect sal seeds they do not have any obligation to construct roads and develop infra-structure in the area as is being done by Similipahar Forest Development Corporation. Normally, such licensee organise collection of sal seeds through agents in the area. But the S.F.D.C. has separate organisation of its own for collection of sal seeds directly from Adivasis on payment of fair wages. The State Government have fixed the minimum wages for collection of sal seeds at the rate of 90 paise per Kg. The deponent understands that the plaintiff No. 1 has offered 60 paise per Kg. while S.F.D.C. pays at the rate of 90 paise per Kg.

6. That there are five other solvent extraction units in the State which also require sal seeds as their raw materials. Pending establishment of Solvent Extraction Plants by the S.F.D.C. the sal seeds collected may be utilised to meet the short-fall requirement of other existing solvent extracting units in the State as far as possible."

16. The Deputy Secretary to the Government of Orissa in the Department of Forest, Fisheries and Animal Husbandry has also sworn an affidavit and has stated that the respondent No. 1, in letter No. S.15/524/79-80 dated 26-7-1979 addressed to the Secretary to the Government of Orissa, Forest Department, had stated that its collection of 48.00 metric tons of sal seeds had exceeded its capacity of 42,000 metric tons and it had requested the State Government for orders for transporting 10,000 tons of sal seeds kernels for processing outside the State. Although in the chart at page 18 of the plaint, the collection had been shown to be much less than the actual potentiality of the areas, it would appear from this letter, a copy of which has been enclosed to the affidavit filed in this Court, that in the year 1979, there has been excess collection which could not be processed inside the State and for this, permission of the State Government had been sought for processing 10,000 tons of sal seeds kernels outside the State.

17. All this would show that the averments made by the respondents that

but for an imminent order of injunction, irreparable injury would be caused to the respondents could not prima facie be accepted and as a Government of Orissa Undertaking has already undertaken the operations in the areas which were previously with the respondent No. 2 as per the Agreement, but had been carved out of the areas by virtue of sub-clause (v) of clause 17 of the Agreement on coming into existence of the Corporation, it could not be said that the balance of convenience in the instant case was in favour of the respondents.

18. True, the facts pleaded in these affidavits by both the sides in this Court were not placed before the learned Subordinate Judge and there was hardly any time for it, but the learned Subordinate Judge did not properly take into consideration, important aspects, such as, the foundation for the apprehension of irreparable injury as pleaded by the respondents and the balance of convenience in favour of either of the two sides and after merely recording the case of the respondents mentioned in the plaint, the learned Subordinate Judge passed the impugned order which, prima facie, would appear not to be a reasonable and reasoned one. Besides, mandatory provisions of law causing prejudice to the appellants had been infringed and I have already referred to these aspects.

19. At the stage of hearing this matter, Mr. Mohanty for the respondents has moved an application under O. 40, R. 1 read with S. 151 of the Civil P. C. for the appointment of a receiver and has, in the alternative, submitted that the respondent No. 2 Company may be appointed to be the receiver for collection, treatment, custody and safe storage of the sal seeds in question. In this connection, Mr. Mohanty has placed reliance on the principles laid down in *Ravi Lakshmaiah v. Nagamothu Lakshmi*, AIR 1971 Andh Pra 380 and his contention is that the words "make such other order" occurring in O. 39, R. 1 of the Civil P. C. include a power to appoint a receiver and such an appointment can be made in an application for injunction even suo motu if the circumstances and facts justify it. This application has been resisted by the learned Advocate-General and it has been submitted that the respondent No. 2, in view of the facts and circumstances of the case, is not to be appointed receiver and as the Gov-

ernment of Orissa Undertaking has already taken up the operations this year. no receiver should be appointed. In view of what has been stated by me in the body of this order, it would not be just, reasonable and equitable to appoint a receiver and the application is rejected.

20. For the reasons aforesaid, I am of the view that it would be legal and equitable, reasonable and proper to stay the operation of the impugned order as prayed for, I would, therefore, make absolute my order staying operation of the order of injunction passed by the learned Subordinate Judge on 14-5-1982 and do hereby order that there shall be stay of the order of injunction appealed against till the disposal of this appeal.

21. Before I close, I would like to make it clear that I have dealt with some of the matters in details as lengthy arguments have been advanced at the Bar raising a number of legal and factual contentions and I have made the observations only for the purpose of disposing of the application for stay of the impugned order. My observations should not, in any manner affect the merits of the suit or influence the mind of the court in seisin of the suit,

Order accordingly.

AIR 1982 ORISSA 258

N. K. DAS AND R. R. PATNAIK, JJ.

Shri Nathulal Aggarwalla, Petitioner v. Deputy Collector of Central Excise and others, Respondents.

Criminal Jurisdiction Case No. 17 of 1978, D/- 3-5-1982.

Gold Control Act (5 of 1968), S. 79 — Order of Excise Authority for seizure and confiscation of gold in possession of petitioner — 6 months' notice not given — Seizure is illegal and property seized must be returned to the petitioner.

The object of S. 79 being to apprise the person concerned of the grounds on which it is proposed to confiscate and/or to impose penalty and to give him a reasonable opportunity of making a representation in writing with such reasonable time as may be specified in the notice and to give him further an opportunity of being heard in the matter, if he so desires, the giving of notice is vital and a condition precedent. The object of

judicial function and administrative function are the same, namely, to do justice and decide the questions fairly and justly. The power exercised under the Chapter is quasi-judicial and at any rate one requiring a judicial approach. Further, "giving" of notice is not complete unless and until the notice reaches the person concerned or is actually tendered to him. Mere despatch of the notice to the address of the petitioner is not enough. AIR 1972 SC 689; AIR 1972 Guj 126 and AIR 1966 SC 330, Rel. on. (Paras 6, 8, 10)
Cases Referred: Chronological Paras
AIR 1972 SC 689 6, 8, 8A
AIR 1972 Guj 126 7, 8A
AIR 1966 SC 330 8

R. Mohanty and R. Sharma, for Petitioner; Standing Counsel (Central), for Opposite Parties.

PATNAIK, J.:— The petitioner, an agriculturist and a pawn-broker, seeks a writ or an order in the nature of Certiorari for quashing of the original order dated 10-8-1973 (Annexure 4) of confiscation and penalty, passed by the Deputy Collector of Central Excise (opposite party No. 1) and the appellate and revisional orders (Annexures 11 and 12 respectively) and for a writ or an order in the nature of Mandamus directing the opposite parties to return the gold seized.

2. The petitioner has urged that he is the karta of a large Mitakshara family and is carrying on business as a pawn-broker and is also an agriculturist. In course of the business, he and members of his family owned and possessed gold. On 28-10-1969 the staff of the Central Excise Department searched the business and residential premises of the family and seized, as per the allegation, primary gold, gold coins and gold ornaments. According to the petitioner, the seizure was illegal and unwarranted in law.

3. Mr. R. Mohanty learned counsel for the petitioner has asserted that adjudication proceeding under Chapter XIV of the Gold (Control) Act, 1968 (hereinafter referred to as the 'Act') was not initiated by giving a notice in writing within six months from the date of seizure of the gold. The extension of time on various occasions for showing cause was made ex parte without hearing the petitioner. He has further asserted that in the facts and circumstances of the case the gold seized on 28-10-1969 was not liable to be seized or confiscated.

4. The first two points, albeit technical, go to the root of jurisdiction of the authorities in the matter of adjudication under Chapter XIV and if the authorities lacked jurisdiction by initiation of proceeding within the time prescribed by law, merits of the matter are irrelevant because the authorities lacked jurisdiction to adjudicate. We have, therefore, directed ourselves to a consideration of the question of jurisdiction.

5. Chapter XIV of the Act provides for adjudication, appeal and revision; defines the powers of the adjudicating authorities and prescribed the procedure, fixes the time limit. S. 79 is an important provision, which we quote:

"79. Giving of an opportunity to the owner of gold, etc.—No order of adjudication of confiscation or penalty shall be made unless the owner of the gold, conveyance, or animal or other person concerned is given a notice in writing—

(i) informing him of the grounds on which it is proposed to confiscate such gold, conveyance or animal or to impose a penalty; and

(ii) giving him a reasonable opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the confiscation or imposition of penalty mentioned therein and, if he so desires, of being heard in the matter;

Provided that the notice and the representation referred to in this section may, at the request of the owner or other person connected, be oral;

Provided further that where no such notice is given within a period of six months from the date of the seizure of the gold, conveyance or animal or such further period as the Collector of Central Excise or of Customs may allow, such gold, conveyance or animal shall be returned after the expiry of that period to the person from whose possession it was seized.

Explanation.—Where any fresh adjudication is ordered under this Act, the period of six months specified in the second proviso shall be computed from the date on which such order for fresh adjudication is made"

The section begins with a peremptory mandate by saying that no order of the nature specified in the section must be made unless a notice in writing is given to the person concerned as stated in the section and giving him a reasonable op-

portunity of making a representation and of being heard if he so desires. The notice may be oral at the request of the person to whom the notice is required to be given. The second proviso, as it seems, is crucial and important. A clear injunction is decreed by the legislature that where no such notice as contemplated by the section is given within a period of six months from the date of seizure or such further period as the authority mentioned may allow, the article seized must be returned after the expiry of the period. It is, therefore, crystal clear that the legislature intends that the article seized must be returned to the person from whose possession it was seized unless a notice is given within the period of six months. The legislature has given reasonable time to the authority to initiate the proceeding and to give a notice and extend the period in certain circumstances and following certain procedure.

6. The position in law is no longer in doubt after the authoritative pronouncement of the Supreme Court in *Asst. Collector of Customs and Supdt. Preventive Service Customs, Calcutta v. Charan Das Malhotra*, AIR 1972 SC 689. Their Lordships of the Supreme Court were called upon to interpret the provisions contained in S. 110 (2) and the proviso to the sub-section and S. 124 of the Customs Act, 1962. Similar provisions as contained in Ss. 124 and 110 (2) proviso 2 have been made in S. 79 of the Act of 1968.

7. Mr. R. Mohanty, learned counsel for the petitioner, submits that the law laid down by the Supreme Court in the aforesaid case is in all fours having regard to the similar provisions contained in Section 79 of the Act of 1968. He further relies on a Division Bench decision of the Gujarat High Court in *Ambalal Morarji Soni v. Union of India* (AIR 1972 Guj 126).

8. There can no longer be any dispute with regard to the meaning of "giving" used in S. 79 after the decision of the Supreme Court in *Narasimhiah v. Singri Gowda* (AIR 1966 SC 330). *Das Gupta, J.* observed (at pp. 332-333):—

"Giving of anything as ordinarily understood in the English language is not complete unless it has reached the hands of the person to whom it has to be given. In the eye of law however "giving" is complete in many matters where it has been offered to a person

but not accepted by him. Tendering of a notice is in law therefore giving of a notice even though the person to whom it is tendered refuses to accept it. Thus as soon as the person with a legal duty to give the notice despatches the notice to the address of the person to whom it has to be given, the giving is not complete.

The main object to giving the notice under Sec. 27 (3) is to make it possible for the Councillors to so arrange their other business so as to be able to attend the meeting. For an ordinary general meeting the notice provided is of clear seven days. That is expected to give enough time for the purpose. But a lesser period — of three clear days — is considered sufficient for "special general meetings" generally. The obvious reason for providing a shorter period of such meetings is that these are considered more important meetings and Councillors are expected to make it convenient to attend these meetings even at the cost of some inconvenience to themselves. Where the special general meeting is to dispose of some matter of great urgency it is considered that a period of even less than three clear days' notice would be sufficient.

The Legislature did intend that ordinarily the notice as mentioned should be given; it could not have been intended that the fact that the notice is of less than the period mentioned in the section and thus the Councillors had less time than is ordinarily considered reasonable to arrange his other business to be free to attend the meeting should have the serious result of making the proceedings of the meeting invalid."

The object of S. 79 being to apprise the person concerned of the grounds on which it is proposed to confiscate and/or to impose penalty and to give him a reasonable opportunity of making a representation in writing within such reasonable time as may be specified in the notice and to give him further an opportunity of being heard in the matter, if he so desires, the giving of notice is vital and a condition precedent. The object of judicial function and administrative function are the same, namely, to do justice and decide the questions fairly and justly. The power exercised under the Chapter is quasi-judicial and at any rate one requiring a judicial ap-

proach (see Charan Das's case, (AIR 1972 SC 689) (supra)).

The provision, therefore, requires that the notice must have been received because giving is not complete unless and until the notice reaches the person concerned or is actually tendered to him. As the learned Judges of the Gujarat High Court observed, with which we respectfully concur, mere despatch of notice to the address is not the satisfaction of the provisions; but receipt by the person concerned or its tender to him.

8-A. The petitioner has alleged in paragraph 4 of the writ petition that though the articles were seized on 28-10-1969 and the six-month period as prescribed by Section 79 expired on 28-4-1970, no notice was received by the petitioner within the said period and the notice (Annexure 3) extending the said period for showing cause till 16-6-1970 was received by him after 29-4-1970. The petitioner urges that the notice, Annexure 3, is invalid and the extension of time beyond six months having been given ex parte without hearing him, the extension is also bad according to the decision of the Supreme Court in Charan Das's case (AIR 1972 SC 689).

The stand of the opposite parties in the counter-affidavit is that the notice could not be delivered to the petitioner in time and the averments made in paragraph 4 relating to non-service of notice within the time prescribed are substantially correct.

9. We do not feel inclined to decide the second question as in our opinion on the first question the petitioner should succeed, namely, that no notice was given as required by Section 79 within the period of six months. The Supreme Court observed (at p. 694):—

"The right to restoration of the seized goods is a civil right which accrues on the expiry of the initial six months and which is defeated on an extension being granted, even though such extension is possible within a year from the date of the seizure. Consequently such a vested civil right in the respondent cannot be defeated by an ex parte order of extension of time by the Collector. An opportunity to be heard should be available even in a case where extension is granted before expiry of the initial six months, after which period alone the re-

spondent can claim the right to return of the seized goods."

In the case before the Gujarat High Court, the goods were seized on May 7, 1969 and the relevant notices were received on Nov. 8, 1969. Though the notices were posted on Nov. 5, 1969 (i.e. posting was made within the period of six months) their Lordships held (at p. 130 of AIR Guj):—

"..... Merely despatching of the notice to the address of the person does not complete the giving of the notice. In the instant case, therefore, the fact that the respondents despatched the notices by post on November 5, 1968, would not complete the giving of the notice. The giving of the notice should have been completed on or before November 6, 1968 i.e., notices should have reached the petitioner on or before November 6, 1969 or should have been tendered to him before that date. That was not done in the instant case and, therefore, as from November 7, 1969, the civil right to get back the seized goods accrued to the petitioner."

It may be noted that the notices in the Gujarat case were under Section 79 of the Gold (Control) Act, 1968 and Section 110 (2) of the Customs Act.

10. In our opinion, no notice having reached the petitioner or having been tendered to him within the period of six months, he earned a civil right of return of the articles seized.

11. The petitioner had raised these questions specifically and pointedly before the appellate and revisional authorities. It is unfair of them to have side-tracked the issue and not recorded findings.

12. On the aforesaid analysis and findings, we allow the writ petition quash Annexures 9, 11 and 12 and direct the opposite parties to return the articles seized. Let a mandamus issue. Hearing fee is assessed at Rs. 200 (Two hundred only).

DAS, J.:— I agree.

Petition allowed.

AIR 1982 ORISSA 261

P. K. MOHANTY, J.

Md. Yakub Ali and another, Appellants v. Md. Shibli and another, Respondents.
Second Appeal No. 51 of 1977, D/- 30-4-1982.*

Orissa Estates Abolition Act (1 of 1952), Ss. 6, 7 — Suit for partition — Defence that there was already a previous partition as evidenced by separate note of possession in the Record of Rights and separate settlement under Ss. 6 and 7 of the Act — Held, that such note and settlement are not conclusive proof of partition.

It is well settled that the settlement in favour of one of the co-sharers enures to the benefit of the entire body of co-sharers. (Para 7)

The settlement made in favour of the plaintiff and defendant No. 1 enured to the benefit of the entire body of co-sharers. It does not establish a partition. (Para 7)

G. Rath, R. K. Rath and N. C. Panigrahi, for Appellants; R. K. Misra, M. Mohanty, A. K. Mahapatra and J. R. Dash, for Respondents.

JUDGMENT:— The second appeal, by defendants 1 and 3, is against a decree of affirmance and arises out of an action for partition.

2. The plaintiff's case may be briefly stated as follows:

The suit land measuring 2.41 acres originally belonged to Tadmul Alli. He died leaving behind him his two sons namely Sahabad and Abdul Rasid who got equal shares in the suit property. The plaintiff represents the branch of Abdul Rasid while the defendants represent the branch of Sahabad. Abdul Rasid, the father of the plaintiff, transferred his half share in the property in favour of his wife Hazira Bibi by a registered Haba-bil-awaz (vide Ext. 1). On 7-12-51, Hazira Bibi sold a portion of the property out of her 8 annas share in favour of the plaintiff (vide Ext. 3). She also made an oral gift in respect of the remaining property in favour of the plaintiff. Thus, the plaintiff became the full owner of the entire 8 annas share of Abdul Rasid.

*From decision passed by M. V. Gangaraju, Addl. Dist. J., Balasore, D/- 16-12-1976.

After the death of Sahabad his three sons inherited his half share in the property. The third son Mohammad relinquished his share in favour of defendant No. 1 Yakub. On 21-10-54 defendant No. 1 made a gift of certain property out of his share in favour of his daughter, defendant No. 3 (vide Ext. G). The plaintiff's contention is that there was no partition by metes and bounds but the parties were possessing separate portions of the property for the sake of convenience and accordingly separate note of possession was made in the C. S. Khatian. The plaintiff demanded amicable partition but to no effect. Hence the suit.

3. The suit was resisted by defendants 1 and 3. Their contention was that the suit properties having been already partitioned by metes and bounds between Hazira Bibi and the sons of Sahabad, a suit for re-partition did not lie. It was also contended that the parties had intermediary interest in the suit property and after abolition of the estate the plaintiff applied for settlement under Sections 6 and 7 of the O.E.A. Act and the suit plots Nos. 2432, 2433, 2435, 2441, 2442, 2445 and 2395 were settled in his favour. Similarly defendant No. 1 applied for settlement and suit plots Nos. 2434, 2436 to 2440 and 0.03 acre out of plot No. 2395 were settled in his favour. It was contended that as the lands have been separately settled in favour of the parties no suit for partition would lie.

4. Defendant No. 2 who is the widow of the second son of Sahabad filed a separate written statement supporting the plaintiff's case. She contended that defendant No. 1 had only 2 annas 6 pies interest in the suit property and her husband Jafar Hossain had 5 annas 6 pies interest. Jafar Hossain transferred his 5 annas interest in her favour by a registered Hiba-bil-awaz dated 5-6-39 and after her husband's death the rest 6 pies interest devolved on her. She sold 4 annas interest in the property in favour of defendant No. 1 by a registered sale deed dated 5-10-45 and retained 1 anna 6 pies interest for self. She prayed for carving out her 1 anna 6 pies interest.

5. The trial Court, on a consideration of the evidence on record, disbelieved the defence plea of pre-partition and accordingly passed a preliminary decree

for partition with certain directions as to how partition is to be effected. On appeal, the learned Addl. District Judge agreed with the trial Court and dismissed the appeal.

6. The question raised in this appeal is whether separate note of possession in the C. S. record of rights, the separate dealings with the property by the parties and separate settlement under Sections 6 and 7 of the O.E.A. Act would establish previous partition by metes and bounds.

7. The note of separate possession in the settlement record-of-rights offers by itself but a very slight indication of an actual partition and cannot be regarded as sufficient evidence upon which a finding of previous partition can be based. Unless separate note of possession in favour of the co-sharers is made according to their shares no previous partition can be presumed and it may be held that such possession was for the sake of convenience. The total extent of the property is 2.41 acres out of which 1.42 acres are shown to be in possession of the defendants' branch and the remaining 0.99 acre is shown to be in possession of the plaintiff's branch. Thus the separate possession is not in conformity with the shares of the respective parties. No explanation was offered by the defendants as to why there was unequal distribution of the property when the co-sharers were entitled to equal shares. There was neither any pleading nor any evidence as to when the alleged partition by metes and bounds took place. The defendants did not produce any evidence, either oral or documentary, to establish the plea of pre-partition. So far as the dealings of the parties are concerned all the transactions referred to above are within the respective branches. There was no transaction either between the parties inter se or with any outsider. There is no recital in any of the document referred to above that there was a previous partition. So far as the settlement under Sections 6 and 7 of the O.E.A. Act is concerned the legal position is well settled the settlement in favour of one of the co-sharers enures to the benefit of the entire body of co-sharers. On the date of vesting the plaintiff, his mother and defendant No. 1 were the co-sharers intermediaries in respect of the suit land. The settlement in favour of the plaintiff was made in respect of 0.99 acre which

he had purchased from his mother by the registered sale deed—Ext. 3. The mother of the plaintiff did not apply for settlement in respect of the remaining lands but defendant No. 1 applied for the entire 1.42 acres of land in respect of which rent schedule was issued in his favour. Although rent schedule was issued to defendant No. 1 in respect of the entire 1.42 acre of land he cannot alone take the benefit of that settlement. As mentioned earlier, the settlement made in favour of the plaintiff and defendant No. 1 enured to the benefit of the entire body of co-sharers. The courts below were, therefore, justified in disbelieving the plea of pre-partition.

8. There is no merit in this appeal and it is accordingly dismissed with costs.

Appeal dismissed.

AIR 1982 ORISSA 263

Dr. B. N. MISRA, J.

Executive Engineer, Rural Engineering Division, Dhenkanal, Appellant v. Biswanath Agarwalla, Respondent.

Misc. Appeal No. 17 of 1981, D/- 31-3-1982.*

Arbitration Act (10 of 1940), Ss. 29, 13 — Power to award interest — Interest can be awarded only on principal sum and not on total amount which includes interest, AIR 1981 Orissa 32, Foll.

(Para 4)

Cases Referred: Chronological Paras AIR 1981 Orissa 32 4

Indrajit Ray, Standing Counsel, for Appellant; B. Agarwalla, M. Agarwalla and S. C. Ghosh, for Respondent.

JUDGMENT:— This appeal under S. 39 (1) (vi) of the Arbitration Act, 1940 (hereinafter referred to as the Act) is directed against the judgment dated 10-10-1980 passed by the learned Subordinate Judge, Bhubaneswar in Title Suit No. 87 of 1980.

2. The respondent is a contractor. The appellant had entrusted the work of "Renovation to Kishore Sagar M.I.P." to the respondent under Agreement No. 73/F.2 of 1973-74. In course of execution of the work, disputes arose between the parties and as per Cl. 23 of the F.2

agreement, the concerned Chief Engineer appointed an arbitrator to decide the disputes between the parties. The Arbitrator called for the statement of claims and counter-claims from both parties and finally passed an award for Rs. 98,501.00. This amount includes interest of Rs. 34,121.00. The Arbitrator's further direction is that if the award was not paid up within three months from the date of its filing, interest at the rate of 12 per cent on the amount should be payable by the appellant till the date of the decree. After the award was received in the Court of the learned Subordinate Judge, Bhubaneswar, the appellant filed objection under Sections 30 and 33 of the Act. By his judgment dated 10-10-1980, the learned Subordinate Judge upheld the award and granted further interest at the rate of 12 per cent per annum from the date of the decree till payment of the awarded amount.

3. On going through the award I find that the Arbitrator has not given any reasons for his decision. It is the settled position of law that the Arbitrator is the sole judge of the facts and law involved in the case before him and his decision when not supported by reasons is not open for review by the Court.

4. The only point urged by the learned Standing Counsel is that the Arbitrator and the learned Subordinate Judge acted illegally in awarding interest on interest and in support of this contention reliance is placed on a decision of this Court reported in AIR 1981 Orissa 32, (Andhra Civil Construction Co., Hyderabad v. State of Orissa). On the question of interest, it was held (at p. 39) —

"The direction of the arbitrator appearing in the second paragraph at p. 69 of the paper book to pay further interest on the total amount of award granted in favour of the claimant, for the period from 2-3-1978 till payment of the said amount to the claimant or till the date of the decree whichever is earlier evidently entails payment of interest on interest granted under item No. 22 of the contractor's claim. This is challenged by Mr. Patnaik as an illegality on the face of the record. I agree that the said award, so far as it relates to payment of interest on the interest amount calculated under item No. 22, cannot be sustained. Hence the said direction to that extent is set aside. But that direc-

*From order of S. K. Satpathy, Subordinate Judge, Bhubaneswar. D/- 10-10-1980.

tion shall hold good in respect of the total principal sum awarded in favour of the claimant under item Nos. 1 to 3, 6 to 9, 11, 15, 16, 18 (as modified) to 20 and 21 (a). So the above direction of the arbitrator for the payment of interest for the period beginning from 2-3-1978 stands modified as stated above and the award be modified accordingly.

In the facts of this case the claimant should get interest on the principal amount as permissible under S. 29 of the Arbitration Act. It is accordingly hereby ordered that apart from making the abovementioned payments to the claimant, the respondent shall also pay interest on the said principal sum at the rate of 6 per cent per annum from the date of the decree till the payment of the entire decretal dues to the claimant."

In the present case, ten items of claims have been noted in the award. The last item deals with interest and Rs. 34,121.00 have been awarded under it. Therefore, the principal sum in respect of items 1 to 9 works out at Rs. 64,380.00. The Arbitrator's direction on interest is as follows:

"The amount due to the claimant as per awards is to be paid within three months from the date of filing of the award failing which an interest of 12% (Twelve per cent) on award amount will be payable by the Respondent till the date of decree."

It appears from the above direction that the expression "award amount" does not refer to the principal sum of Rs. 64,380.00 but to the total amount of Rs. 98,501.00 inclusive of interest. As pointed out in the aforesaid decision of this High Court, award of interest on interest cannot be sustained. The interest can be awarded only in respect of the principal sum of Rs. 64,380.00. The order of the learned Subordinate Judge suffers from the same defect. According to the order, the respondent is entitled to interest at the rate of 12% per annum from the date of the decree till payment on the "awarded amount". Section 29 of the Act authorises the Court to award interest from the date of the decree, but the said interest is to be paid only on the principal sum and not on the total amount which includes interest.

5. For the reasons stated above, the award of the Arbitrator in so far as it directs payment of interest at the rate of 12% on the "award amount", is modified to interest at the rate

of 12% per annum on the principal sum of Rs. 64,380.00 from the date of filing of the award till the date of the decree. The order of the learned Subordinate Judge is also modified to extent that the respondent shall be entitled to interest at the rate of 12% per annum from the date of the decree till payment on the principal sum of Rs. 64,380.00. Subject to the modifications indicated above, the award and the judgment of the learned Subordinate Judge are upheld. The appeal is accordingly allowed in part. There should be no order as to costs. Appeal partly allowed.

AIR 1982 ORISSA 264

P. K. MOHANTI, J.

Ram Raja Ram, Appellant v. Dhruba Charan Jena, Respondent.

Second Appeal No. 59 of 1978, D/- 9-4-1982.*

Evidence Act (1 of 1872), S. 102 — Negotiable Instruments Act (1881), S. 118 — Burden of proof — Suit on pro-note — Defendant admitting execution of pro-note — Allegations regarding execution under threat and coercion not established by defendant — Held mere fact that plaintiff did not prove passing of consideration did not relieve defendant from burden of proving contrary of presumption as to consideration arising u/s. 118. (Para 6)

B. B. Mohanty, for Appellant; S. C. Sahu, for Respondent.

JUDGMENT:— This second appeal is by the plaintiff against a decree of reversal arising out of a suit for recovery of a sum of Rs. 3,119.35 on the basis of a promissory note dated 4-10-1966.

2. The plaintiff's case is that he is the sole proprietor of the firm "Bhagwan Ram Ramrajaram" and he carries on business in steel furniture, asbestos etc. The defendant was serving as a salesman under him and was in charge of cash and stock. The plaintiff while checking the accounts of the firm detected shortage of cash to the tune of Rs. 4,500/- and the defendant admitted to have misappropriated the same and voluntarily executed the suit promissory note in his

*From decision of M. V. Gangaraju, Additional Dist. J., Cuttack, D/- 26-9-1977.

own hand on 4-10-1966 agreeing to repay the same on demand with interest at the rate of 12 p. c. p. a. During the period from 5-6-1968 to 5-4-1969 the defendant paid a sum of Rs. 550/- by instalments and endorsed the total amount of payment on the back of the promissory note on 5-4-1969. He also adjusted a sum of Rs. ₹30.65 out of his pay from 5-5-1969 to 29-10-1970, leaving a balance of Rs. 3,119.35.

3. The defendant admitted execution of the promissory note but contended that it was forcibly obtained from him under threat and coercion. He denied having acknowledged his liability under the promissory note. His contention was that he was only in charge of accounts and under the instructions of the plaintiff he was maintaining account books in duplicate — one for the purpose of avoiding payment of sales-tax and income-tax and the other indicating true account of sale and purchase. Once the sales-tax authorities seized the duplicate accounts and the plaintiff suspected the defendant to have given information to the Sales-tax Department. On 4-10-1966, the defendant was called to the plaintiff's house and he denied having given any information to the Sales-tax authorities, but he was forced to execute the suit promissory note under threat and coercion. It was also contended that even after execution of the promissory note the defendant was forced to serve under the plaintiff and the endorsement of payment on the back of the promissory note was forcibly obtained from him under threat and coercion although no payment in fact was made.

4. The trial court, on a consideration of the evidence, led by both the parties, came to hold that the defendant had failed to establish that the suit promissory note was forcibly obtained from him under threat and coercion. It also disbelieved the defence plea that the endorsement of payments on the back of the promissory note was obtained under threat and coercion. Accordingly, a decree for Rs. 3,119.35 paise was passed in favour of the plaintiff.

On appeal, the learned Additional District Judge reversed the decree of the trial court on the findings that (1) the plaintiff had failed to prove that the defendant had actually misappropriated a sum of Rs. ₹4,500/- and (2) the promissory note was executed by the defendant due to some undue influence

though it may not be due to threat at the point of gun, as alleged.

5. It is urged in this appeal that the lower appellate court erred in law in not drawing the statutory presumption under S. 118 of the Negotiable Instruments Act. As indicated earlier, the defendant admitted execution of the promissory note but contended that it was obtained from him under threat and coercion. Both the courts below concurrently found that the defendant failed to establish the plea that the suit promissory note was obtained from him under threat and coercion. The lower appellate court stressed the fact that the plaintiff did not examine the Gumasta who made entries in the account books — Exts. 3 to 5 — in order to show that the defendant had actually misappropriated a sum of Rs. ₹4,500/-. Accordingly, it held that the plaintiff failed to prove his case against the defendant.

6. Section 118 of the Negotiable Instruments Act is imperative and the Court is bound to draw the initial presumption that the negotiable instrument was made for consideration when its execution is proved. It throws the burden of proof of want of consideration on the defendant. Similarly S. 102 of the Evidence Act throws the burden of proving want of consideration on the defendant, for if no evidence was produced by either side and the execution of the document being admitted, the plaintiff's claim would be decreed. When the court below decided that the defendant had failed to prove that the promissory note was obtained from him under threat and coercion, it was unnecessary to consider whether the plaintiff had proved passing of consideration or not. The execution of the hand-note having been admitted, it was not necessary for the plaintiff to prove passing of consideration. The presumption under S. 118 of the Negotiable Instruments Act, continued in all its rigour until the contrary was proved. The mere fact that the plaintiff did not adduce sufficient evidence to prove passing of consideration did not in any way relieve the defendant from the burden of establishing the contrary of the presumption arising under S. 118 of the Negotiable Instruments Act. The plaintiff produced his account books maintained in the regular course of business and also proved the relevant entry dated 4-10-1966 writ-

ten by the defendant himself admitting misappropriation of Rs. 4,500/- vide Ext. 2. The defendant examined as DW 1 admitted to have written Ext. 2 in his own hand. He also admitted that the accounting made at the particular page of the account book containing Ext. 2 is correct. The burden of proving want of consideration was on the defendant and he failed to discharge that onus. The plaintiff was, therefore, entitled to a decree.

7. In the result, the appeal is allowed with costs, the decree of the lower appellate court being set aside and that of the trial court being restored.

Appeal allowed.

AIR 1982 ORISSA 266

R. N. MISRA, C. J. AND
R. C. PATNAIK, J.

Satyajit Roy Choudhury and others,
Petitioners v. Utkal University and
others, Opposite Parties.

Original Jurisdiction Case No. 1471 of
1981, D/- 22-12-1981.

Constitution of India, Art. 226 — Writ
against University — Petition challeng-
ing cancellation of examination results
on ground of mass malpractice — Re-
sorting of malpractice by almost all can-
didates reported by Centre Superinten-
dent and Supervisors — Incriminating
materials supplied to candidates by out-
siders — Copy materials found in exam-
ination hall on large scale and candi-
dates found using them — Held, cancel-
lation of results was not improper. AIR
1970 SC 1269, Foll. (Para 5)

Cases Referred : Chronological Paras
AIR 1970 SC 1269 4

Dr. S. C. Dash and B. K. Patnaik, for
Petitioners; M. S. Panda, S. C. Moha-
patra and P. K. Ray, for Opposite Par-
ties.

PATNAIK, J.:— The petitioners, who
took the annual Intermediate Examina-
tion in Arts and Commerce, 1981 from
the Adikabi Saraladas College Centre,
Tirtol, have filed this writ application
impugning the notification dated 22-6-
1981 (Annexure-2) issued by the Utkal
University cancelling the results of the
examinees who took the Intermediate
Examination in Arts and Commerce from
the said Centre.

2. The petitioners contend that after
taking the examination they were wait-
ing for the results to be published. But
to their dismay, they learnt that the
results had been cancelled on ground
that there was mass malpractice. They
contend that there was intensive invi-
gilation during the examination and
proper supervision was made by the
University by deputing teachers serv-
ing in the University and other colleges.
There was no report before the Univer-
sity that the petitioners had indulged
in any unfair means. The University
was also not right in cancelling the re-
sults of all the examinees taking the
examination from the centre, on the
ground of mass malpractice. They fur-
ther contend that the principle of natu-
ral justice has been violated as there
was no enquiry into the allegations and
that there was no material before the
University for taking the drastic action.

3. Opposite party No. 1 in the coun-
ter-affidavit has averred that there were
reports before the University from the
Centre Superintendent and Supervisors
to the effect that malpractice was re-
sorted to in a vast scale. As the candi-
dates as a whole did not follow the
norms prescribed for the examination,
the results of the examination were can-
celled.

4. The law on this aspect is no lon-
ger in doubt. In Bihar School Examina-
tion Board v. Subhas Chandra (AIR 1970
SC 1269), Hidayatullah, C. J. observed
(at pp. 1272-73) :

"Where the Bihar School Examination
Board on being satisfied that a vast
majority of the examinees at a particu-
lar centre have adopted unfair means,
it is not necessary for the Board, before
cancelling the examination as a whole at
that centre, to give an opportunity to
all the candidates to represent their
cases. The Board had not charged any
one with unfair means so that he could
claim to defend himself. The examina-
tion was vitiated by adoption of unfair
means on a mass scale. In these circum-
stances it would be wrong to insist that
the Board must hold a detailed inquiry
into the matter and examine each
individual case to satisfy itself which
of the candidates had not adopted un-
fair means. The examination as a whole
had to go."

To make such decisions depend upon
a full-fledged judicial inquiry would

hold up the functioning of such autonomous bodies as Universities and School Boards. The Universities and School Boards are responsible for their standards and the conduct of examinations. The essence of the examinations is that the worth of every person is appraised without any assistance from an outside source. If at a centre the whole body of students receive assistance and manage to secure success in the neighbourhood of 100% when others at other centres are successful only at an average of 50% it is obvious that the university or the Board must do something in the matter. It cannot hold a detailed quasi-judicial inquiry with a right to its alumni to plead and lead evidence etc. before the results are withheld or the examinations cancelled. If there is sufficient material on which it can be demonstrated that the university was right in its conclusion that the examinations ought to be cancelled then academic standards require that the university's appreciation of the problem must be respected. It would not do for the Court to say that you should have examined all the candidates or even their representatives with a view to ascertaining whether they had received assistance or not. To do this would encourage indiscipline if not also perjury."

5. At our request, the learned counsel for the university placed before us the various reports submitted from time to time and the percentage of result. The reports reveal that unfair means was practised on an extensive scale and the percentage of result lends assurance. The reports indicate that there was total laxity in the examination halls. Outsiders had free access to the halls and the examination that was being conducted was a travesty.

It is gathered from the reports that (a) "there was general disturbance", (b) "a large number of outsiders gathered near the windows in the last hour of the sitting and they threw papers and torn pages of books into the halls and dictated answered in loud voice. They were prevented from coming near the halls in the first two hours, but subsequently the situation became uncontrollable," (c) "outsiders were supplying incriminating materials to the candidates and dictating answers", (d) "there was chaotic mass malpractice", (e) "the examination halls were full of copy

materials and the candidates were using them. The halls were like "Mella", (f) "Incriminating materials were found every where in the rooms and also with all the candidates. Outsiders were entering into the rooms without hesitation. Almost all the candidates were found resorting to malpractice. They did not care for the invigilators", (g) "Lots of incriminating materials were found from under the long benches and desks of a large number of candidates. Outsiders (about a hundred in number) supplying hand written answers and torn pages of books to the candidates through windows. There was mass malpractice which could not be stopped even by persuasion. The candidates were talking with themselves in presence of the invigilators. General condition inside the examination halls-like a Mella and fish market."

In the aforesaid premises, hardly can any course be contemplated other than the one adopted by the University of cancelling the results of the examination. Though, no doubt, it is true that selection of the centres and conducting of the examination in the centres are the responsibilities of the University, recourse to large scale malpractice leaves no alternative to the University except to cancel the results of the examination.

6. The country can ill-afford to have a posterity of ignoramuses. The malady has spread so wide and so deep that it deserves consideration from educationists, guardians and the Government. Where the future of posterity is involved, procrastination is unwise and to lie by is insensible. Let not the elders contribute to the deterioration of standard and destruction of norms by their callousness.

7. The writ application has no merit and is dismissed. No costs.

R. N. MISRA, C. J.:— I agree. The concern my learned brother has expressed should be shared by all today so that we may look for a better tomorrow.

Application dismissed.

AIR 1982 ORISSA 268

Dr. B. N. MISRA, J.

Bauri and others, Appellants v. Natabar Swain and others, Respondents.

Second Appeal No. 26 of 1977. D/- 22-12-1981.*

Civil P. C. (5 of 1908), O. 2, R. 2 — Suit for permanent injunction restraining defendants from interfering with possession of plaintiff — Defendants dispossessing plaintiff after filing of the suit in violation of injunction order — Held, court can take notice of changed circumstances in order to shorten litigation and grant relief of recovery of possession even without pleadings, particularly when defendants were not prejudiced on account of lack of notice. AIR 1974 SC 1178, Foll. AIR 1977 J & K 21, Disting. (Para 8)

Cases Referred : Chronological Paras

AIR 1977 J & K 21	8
AIR 1974 SC 1178	8
AIR 1953 SC 235	8
AIR 1915 Cal 103	8

P. K. Misra and L. Mohapatra, for Appellants; P. C. Misra, for Respondents.

JUDGMENT:— This appeal arises out of Title Suit No. 219 of 1970 filed by the plaintiff in the Court of the Second Munsif, Cuttack. The prayer of the plaintiff was that defendants 1, 2 and 3 should be permanently enjoined from interfering with the possession of the plaintiff and pro forma defendants 4 and 5 over the disputed plot No. 1408 and the five mango trees standing thereon.

2. The plaintiff's case is that the disputed plot No. 1408 appertaining to Khata No. 167 of village Kuliagaon stands recorded in the names of Shyam Swain, Dhaneswar Swain and the plaintiff. Shyam Swain has gifted his 1/3rd share in the suit plot in favour of pro forma defendant No. 4 by a registered deed of gift in the year 1964. Dhaneswar Swain died leaving behind him his widow, pro forma defendant No. 5 as his only heir. It is claimed that the plaintiff and pro forma defendants 4 and 5 are the full owners in possession of the disputed plot No. 1408. There were seven old mango trees standing on the disputed plot and this has been record-

ed in the C. S. Khatian. Two mango trees were subsequently cut and by the time of the suit five old mango trees stood on the western side of plot No. 1408 on its southern portion. It is alleged that defendants 1, 2 and 3 who are owners of the contiguous plot No. 1407 to the immediate west of the disputed plot No. 1408 were laying a false claim to the five mango trees on plot No. 1408 in connivance with some other people. According to the plaintiff, the cause of action arose on 29-10-1970 when defendants 1, 2 and 3 threatened to cut the mango trees on plot No. 1408 and interfered with his possession.

3. In their written statements defendants Nos. 1 to 3 admit that plot No. 1408 belongs to the plaintiff and defendants 4 and 5. According to these defendants, seven mango trees stood on plot No. 1408 at the time of settlement operations in 1930, but all those trees were cut long long ago either by the plaintiff and defendants 4 and 5 or their predecessors. Thereafter there were no mango trees left on plot No. 1408. These defendants admit that plot No. 1407 belonging to them is contiguous to plot No. 1408 and stands to its west, but they deny that they are laying any false claim, to the five mango trees standing on plot No. 1408. They have also denied that they have removed any mango trees from plot No. 1407 as alleged by the plaintiff. These defendants have said that they have never threatened the plaintiff and defendants 4 and 5 or interfered with their possession over plot No. 1408. These defendants have further stated that at the time of the suit five mango trees stood on plot No. 1407 and these trees belong exclusively to defendants 1, 2 and 3 with a gap of about 5 to 10 links between plots Nos. 1407 and 1408. These defendants have put in an alternative plea of adverse possession in case it was found that any of the mango trees were situated on plot No. 1408.

4. During trial a Civil Court Commissioner was appointed and his report was accepted. However, in appeal the Commissioner's report was set aside and the appellate Court directed a fresh Civil Court Commissioner to be appointed. The second Commissioner came to the same finding as the previous one that the disputed land appertains to plot No. 1408 belonging to the plaintiff and defendants 4 and 5. On a consideration of the oral and documentary evidence and the re-

*From decision of K. M. Subudhi, Addl. Chief Judl. Magistrate-cum-Addl. Sub. J., Cuttack, D/- 30-11-1976.

port of the Commissioner, the trial Court came to hold that the disputed mango trees stood on plot No. 1408 and that defendants 1, 2 and 3 had no manner of right, title and interest over the same. The plaintiff's suit was decreed and defendants 1, 2 and 3 were directed to restore possession of the encroached portion of plot No. 1408 with the five mango trees standing thereon to the plaintiff within a period of one month from the date of the judgment. The trial Court granted the relief of recovery of possession to the plaintiff in the following circumstances. The plaintiff filed his suit on 2-11-1970 along with a petition for temporary injunction. Defendants 1, 2 and 3 appeared on 6-11-1970 and filed their objection. The injunction matter was heard on 7-11-1970 and interim injunction was granted against defendants 1, 2 and 3. No appeal was preferred against this order. On 7-12-1970 an application under O. 39, R. 2 (3), C.P.C. was filed by the plaintiff alleging violation of the order of injunction by defendants 1, 2 and 3 who had put a fence around the mango trees, thereby depriving the plaintiff of his possession over the mango trees. The defendants filed their objection on 16-2-1971 to the effect that they have not put any new fence at the spot, but that the fence had existed since prior to the filing of the suit. During hearing of that matter three witnesses were examined on behalf of the plaintiff and one on behalf of the defendants. The trial Court by his order dated 20-3-1972 found that there was no violation of the injunction order by the defendants. The plaintiff filed Misc. Appeal No. 30 of 1972 before the District Judge, Cuttack against the aforesaid order dated 20-3-1972. After hearing the parties, the learned Additional District Judge by his order dated 15-9-1972 allowed the appeal, found that the defendants were guilty of violation and directed attachment of property worth Rs. 500 of the defendants for a period of six months. In these circumstances, though there was no prayer for recovery of possession, the learned trial Court directed restoration of possession, to the plaintiff who had been dispossessed by the defendants after the filing of the suit and in violation of the injunction order of the Court. Defendants 1, 2 and 3 filed Title Appeal No. 143 of 1978 which was dismissed by the learned Appellate Court by his judgment dated 30-11-1976.

Thereafter these defendants have filed the present appeal. In the meanwhile appellant No. 1 having died, appellant No. 1/a and appellant No. 1/b have been substituted in his place. The application under O. 41, R. 27, C.P.C. filed by respondent No. 1 was not pressed at the time of hearing of this appeal and hence the same is rejected.

5. This appeal has been admitted for hearing on the following three points of law:

"(1) Whether a suit purely for permanent injunction will lie in view of the facts and circumstances of the case without a prayer for declaration of title.

(2) Whether in view of the evidence on record, plaintiff has also to pray for recovery of possession.

(3) Whether the Commissioner's report is acceptable as a satisfactory evidence in view of the statement of the Commissioner and whether it is supported by other evidence on record?"

6. The first point of law rightly has not been seriously pressed in this appeal. As regards this point, the learned trial Court is correct in his observation that in a suit for permanent injunction it is not essential for the plaintiff to prove his title. Moreover, on a reference to the pleadings of the parties it is seen that the appellants (defendants 1, 2 and 3) have clearly admitted that the plaintiff and defendants 4 and 5 are the owners of plot No. 1408. In view of this clear admission it was not necessary for the plaintiff to prove his title over plot No. 1408.

7. As regards question No. 3, on going through the judgments of the Courts below I find that both the Courts below have discussed the entire evidence adduced by the parties along with the Commissioner's report. The Commissioner's report has been discussed in detail by the learned trial Court and I see no reason to take a different view.

8. As regards question No. 2, learned counsel for the appellants has submitted that in the absence of a prayer for recovery of possession, the Courts below acted illegally in granting the said relief to the plaintiff. In support of this contention reliance is placed on AIR 1977 J & K 21 (Mohd. Sultan Wani v. Qasim Ali). In the aforesaid decision the following observation of the Supreme Court in AIR 1953 SC 235 (Trojan & Co. v. Nagappa Chettiar) has been extracted:

"The decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. Without an amendment of the plaint the Court was not entitled to grant the relief not asked for."

Relying on the aforesaid observation of the Supreme Court the Jammu and Kashmir High Court held (at p. 23):—

"..... In the same way where a plaintiff in a suit for permanent injunction is dispossessed by the defendant during the pendency of the suit, the Court can no doubt take notice of this subsequent event but it has no power under O. 7, R. 7 to grant relief of possession to the plaintiff without notice to the defendant and without asking the plaintiff to amend the plaint....."

The main point emphasised in the aforesaid decision is that though the Court can take notice of subsequent events it should not grant the relief of possession to the plaintiff without notice to the defendant. True, it will be most unfair to grant a relief to the plaintiff without any notice of the matter to the defendant. The facts of the present case are however different. In this case, the appellants cannot say that they had no notice of the matter. In fact they were found to have dispossessed the plaintiff after the filing of the suit in violation of the order of injunction passed against them by the Court. Therefore in this case the question of lack of notice to the defendants does not arise. They knew fully that they had unlawfully dispossessed the plaintiff after the filing of the suit and they were punished for that. Learned counsel for the respondents submitted that Courts can take notice of subsequent events and grant relief even without pleadings in exceptional circumstances and according to him, the facts of this case justify the relief of recovery of possession to be granted to the plaintiff without a prayer for the same in the plaint. In support of his contention learned counsel relies on AIR 1974 SC 1178 (Shikharchand Jain v. Digambar Jain Praband Karini Sabha) wherein it was held—

"..... Ordinarily, a suit is tried in all its stages on the cause of action as it existed on the date of its institution. But it is open to a Court including a court of appeal to take notice of events which have happened after the institution of the suit and afford relief to the parties in

the changed circumstances where it is shown that the relief claimed originally has (1) by reason of subsequent change of circumstances become inappropriate; or (2) where it is necessary to take notice of the changed circumstances in order to shorten the litigation, or (3) to do complete justice between the parties. (See *Rai Charan v. Biswanath*, AIR 1915 Cal 103)."

On the basis of the aforesaid decision I have no hesitation to agree with the learned Courts below that it was necessary for the Court to take notice of the changed circumstances in order to shorten the litigation and the course they adopted best subserves the ends of justice, particularly when the defendants are not prejudiced on account of lack of notice.

9. For the reasons stated above, this second appeal is dismissed with costs throughout. The judgments and decrees of the Courts below are confirmed.

Appeal dismissed.

AIR 1982 ORISSA 270

R. N. MISRA, C. J.

Purusottam Das Agarwala, Petitioner
Smt. Puspā Devi, Opposite Party.

Civil Revn. No. 60 of 1981, D/- 26-2-1982.*

Hindu Marriage Act (25 of 1955), S. 24
— Application by wife for interim maintenance for her and her child in pending divorce proceedings against her— Award of maintenance for child is not within purview of S. 24. (Para 2)

C. V. Murty, for Petitioner; R. K. Prabaraj, for Opposite Party.

ORDER:— In a pending action under S. 13 of the Hindu Marriage Act by the husband against wife, an application under S. 24 of the Act was made asking for interim maintenance as also litigation expenses. By the impugned order dated 13-1-1981, the learned Subordinate Judge has directed that maintenance for the wife should be at the rate of Rs. 150 per month, maintenance for the child living with wife should be at the rate of Rs. 100 per month and consolidated sum of Rs. 500 could be paid as litigation expenses. Mr. Murty appearing for the petitioner contends that in an application

*From order of B. B. Das, Sub. Judge, First Court, Cuttack, D/- 13-1-1981.

under S. 24 of the Act, maintenance for a child is not contemplated and he also relies on the feature that the child here is said to be not born out of the wedlock. He also contends that the expense of Rs. 500 as awarded is excessive.

2. So far as the first contention is concerned, I would agree. The award of maintenance for a child is not within the purview of S. 24 of the Act and accordingly I would delete the direction for payment of maintenance to the child. I do not propose to interfere with the quantum of litigation expenses as ordered to be paid.

3. The suit has been pending for quite some time. The learned Subordinate Judge shall have a direction to dispose of the suit before closure of the Court for the long vacation.

There shall be no direction for costs.
Order accordingly.

AIR 1982 ORISSA 271

P. K. MOHANTY, J.

Balaram Barik and others, Appellants
v. Banambara Maharana, Respondent.

Second Appeal No. 353 of 1977, D/-
2-2-1982.*

Specific Relief Act (47 of 1963), S. 22 — Refund of consideration — Grant of such relief — Court directing that possession of suit land to be retained till money refunded — Validity.

Where a suit for specific performance of agreement of sale was decreed directing vendor to refund the amount received by him from plaintiff towards consideration and that plaintiff should retain possession of even the portion of land purchased by subsequent transferees till money was refunded, it was held that such direction is not justified in view of concurrent finding of courts below that subsequent transferees are bona fide purchasers for value without notice of prior agreement. (Para 7)

B. H. Mohanty, for Appellants; M. Patra, B. K. Dagara and B. Misra, for Respondent.

JUDGMENT:— The second appeal is by the defendants against a reversing decree passed in a suit for specific performance of contract for sale of land.

*From decision of B. K. Patnaik, 2nd Addl. Sub. Judge, Cuttack, D/- 21-9-1977.

2. The plaintiff's case was that defendant No. 1 Balaram Barik, who was the owner in possession of the suit land measuring 0.36 acre, contracted to sell the same to him for a sum of Rs. 2,000 and on receipt of a sum of Rs. 1,500 as part consideration delivered possession in his favour. The contract was entered into on 21-1-75 and the deed of contract (Ext. 1) was executed on that date. He remained in possession of the suit land from the date of contract and offered the balance consideration of Rs. 500 to defendant No. 1 but he avoided to execute the sale deed. On 17-3-75, defendant No. 1 sold 0.08 acre out of the suit land to defendant No. 5 under a registered sale deed (Ext. A) and on 9-4-75 he also sold 0.08 acre out of the suit land under a registered sale deed (Ext. B) to defendants 2, 3 and 4. The plaintiff's contention was that the defendants 2 to 5 having prior knowledge of his contract obtained the sale deeds (Exts. A and B) without payment of consideration.

3. Defendant No. 1 denied the contract and contended that he took a loan of Rs. 300 only from the plaintiff and gave his L.T.I. on a blank paper which has been converted into a deed of contract for the purpose of this case. He also denied having received Rs. 1,500 from the plaintiff. He admitted to have sold a portion of the suit land to defendants 2 and 5 under the two sale deeds (Exts. A and B).

4. Defendants 2 to 5 took the stand that they are bona fide purchasers for value without notice.

5. The learned Munsif dismissed the suit holding that there was no contract between the plaintiff and the defendant No. 1 and that the deed of contract (Ext. 1) is not genuine. He also held that there was no delivery of possession of the suit land in favour of the plaintiff. He accepted the contention of defendants 2 to 5 that they are bona fide purchasers for value without notice of any previous contract.

On appeal, the learned Additional Subordinate Judge believed the plaintiff's case and held that the deed of agreement is genuine. He also held that defendant No. 1 received a sum of Rupees 1,500 as part consideration and that the plaintiff was in possession of the suit land from the date of the contract. He agreed with the finding of the trial Court that defendants 2 to 5 are bona fide purchasers for value without notice. He

passed a decree directing the defendant No. 1 to refund the sum of Rs. 1,500 to the plaintiff. He further directed that the plaintiff would not vacate possession of the suit land unless the sum of Rupees 1,500 was refunded to him by defendant No. 1.

6. Although all the five defendants have jointly filed this appeal, the learned counsel appearing on behalf of the appellants did not press the appeal so far as defendant No. 1 is concerned. He did not challenge the correctness of the decree directing defendant No. 1 to refund the sum of Rs. 1,500. He challenged the decree allowing the plaintiff to retain possession of the suit land until return of Rs. 1,500 by defendant No. 1.

7. As already mentioned, both the courts below concurrently found that defendants 2 to 5 are bona fide purchasers for value without notice. These defendants have nothing to do in connection with the refund of consideration by defendant No. 1. There is no reason why they should be kept out of possession until refund of consideration by defendant No. 1. The appellate court was, therefore, not justified in allowing the plaintiff to retain possession of the lands purchased by defendants 2 to 5 under the sale deeds (Exts. A and B).

8. In the result, the decree allowing the plaintiff to retain possession of the portion of land purchased by defendants 2 to 5 is set aside. Subject to this modification, the appeal stands dismissed but in the circumstances without any order as to costs.

Order accordingly.

AIR 1982 ORISSA 272

R. C. PATNAIK, J.

Bairagi Ch. Das, Petitioner v. Kartik Chandra Das and others, Opposite Parties.

Civil Revn. No. 222 of 1979, D/- 29-7-1982.*

Civil P. C. (5 of 1908), S. 115 and O. 14 R. 2 (after amendment of 1976) — Trial of issue of land as preliminary issue — Discretionary with Court — Refusal to exercise discretion — Revision against — Not competent.

*From order passed by M. R. Mohanty, Munsif, Bhadrak, D/- 9-4-1979.

HZ/IZ/D618/82/SNV

The amended O. 14, R. 2 makes it abundantly clear that the court in its discretion may try an issue of law as a preliminary issue only if that issue relates to the jurisdiction of the court or a bar to the suit created by any law for the time being in force. An issue of fact or a mixed issue of fact and law cannot be decided as a preliminary issue. Where an issue of jurisdiction is a question of fact or is a mixed question of law and fact, it cannot be decided as a preliminary issue; but it should be decided on merits along with the other issues. The object being avoidance of piecemeal trial and protracted litigation, in case of doubt all the issues should be tried at one and the same time. Moreover, the trial of the suit on a preliminary issue being discretionary under the amended R. 2 of O. 14, refusal of the Court to decide the issue as a preliminary issue does not involve any question touching jurisdiction of the court and as such revision application against refusal is not competent. (Paras 8, 10)

Cases Referred: Chronological Paras

AIR 1930 Raj 192	8
AIR 1979 Madh Pra 153 (FB)	8
AIR 1979 Pat 34	8
AIR 1976 Andh Pra 70	5
AIR 1973 All 499	5
AIR 1969 Orissa 295	5
AIR 1964 SC 497	5, 9

Prasanta Mohanty and S. Mohanty, for Petitioner; R. N. Acharya, R. K. Mohapatra, A. N. Misra and S. C. Basa, for Opposite Parties.

ORDER:— This revision is directed against an order passed by the Munsif, Bhadrak, rejecting the prayer of the petitioner to decide the question of res judicata as a preliminary issue under O. 14, R. 2 of the Civil P. C.

2. Brief facts leading to the application are:

Opposite Party No. 1 filed a suit for partition on the basis of his purchase under sale deed dated 16-1-70 from defendant No. 2. Defendant No. 4 mainly contested the suit claiming to have purchased the entire two decimals under sale deed dated 15-4-68. According to the said defendant, Gura (defendant No. 2) was not the daughter of Hadi Das and Jema as alleged by the plaintiff and sister of Makari, his vendor. His specific case was that Gura was the daughter of one Rama Das and had no connection with the family of Hadi Das. So, the purchase of the plaintiff was from an

imposter. It was further alleged that in a previous suit filed by one Minki which was being contested by Gura, an issue was raised as to whether Gura was the daughter of Hadi Das or Ram Das and it was decided by this Court that Gura was not the daughter of Hadi Das. He averred that the said finding in the earlier suit operated as *res judicata* and in view of the said finding, by the purchase the plaintiff did not acquire any title.

3. Having regard to the pleadings, an issue was struck as follows:

"Is the suit barred by the law of *res judicata*?"

When the case was taken up for hearing, defendant No. 4 filed an application under O. 14, R. 2, C.P.C. for deciding the question of *res judicata* as a preliminary issue before trial of other issues. The plaintiff and defendant No. 2 filed objections stating that neither he nor defendant No. 2 being parties to Original Suit No. 46 of 1970 culminating in Second Appeal No. 149 of 1976, they were not bound by any finding and moreover, they pleaded that title in the property was claimed by Gura not as the daughter of Hadi, but as daughter of Jema, and niece of Malli, who were the recorded owners. According to them, it did not matter if it was found that Gura was not the daughter of Hadi Das. They, however, contended that the issue did neither relate to jurisdiction of the court nor to a bar to the suit created by any law for the time being in force. They further urged that the decision of the issue would not finally dispose of the suit and it would be necessary to decide the other issues.

The learned Munsif rejected the prayer of defendant No. 4. Hence this revision.

4. The provision contained in O. 14, R. 2 of the Civil P. C. was amended by Central Act 104 of 1973. Under the Old Code, O. 14, R. 2 read as follows:—

"Where issues both of law and of fact arise in the same suit, and the Court is of the opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined".

5. Interpreting the provision in the Old Code, the Supreme Court in *S. S.*, 1982 Orissa/18 XII G—35

Khanna v. F. J. Dillon (AIR 1964 SC 497) held (at p. 498):—

"Under O. 14, R. 2 where issues both of law and of fact arise in the same suit, and the Court is of the opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. The jurisdiction to try issues of law apart from the issues of fact may be exercised only where in the opinion of the Court the whole suit may be disposed of on the issues of law alone, but the Code confers no jurisdiction upon the Court to try a suit on mixed issues of law and fact as preliminary issues. Normally all the issues in a suit should be tried by the Court; not to do so, especially when the decision on issues even of law depends upon the decision of issues of fact, would result in a lop-sided trial of the suit."

G. K. Misra, J. (as his Lordship then was) in *Ram Saraf v. Mani Dei* (AIR 1969 Orissa 295) succinctly stated the law as (at pp. 295-296):—

"It is well known that the suit must be tried as a whole and not piecemeal unless it involves the question of jurisdiction. For instance, if the valuation of the suit be such that it will oust the jurisdiction of the court before whom it was instituted, then in such cases ordinarily this issue should be tried as a preliminary issue to prevent unnecessary harassment to the litigants. But in all other matters it is always desirable that the cases should be tried as a whole, so that it would not be remanded times without number from the appellate court to re-examine other matters left undecided....."

Harassment to the parties, protraction of the trial and unnecessary waste of time were the considerations disavowing piecemeal trial.

Similarly, in *M/s. Basti Ram Roop Chand v. M/s. Radhey Shyam Gulab Chand* (AIR 1973 All 499) it was held (at p. 500):—

".....Under Rule 2 of Order 14 of the Code of Civil Procedure while the court is bound to try as preliminary issue a question of law on which the entire suit may be disposed of but where the question is not purely of law or it is a mixed

question of law and fact, the court has no jurisdiction to try issue as a preliminary issue....."

In *Ghatmal Champalal v. Amaravathi Dyeing Pvt. Ltd.* (AIR 1976 Andh Pra 70), Madhava Rao, J. held:

"The salutary rule of procedure which must be generally followed is that the Court should give its decision on all the issues in the case so as to avoid unnecessary remand and protraction of litigation."

An exception, however, was made in favour of question of territorial jurisdiction. Under the old Code a duty was cast on the court to try preliminarily the issues of law which would dispose of the case or any part thereof.

6. However, the experience of six decades indicated that the provision was resulting in protracted litigations involving frequent remand, harassment to parties and was unwholesome. So, the provision was substituted by Central Act 104 of 1976 by substituting R. 2 of O. 14 as hereunder:—

"Rule 2. Court to pronounce judgment on all issues:

(1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.

(2) Where issues both of law and of fact arise in the same suit, and the Court is of the opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to—

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after the issue has been determined, and may deal with the suit in accordance with the decision on that issue."

7. It may be observed that the heading gives a direction to the provision by stating "Court to pronounce judgment on all issues". Instead of casting a duty on the court, as under the Old Code by the use of the expression 'shall', a discretion is conferred by using the expression 'it may try that issue first'.

8. The new provision makes it abundantly clear that the court in its discretion may try an issue of law only if that

issue relates to the jurisdiction of the court or a bar to the suit created by any law for the time being in force. An issue of fact or a mixed issue of fact and law cannot be decided as a preliminary issue. Where an issue of jurisdiction is a question of fact or is a mixed question of law and fact, it cannot be decided as a preliminary issue; but it should be decided on merits along with the other issues. The object being avoidance of piecemeal trial and protracted litigation, in case of doubt all the issues should be tried at one and the same time.

In *M/s. Ramdayal Umraomal v. M/s. Pannalal Jagannathji* (AIR 1979 Madh Pra 153), the Full Bench observed (at p. 155):—

"..... Discretion to try preliminary issue of law relating to jurisdiction or bar of suit should be exercised only when it is so clear that the decision will decide the suit finally once and for all without recording of any evidence."

In *Dhirendranath Chandra v. Apurba Krishna Chandra* (AIR 1979 Pat 34), it was held (at pp. 35-36):—

"..... It is, therefore, clear that a departure from the ordinary rule provided in sub-rule (1) of R. 2 can be made by the Court only in the circumstances mentioned in sub-rule (2) and even in these circumstances the Court has only a discretion that it may try an issue of law relating to the points mentioned in Clauses (a) and (b) of sub-rule (2) as a preliminary issue before framing other issues. There is, however, nothing in sub-rule (2) which makes it obligatory for the Court to try such an issue first in all cases. If, therefore, the Court is of the opinion that in any particular case it will be more expedient to try all the issues together and therefore, if it refuses to try and decide any issue of law even on the points referred to in Cls. (a) and (b) of sub-rule (2) as a preliminary issue, it commits no error touching jurisdiction....."

In *Cheni Ram v. Shanti Devi* (AIR 1980 Raj 192), a question arose whether the court had territorial jurisdiction. To decide the said question, it was necessary to take evidence to find out the place where the cause of action arose. The question though related to jurisdiction, the prayer was rejected as the question was not a pure question of law.

9. Before the amendment the position had been made clear by the Supreme

Court in *Khanna v. Dillon* (AIR 1964 SC 497) (supra). Any doubt that may have lingered thereafter was set at rest by the clear provision in the amended R. 2.

10. Moreover, the trial of the suit on a preliminary issue being discretionary under the amended Rule 2 of O. 14, refusal of the court to decide the issue as a preliminary issue does not involve any question touching jurisdiction of the court. This revision application is, therefore, not competent on this short ground also.

11. In this case, the issue sought by defendant No. 4 to be decided as a preliminary issue was not a question of law. The determination would depend upon determination of certain facts which could be established by the parties leading evidence and assuming the answer of this issue of *res judicata* going against the plaintiff, it did not bring an end to the suit; but would bar trial of that very question at issue. As the pleadings show, the plaintiff has claimed title through Gura as successors to Jema and Malli.

12. Considering it from any angle, the move of defendant No. 4 was misconceived and this revision accordingly has no merit and is dismissed. In the circumstances, there would be no order as to costs.

Revision dismissed.

AIR 1982 ORISSA 275

B. K. BEHERA, J.

State of Orissa, Appellant v. M/s. J. N. Choudhury, Respondent.

Misc. Appeal No. 8 of 1982, D/- 6-8-1982.*

(A) Arbitration Act (10 of 1940), Ss. 13 and 29 — Interest — Arbitrator has jurisdiction to award interest unless prohibited in agreement.

Unless there is a specific clause in the agreement prohibiting award of interest, the Arbitrator has jurisdiction to award interest. The Arbitrator has power to award interest when it is an implied term of reference and in the absence of

prohibition in the agreement, interest may be awarded from the due date till the date of the award and the award allowing interest is not vitiated on that ground. AIR 1980 Ori 74, Foll. (Para 3)

(B) Arbitration Act (10 of 1940), Ss. 30 and 13 — Reference of dispute to arbitrator — Jurisdiction of arbitrator to allow claims for additional works.

Where the entire dispute has been referred to the arbitrator it is open to him to allow claims for additional works. Therefore, the award cannot be set aside on the ground that some claims for additional work have been awarded. (Para 4)

The jurisdiction of a court in respect of setting aside an award is limited to the grounds enumerated in S. 30 of the Arbitration Act. In the instant case, the award is not a reasoned one and it is a non-speaking award and the details of the claims cannot be called in question with reference to the materials placed before the Arbitrator. AIR 1982 Delhi 155, Ref. to, (Para 5)

Cases Referred:	Chronological	Paras
AIR 1982 Delhi 155		5
(1982) 53 Cut LT (SN) 35		3
AIR 1981 Ori 124		4
AIR 1981 Ori 160		3, 4
AIR 1981 Ori 172		4
(1981) 52 Cut LT 451		3
AIR 1980 Ori 74		3
AIR 1980 Ori 76		4
AIR 1980 Ori 157		4
ILR (1973) Cut 1218		4
(1970) 36 Cut LT 1088		4

R. K. Patra, Addl. Govt. Advocate, for Appellant; Devananda Misra, Deepak Misra, R. N. Naik and Anil Deo, for Respondent.

JUDGMENT:— The State of Orissa is in appeal against the judgment and order passed by the learned Subordinate Judge, Bhubaneswar, in Original Suit No. 179 of 1981-I making an award in favour of the respondent for a sum of Rs. 3,85,200 a rule of the court and decreeing the suit. The respondent had been entrusted with the work 'Distribution system of Nandini M.I.P.' and had entered into an agreement with the Executive Engineer, M.I. Division, Phulbani, under agreement No. 97 F-2 of 1974-75. As disputes arose between the parties, the Chief Engineer, Rural Engineering Organisation, appointed an Arbitrator who entered into the reference, called upon both the parties to put in their statements of claims and docu-

*From decision passed by S. K. Satpathy Sub. J., Bhubaneswar, D/- 1-10-1981.

ments and after hearing the parties, made an award of Rs. 3,85,200 in favour of the respondent directing its payment within fifteen days from the date of the award and further directing that failing such payment, future interest on the amount awarded at six per cent per annum from 23-7-1981 would be payable till the date of actual payment. After overruling the objections raised on behalf of the appellant, the learned Subordinate Judge made the award a rule of the court.

2. Mr. R. K. Patra, the learned Additional Government Advocate appearing for the appellant, has raised two contentions. His first contention is that the Arbitrator had no jurisdiction to make an award in respect of additional works. Secondly, he contends, he had no jurisdiction to grant interest. As has rightly been submitted by Mr. Devananda Misra, the learned counsel for the respondent, the same questions have been raised and answered against in a number of decisions of this Court.

3. It is not disputed at the Bar that the entire dispute had been referred to the Arbitrator. The agreement had not been made a part of the award. On the principles laid down by this Court in the cases of State of Orissa v. Gokulachandra Kanungo, AIR 1981 Ori 160, State of Orissa v. M/s. J. N. Choudhury, (1981) 52 Cut LT 451 and State of Orissa v. Harikrishna Sahu (1982) 53 Cut LT (SN) 35, the Arbitrator did have jurisdiction to make an award in respect of additional items of work and also for interest payable to the respondent. It has been laid down by this Court in Executive Engineer, Rural Engineering Organisation, Khurda v. D. N. Senapati, AIR 1980 Ori 74, relying on the principles laid down by the Supreme Court and by this Court in earlier decisions, that unless there is a specific clause in the agreement prohibiting award of interest, the Arbitrator has jurisdiction to award interest. The Arbitrator has power to award interest when it is an implied term of reference and in the absence of prohibition in the agreement, interest may be awarded from the due date till the date of the award and the award allowing interest is not vitiated on that ground. I, therefore, see no force in the contention raised on behalf of the appellant that the Arbitrator went legally wrong in making an award for interest.

4. This Court has, in AIR 1980 Ori 76 Executive Engineer, Debury Expressway Division, Kendrapara v. Hemalata Singh, laid down (at p. 79):—

"It is further contended on behalf of the appellant that the award is vitiated as the arbitrator has allowed extra items claimed by the contractor. I have already held that the agreement has not been made a part of the award, nor is the award based on the terms of the agreement. The entire dispute was referred to the arbitrator and in view of the findings made above about the limited jurisdiction of the Court, the award cannot be set aside, in absence of an error of law apparent on the face of the record. When the documents have not been made part of the award, the award cannot be set aside and the aforesaid contention of the appellant has no legs to stand."

In AIR 1981 Ori 160 (supra), it has been held that the Arbitrator has jurisdiction to decide matters relating to additional works as in dealing with those matters, disputes on questions arising out of the contract may have to be considered and decided by the Arbitrator. The Court observed (at p. 165):—

"..... Relying on the decisions in A. C. Parija and Hindusthan Steel cases (1970) 36 Cut LT 1089 and ILR (1973) Cut 1218 (referred to above), this Court has held in State of Orissa v. G. C. Kanungo, 48 Cut LT 505: (AIR 1980 Orissa 157) that the arbitrator has jurisdiction to decide matters regarding additional work, as in deciding those matters, disputes and questions arising out of the contract may have to be considered and decided by the arbitrator. This view has been reiterated in a recent decision of this Court reported in 52 Cut LT 37: (AIR 1981 Orissa 124) (referred to above). The consistent view of this Court in four previous decisions from 1970 to 1981 have been followed which include the cases of A. C. Parija, Hindusthan Steel and G. C. Kanungo. The Hon'ble the Chief Justice has also reiterated the same view in M. A. Nos. 29, 30 and 62 of 1981 disposed of on 7-5-1981: (Reported in AIR 1981 Ori 172) (referred to above)." The entire dispute had been referred to the Arbitrator and, therefore, it was open to him to allow claims for additional works. In view of the principles laid down in the cases referred to above, the award cannot be set aside on the ground

that some claims for additional works have been awarded.

5. The jurisdiction of a court in respect of setting aside an award is limited to the grounds enumerated in S. 30 of the Arbitration Act. In the instant case, the award is not a reasoned one and it is a non-speaking award and the details of the claims cannot be called in question with reference to the materials placed before the Arbitrator. I do share the grave concern expressed by H. L. Anand, J. in the case of *M/s. Ehlwara Synthetics Ltd., New Delhi v. Delhi Hindustani Mercantile Association*, AIR 1982 Delhi 155, that in the expanding horizon of natural justice and the development of administrative law when every judicial, quasi-judicial, executive and administrative body, charged with duty to make a decision affecting rights and obligations, is under a duty to give reasons for its decision, it is quite anachronistic that an Arbitrator in India is still immune from any such obligation. In England, right to know the reasons has been given statutory recognition and an award by an Arbitrator without reasons would be bad in law, but not so in our country. In international arbitration, the convention recognises the obligation to give reasons. As rightly noticed by the learned Judge of the Delhi High Court, the power to make a non-speaking award may have given undue protection to incompetence, arbitrariness and even dishonesty in the arbitral process. However, it is for the Legislature to think of the change in the system. After all, a Judge is to administer the law as it is and not as he thinks, it should be. He cannot enact a law; he can only interpret it.

6. For the reasons recorded by me, none of the contentions raised on behalf of the appellant shall prevail.

7. The appeal fails and the same is dismissed with costs. Hearing fee is assessed at Rs. 100 (Rupees one hundred).

Appeal dismissed.

AIR 1982 ORISSA 277

R. C. PATNAIK, J.

State of Orissa and others, Petitioners v. Gangaram Chhapolia and another, Opposite Parties.

Civil Revn. No. 258 of 1982, D/- 26-7-1982.*

Arbitration Act (10 of 1940), S. 8 — Appointment of arbitrator — Parties submitting panels — Court appointing person from one panel and without giving hearing to parties — No reason given for rejecting names given by other party — Order is liable to be quashed.

Disputes having arisen between the Contractor and the State Trading Corporation an application under S. 8 was filed by the Contractor for appointment of an arbitrator. The contractor filed a panel of names and the petitioners (State) submitted in a memorandum that any member of the arbitration tribunal might be appointed as arbitrator. The Judge, thereupon, appointed 'R', a retired District Judge, and one from the panel of names submitted by the contractor by a cryptic order to be an arbitrator to settle the dispute between the parties. No opportunity of hearing was given to the parties.

Held that at the stage of adjudging the personnel, it is essential, that both sides must have their say. Each party should be given adequate opportunity to convey to the Court its views and reaction to the name suggested. If there is likelihood of some bias, prejudice, interestedness, however remote, in relation to the person suggested, the person is non-grata. The Judge arbitrarily appointed 'R' as arbitrator without giving the petitioners an opportunity of having their say in regard to the names suggested. The petitioners had suggested that any member of the arbitration tribunal appointed by the State Government could be appointed. No reason has been given by the Judge why none of the members was considered suitable by him for appointment as arbitrator. (Para 6)

Cases Referred : Chronological Paras
 AIR 1982 Delhi 155 9
 AIR 1979 SC 429 : 1979 Lab IC 146 9
 AIR 1976 SC 475 9

*From order of B. B. Das, Sub. J., Cuttack, D/- 12-2-1982.

IZ/IZ/E110/82/BNP/SNV—H

AIR 1976 SC 1745 10
 (1971) 1 All ER 1148, Breen v. Amalgamated Engineering Union 9
 AIR 1927 Bom 565 (FB) 8
 89 Conn 74, Dwy v. Connecticut Co. 9

Addl. Govt. Advocate, Addl. Standing Counsel and Standing Counsel, for Petitioners; B. H. Mohanty, Ganeswar Pati, R. N. Panda and M. Jain, for Opposite Parties.

ORDER :— Disputes in relation to the work "FDR to Nabuda Ringh Bundha at Ranpal" undertaken by the opposite party No. 1 — contractor under agreement No. 51 F-2 of 1968-69 having arisen, the contractor issued notice following the arbitration clause in the contract for appointment of an arbitrator. On failure of the Chief Engineer to appoint arbitrator, the contractor moved the learned Subordinate Judge, Cuttack, under S. 8 of the Arbitration Act for appointment of an arbitrator. The learned Subordinate Judge by judgment dated 10-2-1982 in Misc. Case No. 387 of 1980 granted the prayer and directed the parties to suggest names by 12-2-82 for selection of the personnel. On 12-2-82, the contractor filed a panel of names and the petitioners submitted in a memorandum that any member of the arbitration tribunal might be appointed as arbitrator. The learned Subordinate Judge, thereupon, appointed Sri R. C. Kar, a retired District Judge, and one from the panel of names submitted by the contractor by a cryptic order to the following effect :—

"Both the parties file the names of arbitrator. Sri R. C. Kar, retired District Judge is appointed as arbitrator to settle the dispute between the parties."

2. The grievance of the State is that after the panel of names was filed by the contractor and the State intimated to the Court that any member of the arbitration tribunal could be appointed as arbitrator, there should have been a hearing on this question. Selection of the personnel of the arbitrator is not of less importance. The arbitrator is the king-pin in the scheme of arbitration. Not only must he be competent, but it is no less imperative that he is sans bias, sans prejudice towards any of the parties. Selection made by the Court is deemed in law to be a voluntary selection of the parties. The Court, therefore, must be very cautious in not imposing an incompetent and undesirable person

as an arbitrator. The power has been vested in the Court under the various provisions of the Arbitration Act relating to the selection of arbitrator in the trust that the said power shall be exercised judiciously and with circumspection. The arbitrator is not bound to give reasons and generally there is no appeal from his decision. Howsoever erroneous the Court may consider his decision to be, the Court is powerless. At the stage of adjudging the personnel, it is essential, therefore, that both sides must have their say. Each party should be given adequate opportunity to convey to the Court its views and reaction to the name suggested. If there is likelihood of some bias, prejudice, interestedness, however remote, in relation to the person suggested, the person is non-grata.

3. The grievance of the petitioners in this case is that the learned Subordinate Judge arbitrarily appointed Sri R. C. Kar as arbitrator without giving the petitioners an opportunity of having their say in regard to the names suggested. The petitioners contend that they had suggested that any member of the arbitration tribunal appointed by the State Government could be appointed. No reason has been given by the learned Subordinate Judge why none of the members was considered suitable by him for appointment as arbitrator. Their grievance has been that there are a few persons circulating as stock arbitrators and somehow or other they are getting appointed by orders of court passed casually and mechanically without any application of mind, heedless of the grievance and wish of the State, which is no other than, the people of the State.

4. A pertinent question arises: Should a person compulsorily retired be appointed as arbitrator? A person is compulsorily retired on grounds of incompetence, questionable integrity, or on mental or health ground. It does not stand to reason how a person so dealt with can be adjudged competent for appointment as arbitrator. Very often persons in the employment of the Government appear on the arena and get appointed as arbitrators. Where the employer nominates or suggests the name of an employee, it is a different matter. The Orissa Government Servants' Conduct Rules provide in R. 17:

"Private trade or employment — (1) No Government servant shall except

with the previous sanction of the Government, engage directly or indirectly in any trade or business or undertake any employment :

Provided that a Government servant may, without such sanction, undertake honorary work of a social or charitable nature of occasional work, a literary, artistic or scientific character, subject to the following conditions namely :—

(i) he shall, within one month of his undertaking any such work, report to the Government giving full details;

(ii) his official duties do not thereby suffer and

(iii) he shall discontinue any such work, if so directed by the Government."

This rule which has statutory force puts an embargo on the Government servant accepting or undertaking an employment. Appointment as arbitrator is not Government employment nor are the engagement and its acceptance commended in exercise of judicial power of the Court. Appointment is made upon expression of willingness. At this stage R. 17 of the Conduct Rules comes into play. A Government servant cannot accept the appointment without the previous sanction of the Government. It is also the bounden duty of the Court, having regard to the statutory force of R. 17, to ascertain if there is previous sanction by the Government to acceptance by the employee of engagement as arbitrator. I reiterate that the rule is not attracted where the Government (employer) itself suggests or nominates the name. The direction given by a Court is in the form of a request and is not a command. The request is not a judicial order and the Government servant is obliged to decline the offer if there is no sanction of the Government. One comes across instances of arbitration cases piling before some Government servants engaged as arbitrators without previous sanction of Government.

5. There is considerable weight in the submissions made by the counsel for the petitioners, that there is no presumption that the panel submitted by the contractor is sacred and that submitted by the State is profane. The matter boils down to the selection of a person worthy of being appointed as arbitrator. The person should have reputation of possessing an unimpeachable integrity and

probity and not be open to approach by any of the parties and shall not bear even remotely, a bias, prejudice, animosity towards any of the parties. In such a person can both the parties repose their trust and confidence. In a case where parties themselves have chosen a person as arbitrator, they being the best judges of the person, the presumption is that the selection was made upon consideration of the pros and cons. Not so in the case of an appointment by the court, where by reason of the fiction, the person appointed as arbitrator is deemed to be one chosen by the parties. The Courts, therefore, must act in such a manner as the parties would be given a free choice.

6. From the proceedings of Feb. 12, 1982, it does not transpire that the learned Subordinate Judge was alive to the principles. By a bald order Sri R. C. Kar, one of the persons named in the panel of names filed by the contractor, was appointed. It does not seem from the order that a hearing was given to the parties and the pros and cons in regard to the suggestion were considered. The Courts while selecting an arbitrator should bear in mind that the function is not just a routine function to be exercised casually or mechanically. Great stakes are very often involved and a correct adjudication is very much dependant on the person, more on his integrity though no less on his competency. The State is not a "no party" before the law. Its exchequer is the exchequer of the people. It behoves us to remember that the parties before a court of law, the State as well as the private citizen, have the same rights and the same privileges.

7. It is permissible to deviate and consider a few related questions. If one were asked "what afflicts the State of Orissa?" The answer could be: "Inter alia, the malady of the racket of arbitration". Arbitration of late is being considered as a sure way to overnight riches and affluence. It has become a big business. Should not a judge take note of "the felt necessities of the time?" He can no longer be impervious to the winds that blow outside. Leaving the seclusion of his ivory tower, he should come out to the streets to feel "the total push and pressure of the cosmos". In a social welfare State, the need is social Justice. Let us recall to mind what Justice Cardozo said: "It is true, I think, today in

every department of law that the social value of a rule has become a test of growing power and importance."

8. The concept of arbitration is a laudable one and the system is in vogue in this country since the days of the Panch and Panchayats. There were three grades of arbitrators, namely, (a) puga, (b) Sreni and (c) Kula. These were the different degrees of Panchayats. Marten, Chief Justice observed in AIR 1927 Bom 565 (FB):—

"It (arbitration) is indeed a striking feature of ordinary Indian life. And I would go further and say that it prevails in all ranks of life to much greater extent than is the case in England. To refer matters to a panch is one of the natural ways of deciding many a dispute in India....."

The first attempt at codifying the law was made by the Bengal Regulations of 1772 and 1780 where provision was made for submission of disputed accounts to decision by arbitration. In 1781, Sir Elijah Impey's Regulation included a provision that "the Judge do recommend, and so far as he can, without compulsion, prevail upon the parties to submit to the arbitration of one person, to be mutually agreed upon by parties." In 1787, regulation for the Administration of Justice was passed and it contained rules for referring suits to arbitration with consent of parties. There was no detailed provision, however, to regulate the arbitration proceedings. In 1793 Regulation XVI was enacted with a view to promoting reference of disputes of certain categories to arbitration and to "encourage people of credit and character to act as arbitrators". Regulation VI of 1813 made some improvement to the Regulation of 1793 and arbitration was available in cases of disputes in regard to land. Bengal Regulation VII of 1822 authorised the Revenue Officers to refer rent and revenue disputes to arbitrators and the Collectors were enjoined to induce parties to agree to such arbitration. Bengal Regulation IX of 1883 authorised the Settlement Officers to refer disputes to arbitration.

In 1834, the Legislative Council for India was constituted and Act VIII of 1859, the first Code of Civil Procedure for India, was enacted in 1859 and Chapter VI of the Code contained provisions relating to arbitration. The Code, how-

ever, was not applicable to the Supreme Court, or the Presidency Small Cause Courts or non-regulation provinces. The Act was repealed and consolidated by the Civil P. C. of 1877; but the provisions relating to arbitration remained unchanged. Act XIV of 1882 revising the Code did not touch the provisions. The arbitration provisions so far provided for arbitration of disputes after they had arisen. There was no provision for reference to arbitration of future disputes. To remedy this, Indian Arbitration Act, 1899 was enacted basing on the English Arbitration Act, 1889. Various sections of the English Act were verbatim transplanted to the Indian soil. The actual application of this Act was, however, originally limited to Presidency towns and was subsequently extended to a few more commercial towns. When the Civil P. C. of 1908 was enacted the clauses relating to arbitration were transferred from the body of the Code to the Sch. II. Various committees noticed the drawbacks in the existing provisions and advocated for consolidation and amendment of the law and its codification in a separate enactment and that is how the Arbitration Act, 1940 came to the statute book and the Sch. II to the Civil P. C. was repealed.

9. An arbitrator is a tribunal of parties choosing. So, from his decisions—right or wrong—there is no appeal. In view of the concept and the system, the English common law said that he was not bound to give reasons. And this rule of the common law of the olden times was transplanted to our system. A nagging and disturbing thought, however, persists. Can a rule prevalent in a different time and in a different clime be considered to be healthy and wholesome for us today — a time of eroded values and devalued norms. Or should the law cater to the needs of the present day community?

Vast changes are taking place with regard to concepts and systems. Should we continue to hold on to a principle because it is in vogue for scores of years or should we take cognizance of the changed times and the current demands and alter the rule, the law? The horizon of the concept of natural justice is widening day after day. Every Court, Tribunal or Authority adjudicating a dispute is enjoined by principles of natural justice to give reasons for its decision. Lord Denning has said in *Broen v. Amal-*

gamated Engineering Union, (1971) 1 All ER 1148:

"The giving of reasons is one of the fundamentals of good administration."

This observation has the approval of the Supreme Court in *Manager, Govt. Branch Press v. D. B. Belliappa* (AIR 1979 SC 429). The requirement of furnishing "reason" is a shackle on arbitrariness or perversity. Why, pray, must the President of India, the Highest Court of the country and other instrumentalities support their decisions by reasons while disposing of disputes or a lis and not the arbitrator? Because the arbitrator is parties' own choosing'. So what? An arbitrator is after all a human being and is susceptible to all the frailties that human flesh is subject to (even Gods do err, mythology and the scriptures tell us).

We may take a leaf out of the experience of the people from whom we borrowed the rule. The English law has since been amended by incorporating a provision requiring the arbitrator to give reasons for its award.

It has been observed by Wheeler, J in *Dwy v. Connecticut Co.*, 39 Conn 74 (39):

"That court best serves the law which recognizes that the rules of law which grew up in a remote generation may, in the fullness of experience, be found to serve another generation badly, and which discards the old rule when it finds that another rule of law represents what should be according to the established and settled judgment of society, and no considerable property rights have become vested in reliance upon the old rule. It is thus great writers upon the common law have discovered the source and method of its growth, and in its growth found its health and life. It is not and it should not be stationary. Change of this character should not be left to the legislature."

If the mores of today are no longer those of yesterday and what was good for the past generation may not be good for the present, there needs to be a change. This is only plea for a change in the law either by judicial law making or by the intervention of the legislature. The rule has served its days. Let us give it a quiet and decent burial.

A kindred thinker, disturbed like me, has expressed himself in *Bhilwara Synthetics Ltd. v. Delhi Hindustani Mercantile Assn.*, (AIR 1982 Delhi 155) H. L. Anand, J. has observed (at pp. 156 157):—

"Bias, no doubt, is a vitiating element. It impairs the impartiality and objectivity of any Court or tribunal. It is also true that the actual bias and its impact on the decision are unnecessary, the likelihood of bias is sufficient to constitute a fatal infirmity in any decisional process. However bias is not to be readily inferred and is difficult to detect, both in its effect and its likelihood, where there is no personal animus, monetary interest or similar apparent circumstances, it is difficult to infer the likelihood of bias merely from the class composition of the tribunal and association of persons or of the litigating parties.....

Silence no doubt, is a rare virtue and in the realm of spiritual thought has been sublimated to heights of bliss and divinity. Maunam Pandita Lakshnam, i.e. silence is an insignia of a wise man, says the Indian scripture. While the rule and importance of silence in nature's scheme of things is still being explored, there is little doubt that in the present stage of law of arbitration in India, silence is truly golden. It is one of the well known anomalies of law of arbitration that while a speaking award is subjected to unrestricted justiciability, a non-speaking award enjoys near immunity from judicial control. In the expanding horizon of natural justice and the development of administrative law when every judicial, quasi-judicial, executive and administrative body, charged with the duty to make a decision affecting rights and obligation, is considered under a duty to give reasons for its decision, it is quite anachronistic that an arbitrator in India is still immune from any such obligation. It is important to remember that duty to give reasons enlightens the party, who is affected by the decision, as to why the decision was unfavourable to it, illumines the path of the appellate authority, controls the tribunal itself and constitutes a built-in safeguard against arbitrariness. It is for this reason that in England the right to know reasons has been given statutory recognition. In English law, an award by an arbitrator

without reasons, even without adequate reasons, would be bad in law but not so in India. In international arbitration, the convention recognises the obligation to give reasons. While the rule that the arbitrator need give no reason for the award may have had its importance at one time, there is little doubt that the power to make a non-speaking award must have given undue protection to considerable incompetence, arbitrariness and even dishonesty in the arbitral process. Unfortunately, little legal thought has so far been devoted to the problem and it is high time the matter is considered afresh so as to bring the arbitral process in India in conformity with the norms accepted elsewhere. This is particularly necessary in view of the fact that in the present state of the Court system in India and its unfortunate characteristics of endemic delays, rising costs, technicality of procedure and plurality of appeals, there is a search for alternative decision making apparatus and a reoriented arbitration process, particularly under the auspices of organisations in industry, trade and commerce, could throw up an acceptable alternative, which would to an extent relieve the overburdened machinery of Courts. I have no doubt in my mind that in course of time the matter would receive attention at more articulate and effective and, preferably, authoritative levels

I fully associate myself with every word uttered.

I may, with profit, give an extract from a decision of the Supreme Court under S. 10-A of the Industrial Disputes Act. Their Lordships observed:—

"Let us put the proposition more expressively and explicitly. What is important is a question of law arising on the face of the facts found and its resolution *ex facie* or *sub silentio*. The arbitrator may not state the law as such. Even then such cute silence confers no greater or subtler immunity on the award than plain speech. The need for a speaking order, where considerable numbers are affected in their substantial rights, may well be a facet of natural justice or fair procedure, although, in this case, we do not have to go so far. If, as here, you find an erroneous law as the necessary buckle between the facts

found and the conclusions recorded, the award bears its condemnation on its bosom. Not a reference in a narrative but a clear legal nexus between the facts and the finding. The law sets no premium on juggling with drafting the award or hiding the legal error by blanking out. The inscrutable face of the sphinx has no better title to invulnerability than a speaking face which is a candid index of the mind. We may, by way of aside, express hopefully the view that a minimal judicialisation by statement, laconic or lengthy, of the essential law that guides the decision, is not only reasonable and desirable but has, over the ages, been observed by arbitrators and quasi-judicial tribunals as a norm of procedural justice. (AIR 1976 SC 475)." (Emphasis, mine).

A pregnant sentence comes to mind: "Awake, Arise, 'O' Partha". How long shall you be in slumber?

10. Every adjudication shall conform to the principles of natural justice, and shall ensure to the parties just and fair play. The principle of just and fair play in action varies from facts to facts, situation to situation. However, it is essential in any adjudication that the parties should know what they are to meet in order to be able to focus their attention thereon. In such context, the question of framing of issues arises. The requirement of framing of issues under O. 14 of the Civil P. C. is not a dry, bookish or pedantic requirement. It subserves a purpose and the purpose is to pinpoint the real and substantial point of difference and focus attention of the parties and the Judge thereon. Call these issues, or points of difference or controversies, what you may. They are useful and efficacious. Framing of issues is in furtherance of the process of decision making. It enables the Judge, the arbitrator to rivet his mind to the essential question from amongst the forest of trivialities and unnecessary matters. Order 14 has been enacted with a view to achieving this purpose in the adjudicatory process. But the spirit behind the requirement, if I may say so, has application also in kindred fields, not governed by the Code.

I am not unaware that in some decisions, it has been held that O. 14, C.P.C. has no application to arbitration pro-

ceedings. With great respect to the learned Judges, I part company on this issue. In my view, the approach has to be functional and purposive.

The law permits an aggrieved party to question the validity of an award on the ground of lack of jurisdiction in the arbitrator. Lack of jurisdiction can be urged on various grounds, viz., on the ground as in *Union of India v. Om Prakash* (AIR 1976 SC 1745), where it was held that reference to arbitration by the Court was bad after the appointment of an arbitrator under S. 8 (2) or on the ground that the arbitrator lacked jurisdiction because the controversies were not arbitrable, or were "excepted matters."

In an application under S. 20, the Court has to adjudge if having regard to the arbitration clause, the dispute/disputes disclosed is/are covered by the arbitration agreement, viz., if the dispute/disputes is/are arbitrable. If the dispute is not arbitrable, the Court cannot confer jurisdiction on the arbitrator. In a proceeding under S. 8, often questions arise if the disputes or some of them are arbitrable. If such question is raised, the principles of just and fair play require that the arbitrator cannot avoid or evade the question and must give his decision thereon. A denial of this procedure would tantamount to denial of justice to the party raising the question. An arbitrator, though a chosen tribunal of the parties, is not above the principles of natural justice. If the end of all procedures is doing justice, exclusion of this requirement would not subserve the end.

Framing of issues on the points of differences ensures application of mind. Issues or give whatever name you please, crystallise the controversies, the points of difference. In any adjudicatory process, it is imperative to know what are the questions to decide. The necessity, therefore, arises for formulation of the points of difference, specification of the disputes, particularisation of the controversies and decision thereon. How does a party exercise his right if the controversy has not been specifically formulated and the decision thereon given by the arbitrator? Failure to formulate or specify and to record decision

thereon would deprive a party of valuable right conferred by law.

11. With these observations, I quash the order dated 12-2-82 and remit the matter to the learned Subordinate Judge for a fresh disposal according to law, after giving adequate opportunities of hearing to the parties. In the circumstances, there would be no order as to costs.

Order accordingly.

AIR 1982 ORISSA 283

R. C. PATNAIK, J.

Union of India and others, Petitioners
v. M/s. Allied Construction Company,
Opposite Party.

Civil Revns. Nos. 17 and 18 of 1982,
D/- 26-7-1982.*

(A) Arbitration Act (10 of 1940), Section 13 (b) — Powers of arbitrator — Refusal to state special case for opinion of court — Does not amount to misconduct.

Where the arbitrator had refused to state a special case for the opinion of the court upon a question of law arising in course of a reference, such refusal does not amount to misconduct of arbitrator. The arbitrator is under no obligation to state a case. It is discretionary. AIR 1921 Cal 576, Rel. on. (Para 6)

(B) Arbitration Act (10 of 1940), Sections 11 (2), 13 — Arbitration proceedings — Specification and categorisation of disputes are a part of arbitral process — Failure of arbitrator to specify and categorise disputes — Plea of failure not raised before trial court while seeking removal of arbitrator — High Court, in revision, will not consider it as a ground for sustaining an application for removal of arbitrator. AIR 1956 Cal 470, Dissented from. (C.P.C. (5 of 1908), S. 115).

(Para 8)

Cases Referred: Chronological Paras
AIR 1982 Orissa 277 8
AIR 1956 Cal 470 7
AIR 1921 Cal 576 6

P. C. Misra, S. C. Ray, S. P. Misra,
D. Das, S. K. Choudhury and S. Latif.

*From common order of D. P. Mohanty,
Sub. Judge, Balasore, D/- 19-10-1981.

IZ/JZ/E109/82/TGD/SNV

for Petitioners; P. Palit, J. Patnaik, R. Mohapatra and A. K. Bhagat, for Opposite Party.

ORDER:— These two revisions arise out of orders passed by the learned Subordinate Judge, Balasore, rejecting the two applications filed by the petitioners for removal of the arbitrator.

2. The opposite party entered into agreements with the petitioner, namely, contract No. 20 of 1971-72 and contract No. 7 of 1971-72 for construction of storage and residential quarters at Chandipur in the district of Balasore. Disputes having arisen, Original Suits Nos. 36 of 1974 and 37 of 1974 were filed under S. 8 read with S. 20 of the Indian Arbitration Act, 1940. The applications were allowed and an engineer was appointed to act as arbitrator. Miscellaneous Appeals Nos. 9 of 1977 and 10 of 1977 were filed in this Court. The challenge was relating to the personnel of the arbitrator. In para 3 of the judgment of this Court, disposing of both the appeals in a common judgment, it has been held:—

"It is not disputed that a notice for reference of the dispute to arbitration had been issued to the competent authority and no action was taken by him. The provisions of sub-section (2) of S. 8 of the Arbitration Act are clear. If the appointment under the arbitration clause is not made within fifteen clear days after service of the notice, the court is entitled on the application of the party who gives the notice and after giving the other parties an opportunity of being heard to appoint an arbitrator..... and the revisions were dismissed. The petitioners carried Civil Appeals Nos. 104-105 of 1978. Before the Supreme Court it was contended that the reference to arbitration was premature, but the plea was, however, not entertained and the Supreme Court confirmed the appointment of the arbitrator. The arbitration proceedings thereafter made some headway before the arbitrator.

3. The petitioners have alleged that the claim of the opposite party was considerably inflated by way of filing additional claims before the arbitrator. During the pendency of the proceedings before the arbitrator, the petitioners moved the arbitrator for stating a special case for the opinion of the court on the

question of his jurisdiction and obtain a clarification as to whether the applications in Original Suits Nos. 36 and 37 of 1974 were disposed of under S. 8 or under S. 20 of the Arbitration Act. They further alleged that the arbitrator mis-conducted himself and the proceeding by making some observations regarding the claim of the opposite party. The second point, however, has not been pressed and has been given a go-by. Mr. S. C. Roy, the learned counsel for the petitioners, has candidly stated so. The arbitrator having refused to state a special case for the opinion of the court, the two applications were filed before the learned Subordinate Judge, Balasore, under Ss. 5, 11 and 33 of the Indian Arbitration Act for removal of the arbitrator. The said applications were numbered as Miscellaneous Cases Nos. 135 and 136 of 1980.

4. The points raised in the court below and in these revisions are identical and so, are disposed of by this common judgment. Mr. S. C. Roy, learned counsel for the petitioners, has urged that the applications were under S. 20 of the Arbitration Act and inasmuch as the disputes have not been referred to the arbitrator, the proceedings before the arbitrator were void. He has further urged that the arbitrator, having regard to the question of jurisdiction raised before him, should have stated a special case for the opinion of the court and his refusal amounted to misconduct and warranted his removal. He has further urged that having regard to the claims and the additional claims, the arbitrator should have specified and categorised the disputes so as to enable the petitioners to meet the case of the opposite party. He has urged that categorisation was necessary to enable the petitioners to contend that certain of the items were beyond the jurisdiction of the arbitrator and thus, not arbitrable. He has further submitted that if the applications were under S. 8, the disputes should be specified and particularised by the arbitrator. If on the other hand the applications were under S. 20, the court should have framed the disputes and referred the same to the arbitrator. His submission in sum and substance has been that the petitioners were entitled to know the case they were to meet and that could be possible only by specifying or categorising the disputes.

5. No doubt, the original applications were filed under Ss. 8 and 20 of the Arbitration Act. The judgment of the learned Subordinate Judge in Original Suits Nos. 36 and 37 of 1974 and the judgment of this Court in Miscellaneous Appeals Nos. 9 and 10 of 1977 and the judgment of the Supreme Court in Civil Appeals Nos. 104-105 of 1978 also go to show that.

However, the portion extracted from the judgment of this Court in Miscellaneous Appeals Nos. 9 and 10 of 1977 would go to indicate that the disposal was under S. 8 (2) of the Arbitration Act. It was not contended otherwise before the Supreme Court.

6. The next question is if the arbitrator misconducted himself in refusing to state a special case for the opinion of the court. Recently I had occasion to consider this question in Civil Revision No. 187 of 1982 and I have held there:

"The arbitrator is under no obligation to state a case. It is discretionary."

The provision contained in Sec. 13 (b) is an enabling one conferring certain powers on the arbitrator. He cannot be compelled to exercise those powers.

"It is not misconduct for an arbitrator or umpire to refuse to state a special case upon a question of law arising in course of a reference" (see *Russell on Arbitration*, 19th Edn. 4-3).

Similar view has been taken in the case of *Sewdutra Narasaria v. Tata Sons Ltd.* (AIR 1921 Cal 574), *Greaves, J.* held:—

"The power to state a special case is merely permissive and enabling and not compulsory and the umpire is not bound to state a special case at the request of a party to the submission."

I am in respectful agreement with the aforesaid view. The second ground of attack, therefore, fails.

7. The rest of the submissions of the learned counsel for the petitioners related to categorisation or particularisation or specification of the disputes. Mr. P. Palit, learned counsel for the opposite party, repelled the submissions of Mr. Roy stating that the arbitrator is the best judge of the procedure he has to adopt and follow. The law does not en-

join particularisation or specification of disputes and the submission of the counsel for the petitioners amounted to framing of issues in an arbitration proceeding which is not countenanced in law. In support of his contention, he relied upon a decision of the Calcutta High Court in *Arbn. Jupiter General Insee. Co. Ltd. v. Corporation of Calcutta* (AIR 1956 Cal 470). P. B. Mukherji, J. held as follows:—

"It cannot be said that the provision of the Civil P. C. regarding the formal framing of issues or their formal determination separately is a procedure at all enjoined as compulsory in an arbitration proceeding."

8. With great respect to the learned Judge, I enter my dissent and I am of the humble opinion that specification of the controversies, particularisation of the disputes or points of difference are a part of the arbitral process. I have so held in the case of *State of Orissa v. Gangaram Chhapolia* (Civil Revn. No. 258 of 1982): (reported in AIR 1982 Orissa 277) judgment wherein is being delivered today. This point, however, has not been urged before the trial Judge. So, this will not be a ground for sustaining an application for removal of the arbitrator. It is, however, open to the petitioners to raise the question before the arbitrator and require him to specify the disputes, the controversies, the points of difference and answer the same in the award.

9. In the result, the orders passed by the learned Subordinate Judge are sustained and the revisions lacking merit, are dismissed. In the circumstances, there would be no order as to costs.

Revision dismissed.

AIR 1982 ORISSA 285

B. K. BEHERA, J.

The State of Orissa and others, Appellants v. Paramananda Pradhan, Respondent.

Misc. Appeal No. 276 of 1981 and Civil Revn. No. 756 of 1981, D/- 20-8-1982.*

*From orders passed by S. K. Satpathy, Sub. J., Bhubaneswar, D/- 13-8-1981.

HZ/IZ/D718/82/MVJ

(A) Arbitration Act (10 of 1940), S. 20 (4) — Appointment of arbitrator — Compliance of provision is necessary — Govt. Officer appointed arbitrator — Court not ascertaining that Govt. had sanctioned his acceptance of assignment — Order of appointment is illegal.

The Court while appointing an arbitrator has to apply its mind to the provisions of S. 20 (4). That apart a Government servant cannot accept the appointment without the previous sanction of the Government as required under Rule 17 of the Orissa Government Servants Conduct Rules unless his name has been sponsored by the State Government. It is also the bounden duty of the court to ascertain if there is previous sanction by the Government to acceptance by the employee of engagement as arbitrator. In the instant case, the Judge appointed Superintending Engineer, Cuttack Barrage Irrigation Circle, Cuttack, as arbitrator. There is nothing to show that the State Government had sanctioned this engagement or that the Judge had made an enquiry in that regard. The order of appointment is, therefore, bad in law. AIR 1982 Orissa 277 Foll.

(Para 6)

(B) Arbitration Act (10 of 1940), S. 20 (4) — Appointment of arbitrator — Selection of arbitrator from panel of names — Application of mind is necessary.

The Court, while selecting an arbitrator, should bear in mind that its function is not just of a routine nature to be exercised casually or mechanically. As great stakes are often involved, a correct adjudication is very much dependent while selecting the person, more on his integrity, though no less on his competency. The pros and cons with regard to the suggestions for the appointment of an arbitrator are to be considered before an appointment is made. AIR 1982 Orissa 277 Foll.

(Para 7)

Cases Referred: Chronological Paras

AIR 1982 Orissa 277 : 54	Cut LT 214	6, 7
AIR 1981 Orissa 104 : 51	Cut LT 530	3
AIR 1979 SC 1457		5
AIR 1965 Cal 404		5
AIR 1961 SC 1285		5

R. K. Patra, Addl. Govt. Advocate, for Appellants in Misc. Appeal No. 276 of

1981 and for Petitioners in Civil Revn. No. 756 of 1981; P. K. Patnaik, for Respondent in Misc. Appeal No. 276 of 1981 and for Opposite Party No. 1; S. K. Das and B. P. Patnaik, for Respondent in Misc. Appeal No. 276 of 1981.

ORDER:— The appeal and the revision arising out of Title Suit No. 46 of 1980 of the Court of the Subordinate Judge, Bhubaneswar, have been heard analogously and will be governed by this common judgment.

2. The respondent in the appeal, who is the opposite party No. 1 in the revision, made an application under S. 20 of the Arbitration Act ('the Act' for short) to call for the agreement and appoint an arbitrator to adjudicate upon the dispute between him and the appellants in the appeal, who are the petitioners in the revision. According to the claimant, he was entrusted with the work "Construction of Sewerage Scheme to Goutam Nagar and Part of Panthanibas, Bhubaneswar" and he entered into an agreement with the Executive Engineer, Public Health Construction Division, Bhubaneswar. Certain disputes having arisen between the parties, the Chief Engineer was requested to appoint an arbitrator under cl. 25 of the agreement and since the Chief Engineer did not make any appointment, an application was made before the learned Subordinate Judge who did not accept the contention raised by the State that the agreement did not contain any arbitration clause and directed the filing of the agreement. It is this order which is assailed in the appeal.

3. Clause 25 of the agreement would read thus:

"Decision of Public Health Engineer to be final: Except where otherwise specified in this contract the decision of the Public Health Engineer for the time being shall be final, conclusive and binding on all parties to contract upon all questions relating to the meaning of specifications, drawings and instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, drawings, specifications, estimates, instructions, orders or those conditions or

otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the completion or the sooner determination thereof of the contract."

At the stage of hearing of this appeal, the learned Additional Government Advocate has not pressed the appeal in view of the principles laid down by this Court in a similar case reported in (1981) 51 Cut LT 530 : (AIR 1981 Ori 104) (Paharaj Partners v. State of Orissa) in which the learned Chief Justice of this Court held that the provision made in the relevant clause, similar to this one, did constitute an arbitration clause. The Miscellaneous Appeal shall accordingly fail.

4. After an order was passed directing the petitioners in the Civil Revision to file the agreement, the following orders were passed in the aforesaid Title Suit:—

"1-9-81— Plaintiff files panel of names. Defendant files a petition praying for time to bring stay order from the Hon'ble High Court. P. O. is on C. L. Put up on 7-9-81 before P. O. for orders."

"7-9-81— Plaintiff files *hazira*. The petition filed by defendant on 1-9-1981 is put up today. Agreement has already been filed. Petition is rejected. Put up on 14-9-1981 when defendant to file panel of names."

"14-9-81— Plaintiff files *hazira*. Defendant does not file panel of names. Agreement has been filed. Defendant files a petition praying for time to bring stay order. Copy neither attached nor served. Heard. None appears for the defendant. The prayer for time is rejected. Perused the panel of names filed by the plaintiff for appointment of arbitrator. Sri Mukunda Prasad Mohapatra, S. E., Cuttack Barrage Irrigation Circle, Cuttack is appointed as arbitrator. The claims as mentioned in Annexure-A of the application be referred to the arbitrator." The order dated 14-9-1981 has been challenged in the Civil Revision.

5. The learned Additional Government Advocate has invited my attention to the principles laid down in AIR 1961 SC 1285 (Dhanrajmal Gobindram v. Shamji Kalidas and Co.), AIR 1979 SC

1457 (Union of India v. Prafulla Kumar Sanyal) and AIR 1965 Cal 404 (Union of India v. Himco (India) Pvt. Ltd.) and has submitted that the learned Subordinate Judge after making the direction to file the agreement, had to proceed, but had not proceeded in accordance with the mandatory provisions contained in S. 20 (4) of the Act. Section 20 (4) reads:

"Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the court.

Explanation.— Where the arbitration agreement provides for reference to a person by name or designation, the fact that the arbitrator or the umpire was named or designated, is an employee of or is otherwise connected with, one of the parties, shall not by itself, be deemed to be a person for not referring the matter to the arbitrator or an umpire so named or designated."

It has been submitted that the order of the learned Subordinate Judge appointing the arbitrator is not in accordance with law and he has exercised his jurisdiction with material irregularity. The learned counsel for the opposite party has submitted that as the identity of the arbitrator in cl. 25 of the agreement is vague and uncertain in that the designation "Public Health Engineer" has been mentioned therein, it was open to the learned Subordinate Judge to proceed with the appointment of an arbitrator and he had so done.

6. It would be noticed from the impugned order that the learned Subordinate Judge had not applied his mind to the provisions of S. 20 (4) of the Act. That apart, as has been laid down in (1982) 54 Cut LT 214 : (AIR 1982 Ori 277 (State of Orissa v. Gangaram Chhapolia) by my learned brother, Mr. Justice R. C. Patnaik, a Government servant cannot accept the appointment without the previous sanction of the Government as required under R. 17 of the Orissa Government Servants Conduct Rules unless his name has been sponsored by the State Government and it is also the bounden duty of the court to ascertain if there is previous sanction by

the Government to acceptance by the employee of engagement as arbitrator. In the instant case, the learned Subordinate Judge has appointed Mr. Mukunda Prasad Mohapatra, Superintending Engineer, Cuttack Barrage Irrigation Circle, Cuttack, as arbitrator. There is nothing to show that the State Government had sanctioned this engagement or that the learned Subordinate Judge had made an enquiry in that regard. The order of appointment is, therefore, bad in law, on the principles laid down in the aforesaid reported case.

7. There is also nothing to show from the impugned order that the learned Subordinate Judge had applied his mind before selecting the arbitrator. He has not recorded reasons as to why out of the panel of names submitted by the claimant, he selected Mr. Mohapatra. I am completely at one with my learned brother R. C. Patnaik, J., as observed in (1982) 54 Cut LT 214 ; (AIR 1982 Ori 277) (supra) that the court, while selecting an arbitrator, should bear in mind that its function is not just of a routine nature to be exercised casually or mechanically. As great stakes are often involved, a correct adjudication is very much dependent while selecting the person, more on his integrity, though no

less on his competency. The pros and cons with regard to the suggestions for the appointment of an arbitrator are to be considered before an appointment is made.

8. For the aforesaid reasons, I am of the view that the learned Subordinate Judge, without complying with the provisions contained in S. 20 (4) of the Act, appointed an arbitrator in the manner indicated above and he had thus exercised his jurisdiction with material irregularity and the impugned order does call for interference by this Court in revision.

9. In the result, the Miscellaneous Appeal fails and is dismissed. The order dated 13-8-1981 passed by the learned Subordinate Judge is maintained. The Civil Revision is allowed and the impugned order appointing the arbitrator is set aside. The learned Subordinate Judge is directed to proceed in accordance with law keeping in mind the observations made in this judgment. In the circumstances of the case, the parties are left to bear their own costs of the appeal and the revision.

Order accordingly.

END

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PATNA HIGH COURT

1982

CHIEF JUSTICES

The Hon'ble Mr. Justice Krishna Ballabh Narain Singh, M.A., B.L. (up to 12-3-1982 ~~fore noon~~).
" " Syed Sarwar Ali, M.A., B.L. (A. C. J. from 12-3-1982 After noon).

PUISNE JUDGES :

The Hon'ble Mr. Justice Syed Sarwar Ali, M.A., B.L., (up to 12-3-82).	The Hon'ble Mr. Justice Rajeshwar Prasad Manj- dal, M.A., B.L. (up to 12-2-82).
" " Rameshwar Prasad Sinha, B.A., B.L. (up to 10-7-82).	" " Binoda Nath Singh, B.A., B.L.
" " Bhagwati Prasad Jha, B.A., B.L.	" " Nazir Ahmad, M.A., LL.B.
" " Harilal Agarwal, B.A., (HONS.) B.L.	" " Yadunath Sharan Singh, B.A.
" " Lalit Mohan Sharma, B.A., B.L.	" " Ram Chandra Prasad Sinha, from 18-11-82.
" " Sushil Kumar Jha, M.A., B.L.	" " Ashwini Kumar Sinha from 18-11-82.
" " Nagendra Prasad Singh, B.A., (HONS), B.L.	" " Surendra Narain Jha from 18-11-82.
" " Sunil Kumar Choudhry, M.Sc., B.L.	" " Satya Brata Sanyal from 18-11-82.
" " Uday Sinha, M.A., B.L.	" " Krishna Ballabh Sinha from 18-11-82.
" " Syed Ali Ahmad, B.Sc., B.L.	" " Anand Prasad Sinha, M.A., B.L. from 18-11-82.
" " Birendra Prasad Sinha, M.A., B.L.	" " Ram Naresh Thakur, B.A., B.L. from 18-11-82.
" " Brishketu Saran Sinha, B.A., LL.B.	" " Prabha Shanker Misra, M.Sc., B.L. from 18-11-82.
" " Shivanugrah Narain, M.A., B.L.	" " Bageshwari Prasad Griyaghey, B.A., B.L. from 18-11-82.
" " Prem Shankar Sahay, B.A., B.L.	" " Madan Mohan Prasad, B.A., B.L. from 18-11-82.
" " Syed Samshul Hasan, B.A., B.L.	" " Abhiram Singh, B.A., B.L. from 18-11-82.
" " Sateswar Roy, B.A., B.L.	" " Ram Nandan Prasad, B.A., B.L. from 18-11-82.
" " Umesh Chandra Sharma, B.A., B.L.	
" " Munishwar Prasad Verma, B.COM., B.L.	

AD-HOC JUDGES

The Hon'ble Mr. Justice Chandra Narain Tiwary, The Hon'ble Mr. Justice Choudhary Sia Saran,
B.A., B.L. from 21-7-1982. B.A., B.L. from 21-7-1982.

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THE
All India Reporter
1982

Patna High Court

AIR 1982 PATNA 1

**S. K. CHOUDHURY AND
V. MISHRA, JJ.**

Raghunath Pandey and others, Petitioners v. The State of Bihar and others, Respondents.

Civil Writ Jurisdiction Cases Nos. 1324 and 1391 of 1981, D/- 1-9-1981.

(A) Bihar Municipal Corporations Act (12 of 1978), Sections 1, 2 — Notification declaring constitution of municipal corporation — Requirement of city having population of two lakhs or more — Must have been satisfied on date of notification.

The provisions of the Act can be applied "in any city having a population of two lakhs or more". The date on which the population should be 2 lakhs or more, is the date of notification under Section 2. If the population of the municipal area falls short of the required population "such other" areas round about it may also be included in the corporation for making up the deficit population. After including such other areas in any municipal area if the population comes to 2 lakhs or more, the requirement of the law will be deemed to be met for constituting the corporation. (Para 12)

(B) Bihar Municipal Corporations Act (12 of 1978), Section 2 — Municipal Corporation — Inclusion of suburban areas — They must have assumed urban character (Pt. conceded). AIR 1981 Pat 236, Rel. on. (Para 13)

(C) Bihar Municipal Corporations Act (12 of 1978), Section 2 — Municipal Corporation — Inclusion of suburbs bearing urban character — Does not mean that agriculture of the area is likely to be ruined — Does not amount to violation of Article 48 of the Constitution. (Constitution of India, Art. 48). (Para 14)

(D) Bihar Panchayat Raj Act (7 of 1948), Section 3 (3) — Applicability — Inclusion of Gram Panchayat within limits of Municipal Corporation — No necessity to ascertain opinion of Panchayat under Section 3 (3) — Inclusion of Panchayat in Municipal Corporation does not amount to stultifying progress of Panchayat — No violation of Art. 40 of the Constitution. (i) Constitution of India, Article 40 — (ii) Bihar Municipal Corporations Act (12 of 1978), S. 2). (Para 15)

(E) Bihar Municipal Corporations Act (12 of 1978), Section 2 (3) (d) — Constitution of Municipal Corporation on dissolution of existing Municipality and Gram Panchayats — No necessity to invite objections from Municipality and Panchayats — Deletion of words "proposed to be" from Section 2 (3) (d) — Amounts to excluding rule of natural justice — Requirement as to inviting objections contemplated under provisions of Municipal Act and Panchayat Act cannot be read into Corporations Act — Doctrine of telescoping not applicable — No necessity also to follow procedure for superseding a municipality as no stigma involved in constituting corporation. (i) Bihar and Orissa

Municipal Act (7 of 1922), Sections 4, 5, 6, 385 — (ii) Bihar Panchayat Raj Act (7 of 1948), Section 3 (3) — (iii) Interpretation of Statutes — Doctrine of telescoping). (Paras 17, 18, 21)

(F) Bihar Municipal Corporations Act (12 of 1978), Section 2 — Constitution of Municipal Corporation on dissolution of existing Municipality and Gram Panchayat — An act of general public interest — Seating members deprived of their rights to enjoy full term — Does not amount, in larger interest, to suffering civil consequences — Principle of natural justice not violated. (Constitution of India, Article 226; Words and Phrases — Civil consequences, Public interest; Administrative action — Civil consequences).

When a new Municipal Corporation is constituted on dissolution of the existing Municipality and Gram Panchayats, the seating municipal councillors and members of Panchayats would be deprived of their rights to continue as such for the full term. However, taking pragmatic view the consequences which they may suffer will be such a small drop in the ocean, that in the larger interest it should be held that they also do not suffer from any civil consequence. (Paras 20, 22, 24)

Whenever any act, even beneficial is done, it is hardly possible to find that somebody has not suffered. If there is a gain to the mass the loss to a few individuals is insignificant. The civil consequences of a few individual should not be considered in isolation, where any act is for benefit to the general public. (Para 20)

(G) Constitution of India, Article 245 — Conditional legislation and delegated legislation — Distinction.

In a conditional legislation the law is complete in itself and certain conditions are laid down as to how and when the law would be applied by the delegate. In other words, the delegate, has only to be satisfied if what it is going to do, is in conformity with the conditions laid down in the law. On the other hand, in a delegated legislation only some broad principles and policy are laid down and the details have to be filled up by the delegate namely the State Government. Thus when a law authorises the State Government to frame rules for carrying on the purposes of the Act, those rules that are

framed are under delegated powers, and it is only when those rules are framed that the Act becomes complete. In such cases while framing the rule if the delegate exceeds the limits and does beyond the principle and policy it will be hit by the vice of excessive delegation. Where, however, the legislation is complete in itself and the delegate has only to act within the framework of the same it cannot but only a case of conditional legislation. AIR 1957 SC 510 and AIR 1960 SC 554, Followed.

(Para 23)

(H) Bihar Municipal Corporations Act (12 of 1978), Sections 1, 2 — Constitution of Municipal Corporation — Conditions precedent laid down in Act itself — The Act is a piece of conditional legislation and not delegated legislation — Opportunity of hearing to people not necessary before constituting municipal corporation. (Constitution of India, Articles 226, 245). (Paras 23, 24)

(I) Bihar Municipal Corporations Act (12 of 1978), Sections 1 and 2 — Constitution of Municipal Corporation on dissolution of existing Municipality and Gram Panchayats — No violation of Articles 14 and 21 of the Constitution — No deprivation of citizen's right of franchise thereby. (Constitution of India, Articles 14, 21). (Paras 25, 27)

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Chunni Lal, Government Pleader No. 5	

and Santosh Kumar Jr Counsel to Government Pleader (in C. W. J. C. No. 1391 of 1981), for Respondents. Radha Raman (in C. W. J. C. No. 1324 of 1981), for the Caveators.

V. MISHRA, J.:— These are applications under Articles 226 and 227 of the Constitution of India for quashing Annexure 1 which is copy of a notification declaring constitution of municipal corporation at Muzaffarpur and also for quashing the order appointing Sri Madan Mohan Jha respondent No. 7 as Administrator of the Municipal Corporation (copy of order not annexed). Since the reliefs sought in both the applications are the same, they have been heard together.

2. The petitioners of C. W. J. C. No. 1324 of 1981 are the Chairman and the Commissioners of the erstwhile Muzaffarpur Municipality. Through a petition filed on 11-5-1981, 19 persons came to intervene out of whom 9 are Mukhiyas and 6 are surpanchas of some of the Gram Panchayats which have been included within the limits of the Corporation. There is also one punch of a Gram Panchayat. Petitioners Nos. 16 and 17 are the Secretary and General Secretary of the Taxation Bar Association, Muzaffarpur, petitioner No. 18 is the General Secretary of the Bar Association, Muzaffarpur and petitioner No. 19 is the Convenor of Sawami Sahajara and Saraswati Smarak Samiti. They also support the original petitioners. On the date of the admission of the application itself a caveat was filed by 9 persons of whom caveator No. 9 ultimately backed out. They include the Vice-President of the Bar Association, Muzaffarpur, Chairman Citizens Assistance Council, Secretary District (Cong. I) Committee, Chairman, Town Congress Committee, two Mukhiyas and two villagers. They oppose the application. The petitioners of C. W. J. C. No. 1391 of 1981 are two Mukhiyas of Gram Panchayats. Their case is also same as of the petitioners of the other case. Amongst the respondents, apart from State of Bihar and certain officers, Dr. Jagannath Mishra, Chief Minister of Bihar and Sri Ramesh Jha, Urban Development Minister, Government of Bihar have been specially named. There are certain allegations of malice against the Chief Minister.

3. The notification (annexure 1) dated 16-4-81 has been issued by respondent No. 1 (State of Bihar) in exercise of powers under Section 2 of the Bihar Municipal Corporations Act (Bihar Act 12 of 1978) (hereinafter referred to as the Corporation Act). This is a general Act under which a municipal corporation can be established in any city. According to sub-section (3) of Section 1, it can come into force in any city having a population of 2 lakhs or more. Section 2 of the said Act authorises the State Government to include in the corporation any area of a municipality or notified area committee, or any other areas as may be specified in the notification. The last census records the population of Muzaffarpur Municipality as 1,89,765, which is less than 2 lakhs. Hence in order to make up the population, the State Government included some suburbs of the city, in which Gram Panchayats existed from before. The total population of the corporation thus records more than 2 lakhs. Annexure 1 (the notification) gives the boundaries of the additional areas included within the Municipal Corporation.

4. Before issuing the said notification an enquiry was made from the Commissioner of Muzaffarpur in this regard. Annexure 3 is the copy of the letter dated 14th April, 1981, written by the Deputy Secretary of the Urban Development and Housing Department to the Commissioner of Muzaffarpur. The letter says that there is a proposal to upgrade the Muzaffarpur Municipality but the same can be done only if its population be 2 lakhs or more. Hence the population of Muzaffarpur Municipality was required from him. He was further told for considering if the corporation could be constituted only of the area within the Muzaffarpur Municipality or it would be necessary to include some other areas which might have assumed urban character. A map of the proposed corporation area was also required. Annexure 4 is the copy of the reply of the Commissioner dated 9-4-1981 giving the population of Muzaffarpur Municipality as one lakh eightynine thousand and odd. The Commissioner gave the details of the suburban areas which have assumed urban colour and recommended for including them within the limits of the corporation. It was also

mentioned that the suburban areas suggested to be included fell within the jurisdiction of Muzaffarpur Improvement Trust. A map and details of the areas to be included were all given. It was first placed before the Cabinet on 14-4-1981 as would appear from Annexure 5, but it was postponed. Ultimately on a fresh memorandum it was again placed on 12-5-1981 when it was approved as would appear from Annexures B1 and B2 to the supplementary counter-affidavit of the respondents. Annexure 1 is the notification which followed after the said Cabinet approval. Respondent No. 7 was appointed Administrator and he took charge on 18-4-1981 i. e., within two days of the notification.

5. The petitioners namely Chairman and Commissioner of the Muzaffarpur Municipality and the Mukhiyas of the Panchayats, who are all elected office-bearers have challenged the constitution of the Muzaffarpur Corporation on the ground that their period to continue in their respective offices have been cut short by taking recourse to an undemocratic method. Petitioner No. 1 of C. W. J. C. No. 1324 of 1981, Sri Raghunath Pandey, the Chairman of the Municipality, has attributed motive to the Chief Minister, respondent No. 2, for this action. The details of mala fide have been given in paragraphs 7 to 16 of his petition. It is said that both the Chief Minister and the Chairman belong to the same party but there had been some difference between them on account of implementation of 20 point programme. On account of that difference, the Chief Minister perhaps became hostile to him and started creating impediments in the smooth functioning of the municipality. An Executive Officer (Sri Saran) was posted against his will who was not functioning properly and honestly. Sri Pandey had also filed C. W. J. C. No. 1193 of 1981 pointing the mala fides in the posting of that Executive Officer. In March, 1981 the petitioners had sent a memorandum to the Prime Minister charging the Chief Minister of his acts and omissions. The Chief Minister, it is said, getting annoyed on account of that, had deputed some vigilance officers to report against the working of the Municipality but they failed to find anything

against it. When however the Chief Minister did not succeed in his attempt, he is said to have taken recourse to this indirect method which amounts to supersession of the municipality without observing the rules therefor, and that also in such great haste that his mala fide intentions have been exposed. In support of his application it has also been mentioned that there are four towns namely Jamshedpur, Gaya, Bhagalpur and Bokaro which have population of more than two lakhs each, but none of them was touched, whereas the Municipality of Muzaffarpur which had not the required population was made a corporation—obviously because of personal grudge of the Chief Minister against the Chairman.

6. So far the Gram Panchayats are concerned under the Bihar Panchayat Raj Act, 1947 (hereinafter called P. R. Act) there is a specific provision for seeking opinion for including any area in or excluding any area from a Panchayat. It has been urged that by including certain panchayats within the limits of corporation, there has been violation of the above provisions of the P. R. Act. Similarly so far municipal area is concerned, there is a provision under the Bihar and Orissa Municipal Act (hereinafter called Municipal Act) for seeking opinion for constituting a municipality or altering its areas. That law also is said to have been violated by an undemocratic method. There is no dispute on the point that the opinion of the people residing out of the municipal limits or within the panchayat was not taken in any manner. Further argument has been that it was their fundamental right to continue till their term of election and if that has been infringed that would amount to civil consequence, and as such, even in administrative action, rule of audi alteram partem (a rule of natural justice) was required by law to be followed, which was not followed, and hence constitution of the corporation must be struck down. It has also been argued that the suburban areas included in the corporation do not at all bear any urban character and as such they could not have been included in the corporation. The action of the State Government is also said to be in violation of Arts. 14, 19 and 21 of the Constitution.

7. After the Advocate General had concluded his argument or behalf of the respondents a supplementary affidavit on behalf of the petitioners was filed which was not accepted on the objection raised by the Advocate General.

8. Counter-affidavits have been filed on behalf of the respondents in both the cases. It is admitted that the population of Muzaffarpur Municipality fell short of the requirement for converting it into a municipality (Corporation?) and so the suburban areas were included to make up the requirement. It is, however, stressed that the suburban areas included have all assumed urban character and the total population has become more than two lakhs. Such inclusion is claimed to be permissible in law. The suburban areas are said to be electrified, they have pitched roads, some have drainage and water supply, and most people are engaged in non-agricultural work. The names of quite a number of firms falling within the suburban areas have been given in para 4 of the counter-affidavit. So far the letters written to the Commissioner and the reply thereof are concerned they are claimed to be bona fide. All allegations of mala fides against the Chief Minister have been refuted. A corporation is said to have been established at Bhagalpur on the very date on which Muzaffarpur corporation was constituted. A corporation at Ranchi and Gaya were also under active consideration (perhaps corporation at Ranchi has already been constituted). As for Jamshedpur and Bokaro it is said that they are industrial towns and are so well managed that it has been not considered necessary to bring them within any corporation. It is said that this is a case of upgradation of municipality and the law does not require any seeking of opinion for the same. The creation of the corporation is said to be in the interest of the general public as it is bound to bring all round improvement in the area. Violation of any article of the Constitution is denied.

9. The caveators have also shown their happiness over the creation of the corporation. They have also enumerated a number of institutions which lie within the suburban areas (para 4 of their petition). Sri Radha Raman who has argued on their behalf has support-

ed the learned Advocate General appearing for the respondents.

10. Mr. P. R. Mridul who advanced the main argument on behalf of all the petitioners supplemented by Sri Balbhadra Prasad Singh raised the following points:—

(1) The notification Annexure 1 is ultra vires of the Corporations Act because:

(a) the city of Muzaffarpur had not the population of 2 lakhs.

(b) the suburban areas could not be included, as they do not bear urban character.

(c) the areas of Gram Panchayats were also included in violation of the provision of the P. R. Act.

(d) when the alteration of the existing boundaries of the municipality were involved the provisions of Sec. 2 (3) of the Corporations Act were attracted which were not followed.

(2) Since civil consequence of the petitioners are involved and since it is a case of delegated legislation the principles of natural justice are attracted which have not been followed.

(3) If the rules of natural justice be excluded Section 2 (1) of the Corporations Act will become unconstitutional as being violative of Articles 14 and 21.

(4) The notification is factually arbitrary and is hit by Article 14 of the Constitution.

(5) The mala fide motive of the Chief Minister has vitiated the entire action.

11. For appreciating the first point (page 8) it is necessary to refer first two sections of the Corporations Act. The English rendering of the sections is as follows:—

"1. Short title, extent and commencement.— (1) This Act may be called the Bihar Municipal Corporations Act, 1978.

(2) It shall extend to the whole of the State of Bihar.

(3) It shall come into force in any city having a population of two lakhs or more on such date as the State Government may appoint by notification and different dates may be appointed for different cities.

2. Constitution of corporation and specification of the area thereof.— (1)

The State Government may, by notification in the official Gazette, declare any area, including the area of any Municipality or Notified Area constituted under the Bihar and Orissa Municipal Act, 1922 (Bihar and Orissa Act 7 of 1922) with such other areas as may be specified therein to be a Municipal Corporation, which shall be known by the name assigned to it by the State Government.

(2) The State Government may, from time to time, by notification in the official Gazette, alter the limits of such Municipal Corporations so as to include therein or exclude therefrom such area or areas as may be specified in the notification.

(3) The notification under sub-section (2) shall be issued subject to the following conditions, namely:—

(a). A draft of the proposed notification shall be published in the official Gazette for the information of all persons likely to be affected thereby inviting objections and suggestions, within six weeks from the date of such publication of the said draft;

(b) On expiry of the said period of six weeks and after considering any objection or suggestion which may be received by the State Government within the said period, the State Government may make such amendment in the draft or alter the boundaries of the Municipal Corporation (proposed to be) established under sub-section (1) of this section as it may consider necessary".

The words "proposed to be" within brackets under Cl. (b) of sub-section (3) of Section 2 have been omitted with retrospective effect and, therefore, these words have not to be read. The petitioners have also not based any argument on these words. We have, therefore, to take this section as if the words "proposed to be" within brackets are not there.

12. From Section 1 (3) it would appear that provision of the Act in question can be applied. "in any city having a population of two lakhs or more". At this stage I may also refer to the long title which shows that the Act was provided "for the establishment of the Municipal Corporation for big cities in the State of Bihar". But what is a 'big city' is shown by sub-section (3) of Section 1, according to which it would be

a city having a population of 2 lakhs or more. Undisputedly the erstwhile Muzaffarpur within its municipal limits had a population of about 10,000 less than that what is required, and so ordinarily a corporation could not have been constituted, but there is another relevant clause in sub-section (3) itself and that gives the date on which the population should be 2 lakhs or more, and that date is the date of notification. It, therefore, comes to this that on the date of notification the population should be 2 lakhs or more. Obviously the difficulty, if for any reason the Government choose to have a corporation at any place lesser population, can be overcome by extending the area of the city itself. Whether this can be legally done or not is provided in Section 2. This section says which areas can constitute a corporation. The opening sentence itself shows that corporation may be declared for "any area". It is further made clear by saying that it may include (a) the area of any municipality or notified area and (b) such other areas as may be specified therein (underlining mine). If the population of the municipal area of the notified area falls short of the required population "such other" areas round about it may also be included in the corporation for making up the deficit population. After including such other areas in any municipal area if the population comes to 2 lakhs or more, the requirement of the law will be deemed to be met for constituting the corporation. Exactly that has been done in the instant case. When the area of Muzaffarpur municipality was found to be less than 2 lakhs, about 19 Gram Panchayats have been added. So on the date of the notification the city consists not only of the municipal limits of Muzaffarpur but also of the suburban areas included in the notification. Prima facie, therefore, the notification is quite in order.

13. It has, however, been contended on behalf of the petitioners that the suburban areas added could not have been legally added. The argument is that by bringing them in corporation that area becomes a part of a city. A city as contemplated in the booklet 'Census of India 1981' given to us, is a town having population of 1 lakh or more. So the city in turn becomes a

town. What is a city and what is a town has been the subject matter of discussion in an unreported Bench decision of this Court in C.W. J. C. number 3302 of 1979, D/- 14-10-1980: (Since reported in AIR 1981 Pat 236) in the case of Kamakhya Narain Singh v. State of Bihar. That is a case where a writ was filed in respect of the constitution of the corporation at Ranchi. After referring to certain authorities and the Patna Municipal Corporation Act it has been held that the word town has to be understood in the same sense in which a common man understands it, the houses must be in clear proximity, there should be concentration of large number of people in comparatively small areas, and the engagement of the bulk of the population be non-agricultural pursuits. On basis of this the parties have conceded that the inclusion of suburban areas would be quite justified if they have assumed urban character. It is, therefore, for consideration now if the areas added to the limits of the Muzaffarpur Municipality bear urban character or not. This is a question of fact and the State Government have to be satisfied about their bearing urban character before including them within the limits of the corporation. Of course it is not for this Court to take evidence on this question from both the parties and come to its independent decision. On the materials placed on affidavit the Court can find if the State Government were justified in holding that those areas had come to assume urban character. The caveators in paragraphs 3 and 4 of the caveat have said that the areas included are mostly within the radius of about 4 to 5 miles of the heart of the town. The newly added areas according to them contain various institutions and offices like L. N. Mishra Institute of Business Management, office of the Director of the Animal Husbandry, M. E. Singh Science College, Medical College, Aerodrome, office of the Chief Engineer, Gandak Project, Engineering College, police line etc. etc., The counter-affidavit on behalf of the respondents also shows in paragraph 4 that they are all urbanised, electrified connected with pitch road at various places, some of them having drainage and water supply and other facilities. It also says that quite a

number of factories, schools, mills, shops, police line, furniture mart, cold storage, housing colony, aluminium factory etc. etc. are there. Over and above, it has been said that the people there are engaged mostly in non-agricultural works.

Reference may be made to Annexures 3 and 4 of the petition through which enquiry on the point was made by the State Government and reply was given by the Commissioner of Muzaffarpur. In Annexure 3, the State Government had said that if the population of Mazaffarpur Municipality be less than 2 lakhs only such area could be included which are taking the shape of town. The Commissioner in Annexure 4 while suggesting the areas which could be added has clearly said that "ye sabhi gram sahari parivesh dharan karte hain tatha vyavaharik drishtikon se mukhya saher ke ang hain" i. e., they have assumed urban character and from practical point of view they are part of the main town. It has further been said that the newly added portions were also within the then Muzaffarpur Improvement Trust. Further after these writs were filed an enquiry also seems to have been made as would appear from Annexure A to the counter-affidavit. That is a letter written by the State Government to the Advocate General reiterating the old information that they had assumed urban character. In this annexure also there are details of any number of industrial undertakings, institutions and mills etc., situated within the newly added areas. These assertions have not been refuted before us. I may, however, repeat that after the close of the respondents' argument, a rejoinder to the counter-affidavit was given, which being objected to by Advocate General has not been accepted, and we have therefore not looked to the same even though Mr. Mridul wanted to refer to it.

14. Mr. Mridul argued that the area of culturable land in the suburban area is so huge that it will constitute about 90 per cent of the total area of the corporation and that being agricultural it cannot be said to assume urban character. I am afraid there is no valid material before us to enable us to give any finding on this argument. Whatever land may be there it may be continued to be cultivated. If the people have been urbanised, if so many insti-

tutions are there the natural conclusion would be that the area has acquired urban character. At this stage itself reference was made to Article 48 of the Constitution which requires the State to endeavour to organise agriculture and animal husbandry on modern and scientific lines. It was argued that the agriculture of the area is likely to be ruined if it is brought within the corporation. The Constitution, however, requires efforts for organising agriculture on modern and scientific lines: the chances thereof are surely better if the area is within corporation. Hence Article 48 of the Constitution is not violated by bringing suburbs within the corporation limits. In my opinion, therefore, the suburbs added bear urban character and the State Government have rightly satisfied themselves on the point.

15. It has further been argued that the inclusion of the Gram Panchayat is in violation of P. R. Act. Section 3 of that Act deals with the establishment and constitution of the Gram Panchayat. The first two sub-sections deal with initial constitution of the Gram Panchayat and the next two sub-sections deal with inclusion and exclusion of any portion from that area. For better appreciation I would quote the first four sub-sections of Section 3 of the P. R. Act. They are as follows:—

"Establishment and constitution of a Gram Panchayat:—

(1) For every village or part of different villages, the Government may, by notification, establish a Gram Panchayat:—

Provided that the Government may, if it thinks fit, establish one Gram Panchayat for a group of contiguous villages or more than one Gram Panchayat in a big village consisting of several Tolas.

(2) The Government shall specify the name and the local limits of the jurisdiction of Gram Panchayat in the notification mentioned in sub-section (1).

(3) The Government may, by notification in the official Gazette, alter the local limits of the jurisdiction of any Gram Panchayat by including therein, or excluding therefrom, any village or part of a village and also alter the name of such Gram Panchayat:

Provided that before making any alteration in the local limits of the jurisdiction of any Gram Panchayat, the Government shall, in the prescribed manner, ascertain the views of the people of the area affected by such alteration.

(4) Upon the issue of a notification under sub-section (3), the Gram Panchayat shall be deemed to have been established under sub-section (1) with its local limits so altered."

It would appear from sub-sections (1) and (2) that the Government may straightway issue a notification constituting a Gram Panchayat for a group of contiguous villages or may constitute more than one Gram Panchayat in any big village consisting of several tolas. The name and local limit of jurisdiction will have to be given in the notification. Thus there is no provision for eliciting the opinion of the public regarding the constitution of the Panchayat. But if after constitution any area is sought to be included or excluded the Government have to ascertain the views of the people of the area affected by such alteration as required by sub-section (3) quoted above. Mr. Mridul has contended that bringing the Panchayat within the fold of the corporation amounts to altering the areas and so it was incumbent on the State Government to ascertain the views of the people of that area. The Advocate General on the other hand has argued that this provision is applicable only where an area is desired to be taken out from one panchayat and put in another panchayat and not in a situation where the entire panchayat is included within a corporation. He has relied upon certain cases where actually some areas from one panchayat were put in another panchayat but instead of issuing one notification of exclusion and inclusion two notifications were made defining the limits of the two panchayats. It was held that in such situation it was not necessary to obtain the views of the people. It all depends upon the notification that is issued. The cases referred to are reported in 1965 B. L. J.R. 227 (Ramautar Mahton v. Sub-divisional Officer, Begusarai 1965 B. L. J. R., 397 (Daroga Singh v. State of Bihar) and 1966 B. L. J. R. 779 (Brajlal Prasad v. State of Bihar). The first two are single Judge cases but the third one is a Division Bench. Brijlal Prasad's case

was dismissed on the ground of delay but the earlier two single Bench decisions have also been noticed. Mr. Mridul has challenged these decisions on the ground that there is violation of natural justice by taking recourse to such a method, and merely issuing two notifications in a different garb instead of one, gives the colour of contrivance which is unconstitutional. The learned Advocate General has submitted that if the notification can be supported by the P. R. Act it can never be said that they are unconstitutional until and unless the provision itself held to be ultra vires. The argument of the Advocate General is supported by the decision of this very Court and as such it cannot be said that issuing of notification would be unconstitutional. It would thus follow that the opinion of the Panchayats as or in the manner laid down in sub-section (3) of Section 3 of the P. R. Act, was not required to be elicited before including those panchayats within the limits of the corporation, and the notification (Annexure 1) is not in violation of any provision of the P. R. Act. Attention was also invited to Article 40 of the Constitution which says that "the State shall take steps to organise village panchayat and endow them with such powers and authority as may be necessary to enable them to function as unit of self-Government". It has been argued that the directive principles require the State to develop panchayat as unit of the self-Government, and hence it would be against the directive principles to obliterate the Gram Panchayat by bringing them within the fold of corporation. The argument is not appealing because it could never be the intention of the constitution, while laying down directive principles, to rule the whole country through panchayats and panchayats alone. If the intention in any act of the State Government be to stultify the progress of the gram panchayat, then of course Article 40 might be attracted but where better privileges are given to particular area, better administration and all round improvement is envisaged in any act, I do not think Article 40 is in any way offended. If of course the constitution of the corporation is held to be unconstitutional the question would be otherwise.

16. It has further been urged that the constitution of the corporation means alteration of the existing boundaries of the municipality and in that view the provision of Section 2 (3) of the Corporation Act should have been followed which was not done. Attention has been invited to Sections 4, 5 and 6 of the Municipal Act in this regard which run as follows:—

"4. Declaration of intention to constitute or alter limits of municipality.—

(1) (a) When the State Government is satisfied that three-fourths of the adult male population of any town are engaged on pursuits other than agricultural and that such town contains not less than five thousand inhabitants, and an average number of not less than one thousand inhabitants to the square mile of the area of such town, the State Government may declare its intention to constitute such town, together with or exclusive of any railway station, village, land or building in the vicinity of such town, municipality, and to extend to it all or any of the provisions of this Act.

(b) When the State Government is satisfied that any municipality, or any area in a municipality, does not fulfil the conditions specified in clause (a), or when the Commissioners at a meeting have made a recommendation in this behalf, the State Government may declare its intention to withdraw such municipality from the operation of this Act, or to exclude such area from such municipality.

(c) When the Commissioners at a meeting have made a recommendation in this behalf, the State Government may declare its intention to include within a municipality any area contiguous to the same or to subdivide any municipality into two or more municipalities.

(d) When the Commissioners of each of the municipalities concerned at a meeting have made a recommendation in this behalf, the State Government may declare its intention to unite two or more municipalities so as to form one municipality.

(2) Every declaration under this section shall be published in the Official Gazette and in such other manner as the State Government may direct.

(3) If any part of a town or local area affected by any declaration under this section is a cantonment or part of a cantonment, no declaration under this section shall be made.

5. Consideration of objections.— The State Government shall take into consideration any objection submitted through the District Magistrate within six weeks from the date of the publication of a declaration under Section 4, by any inhabitant of the town or area, or any rate-payer of the municipality concerned, and in the case of a declaration under clause (a) of sub-section (1) of the said section, by the district board of the district in which the town is situated.

6. Constitution, abolition or alteration of limits of a municipality.— The State Government may thereupon by notification—

(a) constitute the town or any specified part thereof a municipality and extend to it all or any of the provisions of this Act, or

(b) withdraw the whole area comprised in the municipality from the operation of this Act, or

(c) include the local area or any part thereof in the municipality or exclude it therefrom, or

(d) subdivide the municipality into two or more municipalities, or unite the municipalities as the case may be."

The Government before constituting municipality for any town has to declare its intention together with or exclusive of any railway station, village, land or building in the vicinity of such town. Under Section 5, the Government has to consider any objection submitted through various agencies. It is after consideration of those objections that the notification constituting the municipality issues under Section 6. Section 4 (1) (b) (c) and (d) contemplates inclusion or exclusion of any area from an existing municipality. It is the recommendation of the Commissioners which is of importance in this regard. Section 6 contemplates even a notification in regard to inclusion or exclusion. Mr. Mridul has argued that inclusion or exclusion would mean alteration of the area and if it has to be altered by any means, it can be done only in the manner contemplated by Sections 4, 5 and 6. By bringing the whole municipi-

pality within the corporation and by adding some suburban areas the State Government have, as argued, adopted a contrivance for by-passing the law for changing the limits of a municipality. The learned Advocate General has, however, contended that the argument could have force only if Muzaffarpur municipality had been allowed to continue as a municipality, and the provisions mentioned above have no application at all in a case like this, when the constitution of a corporation is under the Corporation Act which does not provide for any such notification declaring the intention and inviting objections. Of course the intention of the State Government in this regard is further made clear by the repeal of the words "proposed to be" from Section 2 (3) (b) of the Corporation Act as mentioned in para 11 of this judgment. When the legislature has laid down an unambiguous law, it is submitted, there is no use to trying to camouflage it with reference to the provisions of any other Acts.

17. Mr. Mridul has further contended with reference to the provision of the Municipal Act and P. R. Act already discussed that when the legislature enacted the Corporation Act but did not lay down a rule for inviting objection from existing municipalities and panchayats in respect of alteration of other areas, it would be presumed that the legislature did not desire to depart from the existing requirements (under P. R. Act and Municipal Act) while constituting the corporation under the Corporation Act. In this view propounded by him, it was argued that sub-sections (2) and (3) of the Corporation Act (inviting objection for including or excluding any area from the corporation and disposing them of) would be attracted even when the initial notification of constitution of the corporation under Section 2 (1) is made. To use Mr. Mridul's words, sub-sections (2) and (3) of Section 2 telescope into sub-section (1). This principle of telescoping is said to be a well recognised method of interpretation and it is in consonance with the doctrine of pragmatic construction and contemporaneous construction. I am afraid these doctrines have no application in the instant case when the legislation is unambiguous on the point — particularly

made unambiguous by the repeal of the words "proposed to be" from Sec. 2 (3) (d) of the Corporation Act. When there was a provision in the Municipal Act for inviting objection, and if the legislature would have desired to have those provisions even while constituting corporation, there was no impediment in the way of legislature in specifically providing for it.

18. On behalf of the petitioners our attention was also invited to Section 385 of the Municipal Act which runs as follows:—

"Power to supersede Commissioners in case of incompetency, default or abuse of powers—

If, in the opinion of the State Government, the Commissioners of any municipality are not competent to perform, or persistently make default in the performance of the duties imposed on them by or under this Act or otherwise by law, or exceed or abuse their powers, the State Government may, by an order published with the reasons for making it, in the Official Gazette, declare such Commissioners to be incompetent or default or to have exceeded or abused their powers, as the case may be, and supersede them for a period to be specified in the order or may, after giving notice to the Commissioners of its intention, by a like order, direct that the offices of the Commissioners shall be deemed to be vacant as from a date to be specified in the order and that a fresh election shall be held on or before that date".

On basis of this it has been argued that the constitution of the corporation at Mazaffarpur means supersession of the municipality, but for superseding the municipality certain conditions are laid down in Section 385, and unless they are fulfilled the municipality could not be superseded, and if it ceases to exist by the notification of the corporation, it amounts to the supersession of the municipality by a contrivance which is unconstitutional. This argument is also challenged on the very same ground on which the arguments based on Sections 4, 5 and 6 of the Municipal Act have been refuted. Obviously the situation envisaged in Section 385 of the Municipal Act is quite different from the situation under which corporation is constituted. While the situa-

tion in Section 385 gives strong stigma to the commissioners, no such stigma is involved against them in constitution of corporation.

19. It would thus appear that the grounds on which the vires of the notification (annexure 1) is challenged are not tenable in law and as such the notification is not ultra vires but intra vires the Corporation Act.

20. Coming to the second point (at page 9 of the judgment) with the creation of the corporation, the municipality and some gram panchayats have no doubt ceased to function. The Chairman and Members of the Committee as also the Mukhiyas had a right to continue for the period they were elected. They were endowed with certain rights and burdened with certain responsibilities, all of a nature commanding respectful regard from the public. Therefore the consequences they may personally suffer may be civil consequences. The question however is as to whose civil consequences will be taken into account — those of a few persons who may choose to come to Court of law, or of the mass which is going to be affected or benefited in other words it should be for examination if the general public will be benefited by the corporation or they will suffer on account of it. Whenever any act, even beneficial is done, it is hardly possible to find that somebody has not suffered. If a pitch road is constructed the bullockcart-walas who had a right to carry their own profession suffer. When buses are allowed to ply on the road the rickshaw-walas do suffer. When tram-lines are laid, the bus-owners suffer. When circuit Bench of High Court is created at any place the counsel of the parent Court suffer and raise their voice against it. When a new school or college is opened, the older institutions suffer, as the students who would have usually gone there, go to new institutions. When a new district is carved out some residents of parent district do suffer. Similar is the case when a new judgship is carved out from an old one. But in all these cases it is the advantage to the general public which is kept in view. If there is a gain to the mass the loss to a few individuals is insignificant. The civil consequences of a few individual should not be considered in

isolation, where any act is for benefit to the general public. It was argued that the villagers of the area included within the corporation have their own right of cultivating their lands, which they might lose by bringing the area within the corporation. This argument does not cut any ice, because whether it is a corporation or a municipality or a village, if the land is agricultural no body can be stopped from cultivating it: rather by bringing it under corporation, better facilities of cultivation may be made available to them. In cases like this, therefore, a pragmatic view of the whole thing should be taken. The inspection hole should not be narrow. The Chairman and the Commissioner may also have better chances and better prospects with the corporation coming in. There will be so many electoral posts for which they may contest and those who succeed will certainly have higher status than the present one. What would have happened if the population of Muzaffarpur would have been 2 lakhs? The Corporation Act would have applied straightway, the Chairman and Commissioners would not have been heard at all, even though they would have suffered the same consequence, which they are suffering now. How can the same consequence be civil in one case only to enable them to raise the plea? In my opinion whether it is a case of civil consequence or not should be determined on facts of individual cases and the answer to this question must be given after considering not only the rights of a few but the rights of the general public going to be affected, and for the simple gains of a few the advantage to the mass must not be sacrificed. Taking a pragmatic view of the situation, I am of opinion that the consequences which the petitioners may suffer will be such a small drop in the ocean, that in the larger interest it should be held that the petitioners also do not suffer from any civil consequence.

21. Certain authorities have been cited to say that where civil consequences follow the rule of natural justice (*audi alteram partem*) has to be followed even in an administrative action. Assuming for the sake of the argument that the petitioners will suffer civil consequences in this case, I

would show with reference to the authorities cited that they are absolutely different on facts and have no application to the present writ applications. Before I proceed to discuss them I would like to emphasise on the point that in all the cases which have been cited it will be found that by the impugned action either a stigma had been caused on the person affected or some specific provision had been violated directly or indirectly. No authority has been cited in which the rule of natural justice has been asked to be followed when there is no stigma on the person affected or where there is no violation of any law. I now proceed to discuss the cases in their chronological order.

(i) The first one is the case of *State of Orissa v. Dr. Miss Binapani Dei* (AIR 1967 SC 1269). Dr. Miss Dei had given different dates of birth on different occasions. An enquiry was held on basis of which a notice was given to her by the Health Department, Orissa as to why the Government should not accept April 10, 1907 as her date of birth which was one of the dates given by her. The copy of the report of the Additional Director was not given to her and she was compulsorily retired taking her date of birth to be April 10, 1907. She was entitled to an enquiry under Article 311 of the Constitution. That enquiry was not held. According to rules framed under Article 309, she could not be removed from office before superannuation "except for good and sufficient reasons". It was held by the Supreme Court in such circumstances that because civil consequence followed, rule of natural justice applied. It was no doubt a case of individual and a case where she was entitled to an enquiry under the law. By being asked to retire earlier, a stigma was, no doubt, cast on her. In the instant case, however, no stigma is cast on any of the petitioners of the two cases. This case has, therefore, no application here.

(ii) The other case relied upon is the case of *A. K. Kraipak v. Union of India* (AIR 1970 SC 150). There a special selection board was constituted for selecting officers of the forest department for appointment to the Indian Forest Service. Mr. N. who was an acting Chief Conservator of Forest, Jammu and Kashmir was one of the members

and he was himself a candidate also. Ultimately his name came at the top of the recommendations. Of course Mr. N had not taken part in the deliberations when his name was being considered but he had certainly taken part when his contestants (some of whom were even senior to him) were discussed. Mr. N was a Judge in his own case, which is abhorrent to concept of justice. In this circumstance it was held that there was miscarriage of justice caused by non-observance of the rule of natural justice. Here the natural justice was not the rule of *audi alteram partem* but it was rule according to which Mr. N should not have been a member of the board. It has been mentioned in this very authority that rules of natural justice are not embodied rules and what particular rule should apply to a given case must depend on facts and circumstances of the case. The learned counsel for the petitioners has cited this authority only for showing that in administrative enquiries also rule of natural justice should follow. Selection of Mr. N certainly cast a stigma on officers senior to him. On facts the case is entirely different and has no application whatsoever.

(iii) In the case of Daud Ahmad v. District Magistrate, Allahabad (AIR 1972 SC 896), Daud Ahmad had a house in Allahabad which was requisitioned for the residence of the Chief Justice. Daud himself was residing in another small house. Daud has some difficulty in his small house and he, therefore, requested the District Magistrate to allow him to occupy the house when vacated by the Chief Justice. The Chief Justice also recommended his case. When the Chief Justice vacated the house he made over the same to Daud Ahmad. Some time later, the District Magistrate passed another order of requisition with respect to that house for Justice Mathur. Section 3 of the Requisition Act had a proviso according to which if a man was in actual possession of the house the District Magistrate had to satisfy himself that suitable accommodation existed for him, before requisitioning that house. This enquiry was not done by the District Magistrate. It was held that the requisition was bad as natural justice was violated. In this case there was a specific requirement of *audi alteram*

partem which was not followed. It would thus appear that it was a particular provision laying down the rule of natural justice which had not been followed. This case has also, therefore, no similarity with the present case.

(iv) In the case of Smt. Maneka Gandhi v. Union of India (AIR 1978 SC 597), the passport of Maneka Gandhi was impounded under Section 10 (3) (c) of the Passport Act "in the interest of general public". The reason was not furnished to her. In the counter-affidavit that was filed the Union of India took the plea that if she made a representation against the impounding it would be disposed of within two weeks. The reason for impounding that was given in the counter-affidavit was that her presence was likely to be required in a commission of enquiry. It was observed that even in administrative proceeding which involved civil consequence the principle of natural justice applied. The order of impounding was, however, not interfered with by the Supreme Court in view of the assurance given by the Union of India about the consideration of her representation. As said above, Maneka Gandhi's movements were restricted by the impounding and as such it was necessary to give her an opportunity of showing cause and of being heard. The lacuna was, however, taken as fulfilled by the subsequent opportunity given to her. The present case is quite distinguishable on facts. While Maneka Gandhi had in her possession a passport, the citizens of Muzaffarpur had not got any such thing of which they are being deprived. Upgradation of municipality or even panchayat should not be taken as entailing civil consequences. The petitioners here cannot be said to represent the entire population of the corporation area. They are elected bodies for certain purpose under the Bihar and Orissa Municipal Act or P. R. Act. If at all they suffer any loss that would be absolutely negligible as indicated earlier. Apart from that, if they or the members of any portion thereof are aggrieved by the creation of corporation, there is a provision in the Act for taking that area out of corporation. If, therefore, they have any grievance it is not that there is no provision for redressal. If it be held that in all administrative actions rule of *audi alteram partem* shall be applied, that

can be taken as cured by the provision of exclusion given in the Act itself. In *Maneka Gandhi's* case even when there was no provision the lacuna was taken as filled up by the assurance of reconsideration. This case has also, therefore, no application.

(v) In the case of *S. L. Kapoor v. Jagmohan* (AIR 1981 SC 136) the Lt. Governor of Delhi under Section 12 of the Punjab Municipal Act 1911, as applicable to New Delhi, appointed nine non-officials and four ex officio members of the New Delhi Municipal Committee to hold office for one year with effect from 4-10-1979. On 27-2-1980 a notification issued under Section 238 (1) of the said Act superseding that committee on grounds of incompetence, abuse of powers, wastage of municipal funds etc. *S. L. Kapoor* and another filed writ against supersession but lost. In the appeal before the Supreme Court the main point raised was that the supersession was in violation of the rule of natural justice and total disregard of fair play because no notice to show cause had been given to the committee and the committee had no opportunity to meet the charges. Ultimately it was held that the very wordings of Section 238 (1) contemplated an enquiry before superseding, and since that enquiry had not been held, the notification was bad. Since, however, only a few days more of the life of the committee were left the Supreme Court did not quash the notification. The appellants felt satisfied by the observation itself, as the stigma cast on them was removed. It would thus appear that on facts even this case is entirely different. No stigma is cast on the petitioners.

(vi) Much reliance has been placed in the case of *Swadeshi Cotton Mills v. Union of India* (AIR 1981 SC 818). On April 13, 1978 the Government of India under Clause (a) of sub-section (1) of Section 18AA of the Industries Development and Regulation Act 1951 authorised the National Textile Corporation Ltd. to take over the management of six industrial undertakings which were all cotton mills at different places under the management of Swadeshi Cotton Mills. A writ was filed in the Delhi High Court which was first placed before a Division Bench. At their request it was placed before a larger Bench

(three Judges) and ultimately before a still larger Bench (five Judges) for considering if prior hearing was necessary, in other words, if the principle of *audi alteram partem* was attracted before the undertakings were taken over. In the set up of Section 15 to Section 18AA of that Act the question was whether Section 18AA excluded the giving of a prior hearing. Ultimately it was held that the rule of prior hearing was not specifically excluded rather a prior hearing in the context of that case should have been given. This case is a trump card of Mr. Mridul, but as I am going to show on facts and also on law the case has no application to the instant case. The scheme of that Act has been given in paragraphs 45 to 51 of the report. Section 15 gives power to the Central Government to cause investigation to be made into a scheduled industry or industrial undertaking before taking over the same. So before the industrial undertaking is taken over an investigation has to be made — this is of importance. Section 16 empowers the Central Government to issue proper direction to the industrial undertaking on completion of the investigation. The directions that can be given are all indicated there. The investigation and the directions obviously required sufficient time. It was felt that the Government could not take over the management of any industrial undertaking even in a situation calling for emergent action without first issuing directions to it and waiting to see whether or not they were obeyed. In order to remove such difficulty Sections 18A to 18F were introduced in the I. D. R. Act. Even these provisions were found insufficient to cover certain contingencies and, therefore, Section 18AA was inserted with heading "power to take over industrial undertakings without investigation under certain circumstances". The heading is quite in accordance with the objects and reasons enacted in paragraph 45-50 of the report. Without quoting Sec. 18AA in extenso, it may be mentioned that Government can take over the industrial undertaking without investigation only in certain conditions. Broadly speaking the Government can take action if it is found that the persons in charge have made reckless investments, created unnecessary encumbrance, have brought about a situation

which would affect the production of the articles and if it is satisfied on facts that immediate action is necessary to prevent such a situation. There are other similar conditions (vide para 51 of the report) to which I need not refer. It would thus appear that it is the mismanagement of the firm (a great stigma to it) which gives the power to the Government to take over the undertaking. In that case also there was a survey report on basis of which the Government took a decision (vide para 18 of the report). The Swadeshi Cotton Mills had not been given any opportunity to meet that report. In this context a question had arisen whether Section 18AA excluded the rule of natural justice. The majority view of the Supreme Court was in negative (one Hon'ble Judge dissenting). The features in the reported authority are thus widely different from the features in the instant case. Before discussing the authorities, I have said that they belong to two classes, namely, where a stigma is caused to the person aggrieved or where the law directly or indirectly requires a prior hearing. This case may come within both the categories.

Before parting with this case, I may with advantage refer to the observation made in paragraph 31 of the report which runs as follows:—

"The next general aspect to be considered is : Are there any exceptions to the application of the principles of natural justice, particularly the audi alteram partem rule? We have already noticed that the statute conferring the power, can by express language exclude its application. Such cases do not present any difficulty. However, difficulties arise when the statute conferring the power does not expressly exclude this rule....."

In the instant case, I think that the intention of the legislature to exclude the rule of natural justice is more than clear, and that is shown by omission of the word "proposed to be" from Section 2 (3) (b) of the Corporation Act. If those words had been left there it would have been obligatory on the part of the State Government to seek the view of the people affected. By omitting those words the intention is clear that the legislature did intend to include the provision of eliciting opinion. Eliciting

prior opinion is a rule of natural justice, parallel to or the same as the rule of audi alteram partem. The rule of natural justice is not a codified rule, it varies from situation to situation. "The phrase is not capable of a static and precise definition. It cannot be imprisoned in the strait-jacket of a cast-iron formula" (para 24 of the report — Swadeshi Cotton Mills). Needless to repeat that by constitution of the Muzaffarpur corporation absolutely no stigma is caused against the petitioners (as could have been caused in the case of supersession of the municipality) nor any requirement of law has been violated. The case of Swadeshi Cotton Mills, therefore, also does not help the petitioners.

22. Thus the impugned notification (Annexure 1) does not offend against the principle of natural justice, on the ground that the petitioners would suffer civil consequences.

23. I would now examine if the notification has been issued under a delegated legislation and if it suffers from the vice of excessive delegation. The argument of the petitioners counsel is that if notification has been issued under delegated legislation it may be struck down if the delegation be excessive. Further argument is that in case it is delegated legislation, the rule of natural justice will be attracted. The Advocate General has contended that it is a piece of conditional legislation and not a delegated one, and in such a case the rule of natural justice is not attracted. It has been so held in the case of Tulsipur Sugar Co. Ltd. v. Notified Area Committee, Tulsipur (AIR 1980 SC 882). This position in law as laid down in Tulsipur case is also conceded by Mr. Mridul.

For appreciating the difference between the conditional legislation and delegated legislation reference has been invited to the cases of Inder Singh v. State of Rajasthan (AIR 1957 SC 510) and Hamdard Dawakhana v. Union of India (AIR 1960 SC 554). The distinction pointed being almost the same in both the decisions, I would refer only to the case of Hamdard Dawakhana (para 29 of the report) where it has been observed:—

"The distinction between conditional legislation and delegated legislation is

this that in the former the delegate's power is that of determining when a legislative declared rule of conduct shall become effective : Hampton & Co. v. United States, (1927) 276 US 394, and the latter involves delegation of rule making power which constitutionally may be exercised by the administrative agent. This means that the legislature having laid down the broad principles of its policy in the legislation can then leave the details to be supplied by the administrative authority. In other words by delegated legislation the delegate completes the legislation by supplying details within the limits prescribed by the statute and in the case of conditional legislation the power of legislation is exercised by the legislature conditionally leaving to the discretion of an external authority the time and manner of carrying its legislation into effect as also the determination of the area to which it is to extend....."

"Thus when the delegate is given the power of making rules and regulations in order to fill in the details to carry out and subserve the purposes of the legislation the manner in which the requirements of the statute are to be met and the rights therein created to be enjoyed it is an exercise of delegated legislation. But when the legislation is complete in itself and the legislature has itself made the law and the only function left to the delegate is to apply the law to an area or to determine the time and manner of carrying it into effect, it is conditional legislation....."

It would appear from above that in a conditional legislation the law is complete in itself and certain conditions are laid down as to how and when the law would be applied by the delegate. In other words the delegate, namely the State Government here, has only to be satisfied if what it is going to do, is in conformity with the conditions laid down in the law. On the other hand, in a delegated legislation only some broad principles and policy are laid down and the details have to be filled up by the delegate namely the State Government. To give concrete example, when a law authorises the State Government to frame rules for carrying on the purposes of the Act, those rules that are framed are under delegated powers, and it is only when those rules are framed that the Act becomes complete.

In such cases while framing the rule if the delegate exceeds the limits and goes beyond the principle and policy it will be hit by the vice of excessive delegation. Where, however, the legislation is complete in itself and the delegate has only to act within the framework of the same it cannot but be only a case of conditional legislation. In the instant case the conditions for constituting a corporation are laid down in the Corporation Act itself, and when those conditions are satisfied or are made to be satisfied (in accordance with the Corporation Act), the Act would apply. The State Government have only to see whether the conditions obtain in accordance with the provisions of the Act. Addition of areas is prima facie within the ambit of the legislation under Sec. 2 (1) of the Corporation Act. In the case of Tulsipur Sugar Co. (ibid) the Supreme Court has held that a notification making an Act applicable to a geographical area is in the nature of a conditional legislation and it cannot be characterised as a piece of subordinate legislation. The Corporation Act, therefore, is out and out a piece of conditional legislation and as such the argument advanced by Mr. Mridul in this regard does not need any further consideration.

24. It is thus clear that in the instant case (a) petitioners do not suffer from any civil consequence, (b) even if they suffer, the law of natural justice will not be attracted, and (c) it is not a case of delegated legislation at all : rather it is a piece of conditional legislation, where law of natural justice does not operate.

25. Points 3 and 4 at page 9 of the judgment may be taken up together. It has already been said that the rule of natural justice is not attracted in this case. It has further to be considered if Section 2 (1) of the Corporation Act violates Articles 14 and 21 of the Constitution. That will answer both the points. I would first discuss Article 21 which reads as follows:—

"No person shall be deprived of his life or personal liberty except according to procedure established by law."

There is no question of deprivation of anybody's life or personal liberty here. If by personal liberty the right to carry on the profession or the right to be

governed by village panchayats is concerned, the State has the right to interfere with it by law. I have shown above and I am also going to show hereafter that the Act by which it has been done is quite constitutional. Article 14 of the Constitution runs as follows:—

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India".

Mr. Mridul who has taken both the Articles together has assailed the Corporation Act on the grounds which I am now going to discuss.

(i) The first argument is that Councillor and Mukhiyas will be visited with civil consequence and no procedural safeguard has been provided for regulating the exercise of power of the State Government. This point I have already discussed in detail and hence I need not dwell upon it any further. I may only say that what has been done is perfectly authorised by the Corporation Act.

(ii) The next argument is that the provision is not reasonable because in the cognate statutes namely P. R. Act and Municipal Act there are provisions for safeguarding the interest of the public. In the P. R. Act there is no provision for eliciting opinion of people for initial constitution of the panchayat. In Municipal Act which is of 1922, there is of course some provision, but that does not seem to have been followed in recent years. Even the F. R. Act which is of 1947 has stood the test of time. This argument also therefore, fails.

(iii) The other ground of attack is that, even the people of the suburban areas have a civic right to be governed by a unit of self government of their choice and their right of franchise is their civic right. I do not understand how a citizen can have his own choice of the form of government. I have already discussed the impact of directive principles under Articles 40 and 48 of the Constitution in this case. A gram panchayat cannot say that it will always remain a gram panchayat or it has a right to refuse any better form of self government. This is a matter to be decided by the legislature and so

long the law laid down by the legislature is within the framework of the Constitution it cannot be assailed. The right of franchise of anybody is not being taken away. If one had a right to choose a Mukhiya he may have now a right to choose a mayor or councillor. In this connection reference has also been made to the case of John Wikes from "Parliamentary Practice" by Sir Erksine May, which only shows that the House of Lords recognised the right of franchise of the electors of a particular constituency as far back as 1764. There is nothing to dispute this right. Needless to repeat that the civic right of the inhabitants of Muzaffarpur Corporation are in no way going to be affected. This argument therefore also fails.

26. The notification (Annexure 1) has been characterised as arbitrary because (a) the city of Muzaffarpur had not the required population and recourse has been taken to a collateral device for making up the same, (b) it is contrary to the mandate of Articles 40 and 48, (c) it destroys the village self government, (d) the objects of the Act may be laudable but the means adopted are illegal, and lastly (e) the State Government have not adduced materials before the court and have not given cogent reasons for its action. Except the last one, all the points have already been discussed and rejected. So far the materials and reasons are concerned, the Advocate-General in the course of the argument submitted that formerly the whole of State had been divided into four commissioneries, namely, Tirhut, Patna, Chotanagpur and Bhagalpur. Out of these Patna and Ranchi had already been converted into corporations. Both these were in South Bihar. The Government from administrative point of view thought it desirable to have at least one in the North Bihar also, and with this end in view the case of Muzaffarpur was taken up first, because in North Bihar there is no town with a higher population. Of course simultaneously with Muzaffarpur, a corporation at Bhagalpur was also constituted. When law for constitution of the corporation is satisfied, I think the reasons given by the Advocate-General do deserve consideration. This is a step for satisfying the people of the different parts of the

State. This objection also therefore is to be ruled out.

If the Corporation Act is constitutional and if the notification (Annexure 1) has been issued in conformity with the provision of the Act (as discussed above), the notification cannot be said to be arbitrary.

27. It is thus clear that the Corporation Act is quite constitutional, it does not violate Articles 14 and 21 of the Constitution and the impugned notification (Annexure 1) is not arbitrary and is not hit by Articles 14 and 21 of the Constitution. Both the points are accordingly answered against the petitioners.

28. Coming to the last point at page 9 it has to be considered if the Chief Minister had any mala fide motive in creation of Muzaffarpur Municipality. In the case of Barium Chemicals Ltd. v. Company Law Board (AIR 1967 SC 295) it has been observed that though an order passed in exercise of the power under statute cannot be challenged on the ground of propriety or sufficiency, it is liable to be quashed on the ground of mala fides, dishonesty or corrupt purpose. But the mala fide has to be established by the petitioners to the satisfaction of the court. The only thing worth mentioning is that the Chairman of Muzaffarpur Municipality (petitioner No. 1 in C. W. J. C. No. 1324 of 1981) had political difference with the Chief Minister. That the Chief Minister or the State Government took steps to find out if a corporation could be constituted at Muzaffarpur or if the municipality was running satisfactorily, cannot lead the court to come to a conclusion that the Chief Minister was actuated with any malice in doing so. In the case of S. Partap Singh v. State of Punjab (AIR 1964 SC 72), a Civil Surgeon was victimized by the State Government. The Civil Surgeon was recalled from leave preparatory to retirement, suspended and proceeded against. During his leave, he had obviously sponsored an article in Blitz casting aspersions against the Chief Minister. The Supreme Court felt satisfied that the dominant motive of the Government was to wreak vengeance on him, and hence found the impugned order to be vitiated by mala fides. There is absolutely no similarity between that case and these writ peti-

tions. Mr. Mridul also conceded towards the end of the argument that if the creation of the municipality is otherwise found to be valid the question of malice will become subsidiary and of little importance. He has, however, laid stress on the fact that in the instant case the counter-affidavit should have been sworn by the Chief Minister himself and not by Sri Sayeeduz Zafar, an Assistant in the Urban Development Department. The argument is that the nature of allegations made against the Chief Minister are personal in nature and so the best person to swear the affidavit is the Chief Minister. He has referred to the cases of G. Sadanandan v. State of Kerala (AIR 1966 SC 1925) and the case of Mohammad Ibrahim v. B. Rama Rao (AIR 1976 SC 1822). In the case of Sadanand it has been held that where allegations are specifically made against an authority then if the denial is by anybody else the conclusion should be of mala fide. In the instant case the allegation of political rivalry is too vague to be called specific. In the case of Mohammad Ibrahim an Executive Engineer was reverted as an Assistant Engineer and in the writ filed against that, counter-affidavit was sworn by an Assistant Secretary disclosing some charges. Their Lordships of the Supreme Court deprecated the practice of the affidavits being sworn by the junior officers. Their Lordships hoped that the higher officers of the State Government would cease to utilise lower ones to provide an alibi for their own want of care. In that case the counter-affidavit gave out certain charges against the appellant but in this case there is only denial of the allegation made. It was argued that if the Chief Minister had sworn the counter-affidavit he could have been summoned by the court for cross-examination and the petitioners would have been able to elicit from him the truth about the allegation of mala fide. There is hardly anything which can be called a legal evidence in support of the allegation which needed a specific denial by the Chief Minister personally. Apart from that the deponent of the counter-affidavits has clearly said that it was learnt from the Chief Minister that he had never expressed displeasure with regard to the implementation of the 20 point programme. It is important to refer in this connection to

the application in C. W. J. C. No. 1324 of 1981, para 7 where the Chairman petitioner No. 1 has made personal allegations against the Chief Minister. Though the allegations are personal in nature, the affidavit has been sworn by Sri Asgar Hussain Ajazi, petitioner No. 12, and not by the Chairman himself. Petitioner No. 12 while referring to para 7 has only said in the affidavit portion that it is to his knowledge. Referring to the nature of allegation unless the deponent says that he was present on relevant occasions, it cannot be an affidavit in accordance with law. I fail to understand, when the Chairman himself has not come to take oath, how can he compel the Chief Minister to rebut the same. He cannot be allowed to escape himself and net the Chief Minister. Perhaps realizing this position, Mr. Mridul became lukewarm while arguing this point. In such a situation the creation of corporation at Muzaffarpur cannot be struck down on the ground of mala fides.

29. It would thus appear that all the points urged by the petitioners of both the applications to challenge the constitution of Muzaffarpur corporation (through a notification Annexure 1) have failed. If Annexure 1 has stood the scrutiny of law, the order appointing respondent No. 4 as Administrator of the corporation has also to be upheld. As a matter of fact no argument has been advanced to challenge his appointment if the creation of corporation is upheld.

30. In view of my discussions aforesaid it is clear that there is no merit in any of the writ applications and as such they are dismissed. In the circumstances, parties shall bear their own costs.

S. K. CHOUDHURI, J.:— I agree.

Petitions dismissed.

AIR 1982 PATNA 19

HARILAL AGRAWAL AND

UDAY SINHA, JJ.

Ram Lakhan Mahto, Petitioner v. Mukhdeo Mahto and others, Respondents.

Civil Revn. No. 467 of 1978, D/- 16-7-1981.*

(A) Arbitration Act (10 of 1940), Sections 14 (2), 17 — Agreement between parties for filing award in Court — Arbitrators handing over award to one of parties — Party must be deemed to have implied authority of arbitrators for filing award. (Contract Act (1872), S. 186).

Where the parties had agreed that steps should be taken for filing the award in the Court in accordance with the provisions laid down in Section 14 (2) and the award which was a registered one, was handed over to one of the parties by the Arbitrators, the party must be deemed to have implied authority of the arbitrators for filing the award in the Court on their behalf, or at least under their authority for making the same a rule of the Court, as the authority may be express or implied and this is also provided under Section 186 of the Contract Act. Case law discussed. (Paras 7, 9)

(B) Arbitration Act (10 of 1940), Section 14 — Limitation Act (1963), Art. 119 — Limitation for filing award in court — Award already filed in Court — Limitation would not apply — It applies only to such a proceeding in which a prayer is made for filing of award. (Para 10)

Cases Referred : Chronological Paras
 1977 Pat LJR 309 6
 AIR 1976 Madh Pra 126 9
 1967 BLJR 757 3, 6, 8, 9
 AIR 1963 All 602:1963 All LJ 147 8
 AIR 1953 SC 313 6
 AIR 1929 Pat 178 6

Shreedeva Narayan and Chandra Shekhar Prasad Singh, for Petitioner; Yogesh Chandra Verma and Gopal Shankar, for Respondents.

HARILAL AGRAWAL, J.:— This is an application by the defendant against

*Against order of Jugal Kishore Prasad, 3rd Addl. Sub. J., Arrah, D/- 9-12-1977.

whom an award has been made a rule of the Court at the instance of the original plaintiff who died during the pendency of the case in the lower appellate Court and was substituted by the present opposite parties.

2. Both the parties are descendants from a common ancestor and when a dispute cropped up between them for division of the landed properties, they entered into an arbitration agreement on 30th June, 1962, for getting the dispute resolved by four named arbitrators. The arbitration agreement was also registered. The arbitrators entered upon the reference on 15th July, 1962, and then after taking evidence, gave their award on 18th April, 1963, which was also scribed on stamp-paper on 3rd July, 1963 and registered on the same day. There has been some difference between the parties as to whether on 18th April, 1963, when the decision of the arbitrators was announced, it was already drawn up on a paper or not but, however, in view of the questions that have been raised before us, this fact has no relevancy. Baldeo Mahto, the ancestor of the opposite parties, then filed a title suit, being No. 164 of 1963, in the Court of Munsif I at Buxar along with the registered award itself with a prayer that a decree may be passed in terms of the award. The plaint which contains only six paragraphs and seems to have been drafted in the mofassil, stated that it has been agreed between the parties that the award could be filed in Court in terms of Section 14 (2) of the Arbitration Act for making it a rule of the Court and, accordingly, the award was being filed. The defendant-petitioner appeared on 30th January, 1964. He filed a petition for time to file written statement which was ultimately filed on 4th March, 1964, taking various pleas, namely, (i) the arbitrators have misconducted themselves; (ii) the suit as framed was not maintainable because the award in question had not been filed in terms of the requirements of Sec. 14 (2) i. e. by the arbitrators; and, (iii) the suit was barred by limitation, i. e., under Article 178 of the old Limitation Act corresponding to Article 119 of the new Limitation Act. The trial Court overruled the defendant on all the questions and came to the following conclusions:—

(i) The defendant failed to prove his case of misconduct on the part of the arbitrators;

(ii) There was no defect in filing of the suit; and,

(iii) The delay in filing the suit was fit to be condoned.

3. The defendant then took the matter in appeal to the District Judge, Arrah, which was disposed of by the Third Additional Subordinate Judge, who dismissed the appeal. He has, however, held that the title suit filed by the plaintiff was competent and must be deemed to be a suit under S. 17 of the Arbitration Act for which proposition he placed reliance upon a Bench decision of this Court in *Makeshwar Misra v. Laliteshwar Prasad Singh* (1967 BLJR 757). Although he recorded a finding that there was no sufficient evidence to hold any misconduct on the part of the arbitrators, he did not permit the defendant to raise other pleas on the ground that the written statement was filed beyond the prescribed time and, therefore, it was inadmissible, being time-barred. The defendant has, accordingly, filed the present application.

4. This application was earlier heard by a learned single Judge of this Court and as it appeared to him that there were some conflicting decisions, he referred the matter to a Division Bench and, accordingly, it has been placed before us.

5. Mr. Shreedeva Narayan, appearing in support of this application, has emphatically contended that the title suit as framed and constituted was not maintainable in view of the fact that the award had not been filed by the arbitrators and the plaintiff had not made out any case that he filed the same under their authority. Before I consider to discuss this argument it would be useful to quote sub-section (2) of Section 14 of the Arbitration Act which reads thus:—

"The arbitrators or umpire shall, at the request of any party to the arbitration agreement or any person claiming under such party or if so directed by the Court and upon payment of the fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award, cause the award or a signed copy of it, together

with any depositions and documents which may have been taken and proved before them, to be filed in Court, and the Court shall thereupon give notice to the parties of the filing of the award". From a perusal of the above provision it is obvious that although the initial obligation is on the arbitrators or the umpire to file the award either at the request of any party to the arbitration agreement or any person claiming under such a party or, if so directed by the Court, the provision contemplates that the arbitrators can also "cause the award or a signed copy of it.....to be filed in Court".

6. Mr. Narayan has placed reliance upon two decisions of this Court, the earliest being the case of *Ram Narain Rai v. Lalji Rai* (AIR 1929 Pat 173). This was a single Judge case and the position there was entirely different inasmuch as the award in question was sent to Court by post and none of the arbitrators took responsibility for saying as to who caused the award to be sent to Court; the award was accordingly held to be not properly placed before the Court and, as such, could not be acted upon by the Court. The proposition that an award can be filed by one of the parties itself under the authority of the arbitrators is not res integra and this Court itself in two Bench decisions has maintained this view, one of them being the case of *Union of India v. Binod Behari Singh* (1977 Pat LJR 309), relied upon by Mr. Narayan himself, and the other being the case of *Makeshwar Misra v. Laliteshwar Prasad Singh* (1937 BLJR 757). I would not like to discuss either of the cases in any detail as the Supreme Court has also maintained this view in the case of *Kumbha Mawji v. Dominion of India* (AIR 1953 SC 313) where, in unequivocal term, it was observed that under Section 14 (2) the actual filing by the umpire is not essential and it is sufficient if the umpire causes the award to be filed. We have, therefore, to see as to whether on the facts and in the circumstances it can be held that the plaintiff, Baldeo Mahto, could be said to have the necessary authority in this regard. In the Supreme Court decision, just referred to above, the position was that the umpire had handed over plain copies of the award to both parties. On the evidence that was produced by the

parties, the learned Judges of the High Court were of the opinion that the authority of the umpire empowering the appellant to file the original awards into Court on his behalf had not been made out on the evidence in the case. The learned Judges of the High Court had come to this conclusion on taking into account that the umpire as a person of commonsense could not be supposed to have authorised both the parties to file the awards into Court on his behalf. The Supreme Court expressly recorded its agreement with this reasoning.

7. I have discussed the facts of the case before the Supreme Court in some detail to emphasise the fact that the proposition laid down on the facts of the case was dependent upon the above circumstance. The circumstance in the case before us, on the other hand, is just to the contrary. Here, apart from the averment in the plaint to the effect that the parties had agreed that steps should be taken for filing the award in the Court in accordance with the provisions laid down in Section 14 (2) of the Act, the award which was a registered one, was handed over to one of the parties, namely, the plaintiff and this circumstance appears to me to be a pointer to the implied authority of the arbitrators to the plaintiff to file the same in Court on their behalf or at least under their authority for making the same a rule of the Court. The authority may be express or implied is well-known and this is also provided under S. 186 of the Indian Contract Act. Therefore, it is not necessary to search for any written authority in this case,

8. A Division Bench of the Allahabad High Court in the case of *Hazi Rahmetulla v. Chaudhari Vidya Bhusan* (AIR 1963 All 602), faced with a somewhat similar situation, held that it was open to the Court before which an award is filed to act on the award under Section 17 in the sense of making a decree on the basis of it when the award is filed through the hand of one of the parties and it is not necessary that the award must have come before it as a result of specific proceedings as provided by Section 14, being taken. It was further observed that it was not essential for the party filing the award to allege specifically that it was filing the award under the authority of the arbi-

trator, inasmuch as the question whether a party to arbitration had the authority of the umpire or the arbitrator to file an award in Court as his agent on his behalf is a question of fact and is to be determined on the evidence and circumstances of each particular case. In *Makeshwar Misra's case* (1967 BLJR 757) (supra) A. B. N. Sinha, J. who delivered the judgment for the Bench, also took a somewhat similar view and held that in such a situation the award must be deemed to have been filed not under Section 14 (2) but under Sec. 17 of the Act and the Court was competent to act upon the same.

9. It is not necessary for me to conclusively decide the question as to whether the filing of an award can be treated as having been filed under Section 17 of the Act, as was held by this Court in the case of *Makeshwar Misra* (1967 BLJR 757) (supra), since I have got some reservations on this account. However, as I have already observed earlier that the plaintiffs must be deemed in the circumstances mentioned above to have the necessary authority of the arbitrators for filing the award, their claim must be deemed to be under Section 14 (2) of the Act.

In this connection I may also refer to a Bench decision in *Umraosingh and Co. v. State of Madhya Pradesh* (AIR 1976 Madh Pra 126), where the plaintiff had filed the award along with his application with following averments in paragraph 8 thereof:—

"That the original award received by the petitioner from the arbitrators for filing here in this Court is submitted herewith".

It was held that on these averments the authority of the arbitrators to file the award in Court was implicit.

The fact that the arbitrators had handed the award to the plaintiffs of this case is not in dispute and two of the arbitrators who examined themselves as P. Ws. 5 and 7, were not even confronted in this regard. I, therefore, do not find any substance in the first contention advanced by the learned counsel.

On examining the various decisions as well, mentioned above, I do not find any apparent conflict in them as said by the learned single Judge.

10. The other question which was also argued with some emphasis by Mr. Narayan was that the suit was barred by limitation. This argument is based upon Article 119 of the new Limitation Act. There is no substance in this argument either, for the simple reason that the period of 30 days prescribed under this Article is in that case where the purpose is for "filing in Court of an award". Then the period of 30 days is to run from "the date of service of the notice of the making of the award". The argument was that inasmuch as on the date on which the suit was filed, more than 30 days had already elapsed from the service of the notice of the making of the award, it was time barred. The argument is entirely misconceived and untenable for the simple reason that this Article of the Limitation Act would apply only to such a proceeding in which a prayer is made for filing of the award, and not where the award is already filed. Similar view has been taken by A. B. N. Sinha, J., in the abovenoted decision where it was said that if the award is already filed along with the claim then there is no question for a direction to the umpire or the arbitrators for filing the award and, therefore, the limitation fixed for such a suit with such a relief was not attracted.

11. Some arguments were also advanced by Mr. Narayan that the suit was not maintainable in view of Sec. 32 of the Arbitration Act. No such argument was advanced in either of the Courts below nor do I find any merit in the same inasmuch as complexion of the bar provided under Section 32 of the Arbitration Act is entirely different and I reject this argument also as being entirely misconceived and erroneous.

12. The result of the discussions is that this application fails and is accordingly dismissed. In the circumstances of the case, however, I would make no order as to costs.

UDAY SINHA, J.:— I agree.

Application dismissed.

AIR 1982 PATNA 23

LALIT MOHAN SHARMA AND

S. ALI AHMAD, JJ.

Sumitra Devi and others, Appellants
v. Sri Nandan Prasad Singh Chaudhary
and others, Respondents.

A. F. A. D. No. 508 of 1975, D/- 16-4-1981.*

Civil P. C. (5 of 1908), O. 34, Rr. 2 (1) (2) and 3 (1) — Suit for foreclosure of mortgage — Preliminary decree — Deposit of amount found due under R. 2 (1) by mortgagor — Extension of time for, though not granted under R. 2 (2) — In view of R. 3 (1) mortgagor has right to deposit the amount at any time before passing of final decree — Rr. 2 (2) and 3 (1) apply to two different stages — They do not render each other nugatory.

Per S. Ali Ahmad, J.:— In a suit for foreclosure of mortgage, after the passing of preliminary decree even if time is not extended under R. 2 (2) of O. 34 for depositing the money found due under Rule 2 (1), in view of R. 3 (1) of O. 34 the mortgagor has right to deposit the amount at any time before passing of final decree. In the present case since the deposit was made by mortgagor admittedly, at a time when final decree was not passed, it was proper for the trial court to pass a decree of redemption after accepting the amount so deposited. AIR 1981 Oudh 121, Rel. on. (Para 7)

Rules 2 (2) and 3 (1) of O. 34 apply to two different stages. Even giving full operation to Rr. 2 (2) and 3 (1), they do not render each other nugatory or inoperative. Under R. 3 (1), the mortgagor is entitled to make deposit although steps have been taken for preparation of final decree and this right continues until a final decree is passed. There is, therefore, no reason to give a narrow construction to R. 3 (1) of O. 34.

(Para 6)
Per Lalit Mohan Sharma, J. (concurring):— In the instant case, the preliminary decree was passed ex parte. The mortgagor had made an application to allow him to make deposit in instalments. The application was not considered by court

and no orders were passed thereon for a long time. In the meantime the entire amount found due was deposited by mortgagor before the preparation of final decree. The mortgagor, therefore, could not be made to suffer for the default of the court in not disposing of his application promptly. Since good cause was shown by mortgagor for extension of time under R. 2 (2) of O. 34, the deposit made by him, was liable to be accepted as valid. (Para 10)
Cases Referred: Chronological Paras
AIR 1948 Nag 56 5
AIR 1931 Oudh 121 5
AIR 1928 PC 137 5
AIR 1919 Pat 497 5

Rama Kant Verma and Ambika Kant Sinha with Miss Rajit Chattha, for Appellants; Guneshwar Prasad and Shyameshwar Dayal, for Respondents.

S. ALI AHMAD, J.:— This second appeal by the defendants arises out of a suit filed by the plaintiff-respondents seeking preliminary decree for foreclosure and for declaration that the appellants were debarred from all rights to redeem the property in suit, which was the subject matter of the deed of mortgage by conditional sale. The trial court decreed the suit ex parte by its judgment dated 23rd Sept., 1966, giving three months' time to the appellants to deposit the entire decretal dues. It was also stated therein that in case the amount as indicated above was not paid within three months, then the plaintiff-respondents shall be at liberty to get the defendants foreclosed and debarred from all rights to redeem the Baiulwafa deed and obtain final decree therefor. A preliminary decree in terms of the judgment was drawn which was sealed and signed on 6th Oct., 1966. Since the defendant-appellants did not deposit the decretal amount within three months, a petition for preparation of final decree was filed on 28-4-1967. Thereafter, the appellants on 9-8-1967 filed an application, inter alia, stating for fixing instalments to enable them to pay the decretal amount. Curiously no order was passed on this application, which remained pending until 25th Sept., 1972, when the appellants deposited the entire decretal amount in court. The respondents objected to this deposit and contended that since the deposit was made beyond the period of three months as directed by the judgment and decree

*From decision of Chandra Shekhar Lal, Addl. Sub. J. 3rd Court, Patna, D/- 5-6-1975.

dated 23-9-1966, the same could not be said to be valid. They accordingly prayed that a final decree for foreclosure should be passed. The appellants, on the other hand, contended that the period of three months as given by the decree dated 23-9-1966 could be extended under O. 34, R. 3 of the Code of Civil Procedure at any time before the final decree was drawn. They, therefore, prayed that a decree asking the plaintiff-respondents to hand over the Baiul-wafa deed and possession of the property in question to them be passed. The trial court, after hearing the parties, held that the court could extend the period of three months under O. 34, R. 3 of the Civil P. C. It accordingly passed a final decree directing the respondents to deliver the mortgage deed and other documents relating to the suit property, if any, to the appellants. It also directed the respondents to put the appellants in possession of the mortgaged property within one month from the date of the order, failing which possession should be delivered to the appellants at the cost of the respondents through the process of court. Aggrieved by the decree passed in favour of the appellants, the respondents carried the matter in appeal to the District Judge, Patna. The appeal came up for hearing before the Additional Subordinate Judge, 3rd Court, Patna, in whose opinion, the trial court erred both in law and on fact in extending the period under O. 34, R. 3 of the Civil P. C. for deposit of the decretal amount. The learned Subordinate Judge was also of the view that the deposits made were only those indicated in the judgment and decree dated 6-10-1966 and did not include subsequent costs, charges, expenses and interest. He accordingly held that the appellants have no right to redeem the mortgaged property. The appeal was, therefore, allowed and a direction for preparation of final decree for foreclosure was made. The defendants have now come to this Court in second appeal.

2. Mr. Rama Kant Verma, learned counsel for the appellants in support of the appeal urged that the view taken by the court of appeal below was erroneous. He contended that under the preliminary decree the appellants were given three months' time to pay the decretal amount. According to him, this did not mean that time to deposit the decretal amount could not be extended

under R. 3 (of) O. 34 of the Civil P. C. in case final decree for foreclosure was not passed. According to learned counsel, the mention of 'three months' in the decree only meant that before the expiry of this period, the plaintiffs were not entitled to make an application for preparation of final decree but that did not mean that deposit under R. 3 of O. 34 of the Civil P. C. could not be accepted. Mr. Guneshwar Prasad, learned counsel for the plaintiff-respondents, on the other hand, contended that after the expiry of the time mentioned in the preliminary decree, courts have no jurisdiction to extend the time under R. 3 of O. 34 of the Civil P. C. According to him, extension of time, if at all, could be given under O. 34, sub-rule (2) of R. 2 of the Civil P. C., which, in this case, was not done. He, therefore, urged that the court of appeal below was right in refusing a decree for redemption in favour of the appellants. The only course available to the court below, according to learned counsel for the respondents, was to direct preparation of final decree for foreclosure.

3. Before I proceed to examine the respective contentions advanced on behalf of the parties it will be useful to refer in brief to the changes and amendments made from time to time with respect to suits for foreclosure. Originally such suits were controlled by S. 86 of the Transfer of Property Act, 1882. According to that section, the court in case of plaintiff's success had to pass a decree directing that an account be taken of what shall be due to the plaintiff for principal and interest on the mortgage and for his cost of the suit, if any awarded to him on the day fixed by it or declaring the amount so due at the date of the decree. It also provided that the court had to give an opportunity to the defendant to pay the amount so found due on a day within six months fixed by it. In case the amount so fixed was paid then, according to the decree, the plaintiff had to deliver to the defendant all documents in his possession and transfer the property to the defendant free from all encumbrances created by the plaintiff or any person under him and had also to put the defendant in possession of the property if necessary, but according to the aforesaid section the decree had to provide that in case payment was not made on or before the

day which was fixed by the court then the defendant was to be absolutely debarred of all rights to redeem the property. It is significant to note that under S. 86 of the T. P. Act, there was no discretion in the court to allow the defendant more than six months' time to pay to the plaintiff the amount found due. The defendant also could not move the court for extending the period to make payment once fixed by the court. Ss. 85 to 90 of the T. P. Act relating to suits for foreclosure, sale or redemption were, however, repealed (by the Code of Civil Procedure, 1908 (Act 5 of 1908), S. 156 and Sch. V) and the law relating to suits for foreclosure was mentioned in O. 34, Rr. 2 and 3 of the Civil P. C. Rule 2 of O. 34 of the Civil P. C. provided that in case the plaintiff succeeded then the court had to pass a preliminary decree ordering an account to be taken of what would be due to the plaintiff for principal and interest on the mortgage and for his cost and directing the defendant to pay into court the amount so due on a day within six months from the date of declaring in court the amount so due. In case such payment was made then the plaintiff, according to the decree that had to be passed under the rule, had to deliver to the defendant all documents in his possession or power relating to the mortgaged property and also if so required had to retransfer the property to the defendant free from the mortgage and from all encumbrances created by him or any person claiming under him. But in case payment as stated earlier was not made on or before the date so fixed by the court then the defendant was debarred from all rights to redeem the property. Then R. 3 of O. 34 of the Civil P. C. provided that in case the defendant made deposit as directed in the preliminary decree then the court will pass a final decree for redemption directing the plaintiff to hand over all documents relating to the mortgaged property to the defendant and also retransfer the mortgaged property to the defendant at his own costs free from all encumbrances created by him. According to sub-rule (2) of Rule 3, however, in case payment as directed by the preliminary decree was not made within the time allowed then a final decree debarring the defendant from all rights to redeem the mortgaged property had to be passed. But according to the pro-

viso to this sub-rule, the court was given a discretion to postpone the date fixed for such payment from time to time upon good cause being shown. That means a provision was introduced in the year 1908 empowering the court to extend the time to make deposit beyond six months on sufficient cause being shown. Rules 2 and 3 of Order 34 of the Civil P. C. were again amended in the year 1929. The appeal has to be decided according to the rules that exist after this amendment. It is, therefore, necessary to keep in mind the provision of Order 34, Rules 2 and 3 of the Civil P. C. as they exist today. Sub-rule (1) of Rule 2 provides for passing of a preliminary decree in a suit for foreclosure. It, inter alia, says that after determining the amount payable under the mortgage, the court should fix a period not exceeding six months within which time the defendant should make payment of the amount together with subsequent interest. It further provides that in case such payment is made then the plaintiff should deliver all documents in his possession relating to the mortgaged property and should also retransfer the property to the defendant at his cost free from the mortgage. In case, however, the payment as aforesaid is not made then the plaintiff-mortgagee becomes entitled to apply for a final decree debarring the defendant from all rights to redeem property. Sub-rule (2) of this rule then provides that on good cause being shown and upon terms to be fixed, the court may from time to time at any time before passing of a final decree extend the period fixed for payment of the amount under sub-rule (1). Rule 3 provides for preparation of final decree. According to sub-rule (1) of this rule, if the defendant makes payment into the court of all amount due from him under sub-rule (1) of Rule 2 before a final decree debarring the defendant from all rights to redeem the mortgaged property is passed then an obligation is cast upon the court to pass a final decree directing the plaintiff to deliver up the document referred to in the preliminary decree and, if necessary, ordering him to retransfer at the cost of the defendant the mortgaged property and also ordering him to put the defendant in possession of the property. Sub-rule (2) provides that if payment in accordance with sub-rule (1) is not made

then on an application made by the plaintiff, the court shall pass a final decree debarring the defendant from all rights to redeem the mortgaged property. If necessary, the court shall also order the defendant to put the plaintiff in possession of the property.

4. I have referred to Section 86 of the T. P. Act which was repealed in the year 1908 and also to Rules 2 and 3 of Order 34 of the Civil P. C. which were amended in the year 1929 only to demonstrate that the Legislature with the changing social conditions gave more facilities to the mortgagor to redeem his mortgaged property. Prior to 1908, as I have mentioned above, the court had no jurisdiction to grant more than six months' time to the defendant to pay the mortgage-debt. Then in the year 1908, Section 86 of the T. P. Act was repealed and Rules 2 and 3 of O. 34 of the Civil P. C. took its place. Under Rule 2 of Order 34 of the Code, the court while passing a preliminary decree was empowered to allow time up to six months to the defendant to pay the mortgage-debt and to get a final decree for redemption. According to sub-rule (1) of Rule 3, if the amount as directed in the preliminary decree was deposited within the time specified in the preliminary decree then a final decree for redemption had to be passed but, according to sub-rule (2) of this rule, if payment was not made within the time prescribed then a final decree for foreclosure had to be passed. The proviso to this sub-rule, however, provided that on sufficient cause being shown, the court could postpone the fixed day, that means, could extend the period or date fixed for payment by the preliminary decree. This was a significant amendment to the advantage of the defendant-mortgagor. According to the existing Rule 3 of Order 34 of the Code, the position is still better. Sub-rule (1) of Rule 3 of the Code provides that at any time before the passing of the final decree for foreclosure the defendant may deposit the amount found due in court and in case such deposit is made then a final decree for redemption has to be passed. I may repeat here that according to sub-rule (1) of R. 3 of Order 34 as it existed prior to the amendment of 1929, the defendant could make deposit on or before the day fixed and not after its expiry. This change in law has to be kept in mind while appreciating the

argument advanced by learned counsel for the parties which I now propose to consider.

5. Mr. Rama Kant Verma, learned counsel for the appellants, urged that irrespective of the fact that no extension of period to deposit the amount was allowed under sub-rule (2) of Rule 2 of Order 34 of the Civil P. C., the defendant-mortgagors have right to make deposit under Rule 3 (1) of Order 34 of the Code. He further urged that in case the amount is so deposited before a final decree is passed then the court is bound to make a final decree for redemption in their favour. Learned counsel to support his argument referred to the case of Sant Bakhsh v. Bhagwandin Singh (AIR 1931 Oudh 121). This case fully supports the contention of Mr. Verma and it says that where no final decree debarring the defendant from the right to redeem the mortgaged property has been passed, the defendant is entitled to make the payment and to ask for a final decree ordering the plaintiff to deliver up the documents referred to in the preliminary decree and also ordering him to retransfer at the cost of the defendant the mortgaged property as directed in the said decree and also ordering him to put the defendant in possession of the property. Mr. Guneshwar Prasad, on the other hand, while contending that unless good cause was shown under sub-rule (2) of Rule 2, the court had no jurisdiction to extend the period for payment prescribed in the decree. In support of his contention, learned counsel referred to the decision in the case of Motilal v. Ujjar Singh (AIR 1928 PC 137) and the case of Madhorao Paikaji v. Eknathrao Balappa (AIR 1948 Nag 56). In my opinion, neither of these two cases support Mr. Prasad. Their Lordships of the Privy Council were considering the scope of Order 34, R. 3 (2) of the Civil P. C. as it existed prior to the amendment made in the year 1929 and in that connection observed that the deposit by the defendant beyond the period fixed by the preliminary decree was bad inasmuch as no cause was shown for extension. I have mentioned earlier that prior to 1929, time to deposit could be extended only on sufficient cause being shown and sub-rule (1) of Rule 3 provided that the deposit could be made on or before the

date fixed. Now as has been seen, Rule 3 has been substantially amended which provides that the defendant can make the deposit at any time before passing of the final decree debarring him from all rights to redeem the mortgage. This case, therefore, has no application. Likewise, the case of *Madhorao Paikaji v. Eknathrao Balappa* (AIR 1948 Nag 56) also does not help Mr. Prasad. The learned Judge only followed the decision of the Privy Council, reported in AIR 1928 PC 137 (supra). Then Mr Prasad referred to the decision in the case of *Ratnakar Gountia v. Chamra Satpasty* (AIR 1919 Pat 497). This case also was decided at a time when O. 34, Rules 2 and 3 were not amended by the Act of 1929. Their Lordships therefore, were interpreting the law as it stood then and I say with respect that they correctly observed "if the preliminary decree is not complied with, the mortgagors have no absolute right to pay the redemption money, and avoid foreclosure merely on the ground that a final decree has not been passed". But this interpretation was made with respect to the two rules as they existed then. The position has now changed after the 1929 amendment. This case also, therefore, does not help Mr. Prasad.

6. Mr. Guneshwar Prasad, learned counsel appearing for the respondents, contends that in case it is held that the defendants have a right to make payment of the amount determined under sub-rule (1) of Rule 2 at any time before the passing of the final decree then that will render sub-rule (2) of Rule 2 absolutely nugatory. He, therefore, contends that a harmonious construction should be given to these two rules so that all the provisions may remain operative. There can be no dispute that as far as possible provisions of the Code should be so interpreted that no part of it becomes nugatory or inoperative. But in this case, to me it appears, in case sub-rule (2) of Rule 2 and sub-rule (1) of Rule 3 are given their full operation, they will not render each other either nugatory or inoperative. The reason is quite obvious. In the decree provided under sub-rule (1) of Rule 2 a period is prescribed enabling the defendants to make the deposit. During that period, the plaintiffs are not entitled at all to apply for preparation of final decree. Likewise, the

plaintiffs are again debarred to take steps for preparation of final decree, if the period to make deposit prescribed under the decree is extended under sub-rule (2) of Rule 2 on good cause being shown. This is the effect of the extension granted under sub-rule (2) of R. 2. But in case time is not extended or the time extended under sub-rule (2) of Rule 2 expires then the plaintiffs get a right to make an application for preparation of final decree debarring the defendant from redeeming the mortgaged property. This is the stage where Rule 3 (1) of Order 34 of the Civil P. C. comes into play. The defendants under this rule are entitled to make deposit although steps have been taken for preparation of final decree and this right continues until a final decree is passed. I, therefore, see no reason to give a narrow construction to sub-rule (1) of Rule 3 of Order 34 of the Civil P. C. The two provisions apply to two different stages. The argument, therefore, that in case sub-rule (1) of R. 3 is given its natural meaning then it will render sub-rule (2) of R. 2 nugatory, has no substance.

7. The view, I have taken, also finds support from some other provisions of Order 34 of the Civil P. C. Rule 4 of Order 34 of the Code provides that on good cause being shown at any time before a preliminary (final?) decree for sale is passed, the time fixed for payment of the amount found or declared due may be extended. Again Rule 5, which provides for final decree in a suit for sale says that if at any time before confirmation of sale the defendant in addition to the amount mentioned in sub-rule (1) of Rule 5 deposits in court for payment to the purchaser a sum equal to five per cent of the amount of purchase money, in addition to the purchase money, then the sale shall not be confirmed and the purchaser will be entitled to withdraw the amount so deposited. The scheme of the Code, therefore, seems to protect and provide all possible facilities to the defendant to pay the mortgage amount and save his property from sale or foreclosure as the case may be. For all these reasons, I am of the view that even if time is not extended under sub-rule (2) of Rule 2 of Order 34 of the Civil P. C., the defendant has a right to deposit the amount under sub-rule (1) of Rule 3 of Order 34 of the Code at

any time before passing of final decree. In this case, since the deposit admittedly was made on 25-9-1972, at a time when final decree was not passed, the trial court was absolutely right in passing a decree of redemption after accepting the amount so deposited. The lower appellate court for the reasons discussed above erred in holding that the deposit made after the expiry of three months as provided in the preliminary decree dated 23-9-1966 was invalid. I, therefore, set aside the judgment and decree passed by the lower appellate court and restore that of the trial court. The appeal is, accordingly, allowed with costs.

LALIT MOHAN SHARMA, J. (concurring):— 8. I agree that the appeal should be allowed and as directed by the trial court, a final decree should be passed.

9. From the judgment of my learned brother, it will be clear that the defendants filed an application on 9-8-67 before the trial court which is at pages 36 and 37 of File 'C'. It was stated that the preliminary decree was passed without any notice to them and if they had any knowledge of the decree, they would have immediately deposited the amount. The service report was challenged as erroneous and collusive. The defendants further asserted their right to deposit the decretal amount and they wanted an order allowing them to make the deposit in instalments. In paragraph 6 of the application, it was said that the defendants had no means to deposit the entire amount in one lump sum and a request for instalments made by them had been accepted by the plaintiffs. Towards the end of paragraph 4 it was said that it was within the discretion of the Court to extend the time. No orders were passed on this application. However, the entire amount was deposited in 1972. During the course of the argument in this Court, the attention of the learned counsel for the respondents had been drawn to this application and he could not give any reason as to why this prayer could not have been allowed under sub-rule (2) of Order 34 Rule 2 of the Civil P. C. which is in the following terms:

"2 (2). The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before a final decree is passed, extend the time fixed for the payment of

the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest."

10. The final decree had not been passed till many years after filing of the application. The defendants cannot be made to suffer for the default of the Court in not disposing of their application promptly. When they were able to collect the money, they deposited the entire amount before the preparation of the final decree. Even if the interpretation of the plaintiffs on Order 34 R. 3 be assumed to be correct, the decision of the lower appellate court must be set aside on the ground that the defendants' application dated 9-8-67 should have been considered and order passed thereon. It is not desirable in the facts and circumstances of the case to remit the matter for this purpose. I have gone through all the relevant materials in this regard on the records of the case and I am satisfied that the defendants had shown good cause for extension of the time. The deposit made by them, therefore, must be accepted as valid. As the appeal has to be allowed on this view, I do not express any opinion on the interpretation of R. 3 of O. 34 of the Civil P. C.

Appeal allowed.

AIR 1982 PATNA 28

S. ALI AHMAD, J.

Ram Chandra Choudhary and another, Appellants v. Mosstt. Rampabitri Devi and others, Respondents.

A. F. A. D. No. 64 of 1976, D/- 31-8-1981.*

(A) Civil P. C. (5 of 1908), Order 41, Rule 33 — Appeal not filed in respect of part of relief claimed but not granted — Same cannot be granted in appeal filed by defendant.

If a part of the decree has not been appealed from, then that cannot be modified or set aside if that part is not dependent upon the decree the appellate Court intends to pass in the appeal.

(Para 5)

Where the plaintiff's suit for recovery of possession of land was decreed to

*From decision of Akhauri Anjani Kumar Sinha, Sub. J., Darbhanga, D/- 18-9-1975.

JY/JY/E621/81/AAJ/SNV

certain extent, the appellate Court would have no jurisdiction to increase the extent of land in the appeal filed by the defendant. (Case law discussed).

(Para 5)

(B) Civil P. C. (5 of 1908), Order 3, Rule 17 — Remand of case with directions to allow amendment in plaint for specific purpose — Amendment for other purpose cannot be permitted.

Where the case was remanded by the second appellate Court to the Court of appeal with directions that if the plaintiff decides to file an application for amendment of the plaint by describing the disputed portion of land with maps etc., more clearly, plaintiff will be at liberty to do so then, the plaintiff would be entitled to file an application for amendment only to the extent of directions given by the second appellate Court and the Court would not be justified in allowing the plaintiff's second application for amendment praying for mesne profits.

(para 7)

Cases Referred : Chronological Paras

1981 BLJR 382	4
AIR 1978 SC 725	5
AIR 1969 SC 1144	3
AIR 1925 Patna 285	5
(1901) 2 Ch. D. 671 : 85 LT 325 : 70 LJ Ch. 828, Attorney-General v. Simpson	4

M/s. Shreenath Singh and Sudhakar Choudhary, for Appellants; Yogen-dra Mishra, Jagarnath Mishra and Lakshmeshwar Mishra, for Respondents.

JUDGMENT:— This suit giving rise to this second appeal by the defendants, was filed sometime in the month of May, 1959, for declaration of title and recovery of possession with respect to 4 kathas 12 dhurs 34 dhurkis of land appertaining to plots Nos. 19412, 19413, 19489 and 19490. Subsequently by an amendment in the year 1961, the area with respect to which declaration was sought was increased to 5 kathas 16 dhurs 12 dhurkis appertaining to Plots Nos. 19411, 19412, 19413, 19434, 19485, 19487 and 19489. The claim of the plaintiffs was resisted by the defendants-appellants. According to the defendants, plaintiffs had no title to the suit land and, as such, the defendant prayed that the same may be dismissed. The trial Court, however, on appreciation of evidence adduced in the case came to the conclusion that the plaintiffs were

entitled to get declaration of their title and recovery of possession with respect to 3 kathas 18 dhurs of land, including 5 dhurs 57 dhurkis of Plot No 19412 and 1 katha 9 dhurkis of Plot No. 19413. The suit, therefore, was decreed in part to the extent indicated. The defendant thereafter, filed an appeal before the District Judge. The appeal was heard on 26-9-1966 and was allowed. Thereafter the matter came up in Second Appeal No. 937 of 1966 to this Court. Mr. Justice B. D. Singh, who heard the appeal was not satisfied with the judgment. He, therefore, allowed the appeal and sent the case back on remand to the lower appellate Court for a fresh decision in accordance with law. When the matter went back to the Court of appeal below, it was again heard on merit. The lower appellate Court again modified the decree passed by the trial Court by its judgment and decree dated 28-9-1970. Second Appeal No. 38 of 1971 was then filed which was heard by Mr. Justice Lalit Mohan Sharma. Mr. Justice Sharma also allowed this second appeal and remanded the case back to the lower appellate Court for a fresh decision in accordance with law. After the case went for the second time to the Court of appeal below, the plaintiffs filed an application for amendment of the plaint seeking that a relief for grant of mesne profits be also passed as against the defendant. The prayer for mesne profits was allowed. The appeal was then heard on merit. The lower appellate Court, this time also modified the decree passed by the trial Court. While so modifying, it decreed the suit with respect to 10 dhurs 57 dhurkis of Plot No. 19412 and 1 katha 9 dhurs in respect of Plot No. 19413. It also passed a decree for mesne profits against the defendants. Thereafter, this second appeal was filed in this Court.

2. The following points were formulated at the time of admission of the appeal by the Court's order dated 14-11-1980:—

(i) Whether the lower appellate court erred in law in decreeing the suit with respect to 10 dhurs and 57 dhurkis of land, out of Plot No. 19412, instead of 5 dhurs and 57 dhurkis only and similarly in decreeing the suit with respect to 1 katha 9 dhurs of land out of Plot No. 19413 instead of 1 katha and 9 dhurkis?

(ii) Whether the Court of appeal below erred in law in allowing a second application for amendment of plaint with respect to mesne profits and decreeing the same?

(iii) Whether on the terms on which the second amendment of the plaint was allowed the claim of mesne profits must be held to be partly barred by limitation?

I now propose to consider these points.

3. Mr. Shreenath Singh, learned counsel for the appellants first contended that the trial Court had given a decree for 5 dhurs 57 dhurkis of Plot No. 19412 and for 1 katha 9 dhurkis of Plot number 19413. He submitted that the plaintiffs did not prefer any appeal against the decree passed by the trial Court. The appeal was preferred only by the defendant. Therefore, according to Mr. Singh, the Court of appeal below had no jurisdiction to increase the area of Plot No. 19412 from 5 dhurs 57 dhurkis to 10 dhurs 57 dhurkis. Likewise Mr. Singh contended that the Court of appeal below had no jurisdiction to increase the area of Plot No. 19413 from 1 katha 9 dhurkis to 1 katha 9 dhurs. This according to Mr. Singh was not only illegal but beyond the competence of the Court of appeal below. Mr. Mishra, on the other hand, contended that the Court below had jurisdiction under Order 41, Rule 33 of the Civil P. C. to pass such decree or orders as the case may require. According to him, although no appeal was preferred by the plaintiffs, but the case required the decree to be modified in the manner it was done. To substantiate his argument that the lower appellate Court has jurisdiction to give a relief although no appeal has been preferred for that purpose, learned counsel has cited the decision in the case of Giani Ram v. Ramji Lal, (AIR 1969 SC 1144) wherein the Supreme Court has observed that if the appellate Court is of the view that any decree which ought in law to have been passed, but was in fact not passed by the subordinate Court, it may pass or make such further or other decree or order as the justice of the case may require. To understand the law laid down by this decision, it will be pertinent to keep the facts of the case in mind. The relevant facts are that the sons, daughters and the widow of the

alienor challenged the validity of the transfer made in favour of the alienee. The transfer was upheld by the High Court. The sons then preferred an appeal before the Supreme Court. The Supreme Court was of the view that the transfer was not valid. It, therefore, while decreeing the suit, held that although the daughters and the widow had not filed an appeal yet they could be given relief under Order 41, Rule 33 of the Civil P. C. The important aspect in that case was that the sons had preferred an appeal and in that appeal the entire subject matter of the suit was involved. Therefore, it could not be said in that case that although the property was not the subject matter of the appeal, relief was given to the respondents in an appeal filed by the appellants.

4. The next case referred to by learned counsel is the decision in the case of Sitesh Kishore Pandey v. Ramesh Kishore Pandey (1981 BLJR 382). In that case, Medini Prasad Singh, J. has held that Order 41, Rule 33 of Civil P. C. in terms are very wide and in a proper case it gives the appellate Court ample discretion to pass any decree or make any order to prevent the ends of justice from being defeated. The proposition of law laid down in this case also, if I may say so with respect, is correct. But in this case also the entire subject matter of the suit was before the appellate Court and, therefore, the learned Judge held that relief could be given to the respondents under Order 41 Rule 33 of the Civil P. C. In this connection, reference may also be made to the case of Attorney-General v. Simpson, ((1901) 2 Ch D 671). In this case the Attorney General brought an action on behalf of the public seeking two reliefs; (a) for a declaration that the public were entitled to the right of passage along a river including the locks without the payment of tolls; and, (b) that the defendant was under an obligation to maintain the locks in an efficient state by repair. The trial court passed a decree declaring that the public were entitled to use the locks without payment of tolls, but it was also declared that the defendant was under no obligation to repair the locks. The defendant then preferred an appeal against the decree. The plaintiff neither filed an appeal nor cross-objection. The court of appeal found that the public were not entitled to use the locks

without payment of tolls to the defendant; at the same time the court expressed the opinion that the defendant was under an obligation to repair the locks. It accordingly passed a decree to that effect. While making this modification, it was observed as follows:—

"In none of the cases brought to our notice has it been laid down that in an appeal preferred by the plaintiff against a portion of the decree the appellate court has no jurisdiction, in the absence of a cross-appeal or cross-objection to dismiss the whole suit and that the utmost that the appellate court is competent to do is to dismiss the appeal..... There may no doubt be cases where no excuse or jurisdiction (justification?) could be found for a party not having preferred an appeal or a memorandum of objections, in which cases justice may not require the exercise of powers under O. 41, R. 33, and the appellate Court will be advised in not exercising such powers."

The facts, I have quoted above, will amply show that in the case before the Chancery Division also the entire subject matter of the suit was before the appellate court and the relief given to the appellants that the public were not entitled to use the locks without payment of tolls to the defendant had close nexus to the opinion that the defendant was under an obligation to repair the locks. The appellate court, therefore, on these facts, in my opinion, was fully competent to give relief under O. 58, Rule 4, which is equivalent to our O. 41, Rule 33 of the Civil P. C.

5. I may also refer to some decisions cited by Mr. Shreenath Singh. The first is the case of *Kesho Prasad Singh v. Narayan Dayal* (AIR 1925 Pat 285). A Bench of this Court held that Rule 33, Order 41 does not apply where a plaintiff whose claim is decreed in part, institutes an appeal with regard to the part not decreed and the defendant prefers neither an appeal nor a cross-objection. In such a case the court of appeal has no jurisdiction to enter into the question whether the plaintiff is entitled or not to any decree at all and to dismiss his suit wholesale. This case fully supports the appellants. Then is the decision in the case of *Tummalla Atchiah v. Venka Narasingarao*, (AIR 1978 SC 725). The facts of this case were that a suit was filed for cancellation or

setting aside the registered deed executed by the plaintiff in favour of the defendant purporting to transfer the decree obtained in an earlier suit for recovery of possession of the scheduled properties. The trial court decreed the suit in part and granted a decree for cancellation of the assignment deed on the plaintiff's paying Rs. 13,000/- to the defendant. The defendant filed an appeal in the High Court. The plaintiff was a party to the appeal. He had filed a cross-objection but did not attack the decree of the trial court making him liable to return Rs. 13,000/- before he could take back possession from the defendant. The defendant's appeal was dismissed by the Court but subject to the finding that a sum of Rs. 7,600/- only was to be (had been?) paid by the defendant to the plaintiff. The Supreme Court in that situation held that the High Court was wrong in taking recourse to O. 41, Rule 33 of the Civil P. C. in interfering with the decree of the trial court in relation to payment of Rs. 13,000/-. The learned Judges observed that without a specific ground in the cross-objection and without payment of court-fees on the said amount he was not entitled to get any relief by the court under O. 41, Rule 33 of the Civil P. C. This case also is a pointer to the view that if a part of the decree has not been appealed from then that cannot be modified or set aside if that part is not dependent upon the decree that the appellate court intends to pass in the appeal. I, therefore, see no merit in the argument of Mr. Mishra that relief could be given to the respondent under Order 41, R. 33 of the Civil P. C.

6. There is yet another aspect of the matter. True, in appropriate cases, the court may give relief under Order 41, Rule 33 of the Civil P. C. but then the judgment must indicate that the relief is being given under Order 41, Rule 33 of the Civil P. C. for the reasons mentioned in the judgment. I have perused the judgment under appeal. It does not appear from it that while passing the decree the court was of the opinion that it was proper and in the interest of justice that the decree should be modified. In this view of the matter, even if it be assumed in favour of Mr. Mishra, that the court, on the facts of this case, was competent to give relief

under O. 41, R. 33 of the Civil P. C. yet there is nothing to indicate whether the discretion under O. 41, R. 33 has been consciously exercised or the mention of enhanced area of the two plots, namely, Plot Nos. 19412 and 19413 is a mere accidental error.

7. The next point urged by Mr. Shreenath Singh is with respect to the amendment of the plaint with respect to mesne profits. It appears that an argument was advanced before Mr. Justice Lalit Mohan Sharma in Second Appeal No. 38 of 1971 that the description of the lands in suit was extremely vague and that the decree if passed in favour of the plaintiffs will be unexecutable on account of vagueness. This aspect of the matter was considered by Mr. Justice Sharma and while remitting the case to the lower appellate court, the learned Judge directed that in case the plaintiff decides to file an application for amendment of the plaint by describing the disputed portion of land more clearly, she will be at liberty to do so. The learned Judge also observed that in case the plaintiff wished to file a map along with an amendment petition that will also be entertained by the court and directed the court to allow such a prayer if made. In view of this direction given regarding amendment of the plaint, the plaintiff filed an application on 1st October, 1974 seeking amendment of the plaint on the basis of two maps on trace-paper along with the application for amendment. As directed by this Court the amendment was allowed. Thereafter, the plaintiffs filed another application for amendment on 17-12-1974. By this amendment, they sought to include the prayer for mesne profits. This prayer also was allowed on 5-9-1975 and as I have stated earlier, the suit has been decreed in part with mesne profits after this amendment. It is true that plaint can be amended even at the appellate stage, but in this case I find that the matter had come to this Court earlier and then went back on remand with certain specific directions. One of the directions was to allow the application for amendment of the plaint if filed for more clearly describing the suit properties. It was not said that the party should file petition for amendment for any other purpose also. Therefore, the appellate court, in my view, was not justified in allowing the amend-

ment for mesne profits. I, therefore, set aside the order dated 5-9-1975 allowing the prayer for amendment of the plaint.

8. Since I have already held that the court below was not justified in allowing the amendment of the plaint, the third question regarding the passing of the decree for mesne profits becomes redundant. The result, therefore, is that the appeal with respect to the lands appertaining to Plot Nos. 19412 and 19413 is allowed and the decree passed by the trial court with respect to these two plots is restored. The decree for mesne profits also passed by the court below is set aside. The appeal is allowed to the extent indicated above. No costs.

Appeal partly allowed.

AIR 1982 PATNA 32

S. ALI AHMAD, J.

Jagdeo Sharma, Appellant v. Nandan Mahto and others, Respondents.

A. F. A. D. No. 515 of 1979, D/- 4-9-1981.*

(A) Transfer of Property Act (4 of 1882), Ss. 10, 126 — Gift in perpetuity — Alienation of property gifted — Validity — Scope of Ss. 10 and 126.

The alienation of a gifted land was challenged on the basis of a stipulation in the gift deed. The stipulation in the deed, *inter alia*, was that the gifted land will be held by the donee and after her death it will be held by her heirs generation after generation but neither the donee nor her heirs will ever have the right of alienating the same either by way of sale, exchange or mortgage etc. It was further stipulated that in case the gifted land was alienated in any manner either by the donee herself or by the heirs of the donee then the effect of such alienation will be that the deed of gift will stand automatically cancelled and the donor will get the right to come in possession of the gifted property.

Held, that Section 126 is a general section which is controlled by Sec. 10 and therefore, Section 126 could not be read in isolation and has to be read with Section 10 which says that any stipulation completely restraining the donee from transferring the gifted pro-

*From decision of Ishwar Bhagat, 3rd Addl. Sub. J., Bihar-Sharif, D/- 20-6-79.

erty is void. In the instant case therefore the gift deed cannot stand cancelled due to the alienation of the gifted land as the stipulation in the gift deed restraining alienation is void in view of Section 10. AIR 1939 All 221, Relied on.

(Para 5)

(B) Transfer of Property Act (4 of 1882), S. 6 — Spes successionis — Land held by limited owner absolutely under gift deed — Alienation by limited owner — Suit challenging alienation, by person having interest in the property, which is spes successionis, is not maintainable.

(Para 6)

Cases Referred : Chronological Paras
AIR 1939 All 221 : 1939 All LJ 77 5

Laxman Saran Sinha and Birendra Singh, for Appellant; S. B. N. Singh, Harendra Prasad, S. Raza Ahmad and Sailendra Prasad Mishra, for Respondents.

JUDGMENT:— Defendant No. 1 is the appellant in this second appeal. The suit was filed for a declaration that the sale deed, (Ext. A/1) dated 9-6-59 executed by defendant No. 2 (the mother of the plaintiffs) and defendant No. 3 (plaintiffs' brother) in favour of defendant No. 1, is null and void and not binding on the plaintiffs. The suit was dismissed by the trial court but on appeal the same was decreed. Thereafter this second appeal has been filed.

2. Admittedly, the land in question was given to defendant No. 2 in gift by the then Raja of Amawan under a registered deed of gift dated 16-4-1944 (Ext. 1). The stipulation in this deed, inter alia, was that the gifted land will be held by the donee and after her death it will be held by her heirs generation after generation but neither the donee (defendant No. 2) nor her heirs will ever have the right of alienating the same either by way of sale, exchange or mortgage etc. It was further stipulated that in case the gifted land was alienated in any manner either by the donee herself or by the heirs of the donee then the effect of such alienation will be that the deed of gift will stand automatically cancelled and the donor will get the right to come in possession of the gifted property. According to the plaintiffs, therefore, their mother (defendant No. 2) or their brother (defendant No. 3) had no right to transfer suit

land in favour of defendant Number 1. It was further said that the transfer was a result of collusion between defendant No. 1 and other defendants. It was also said that the deed was never read over or explained to defendant No. 2 who executed the same as a result of fraud practised upon her by defendant No. 1. It was also said that no consideration in fact passed under this deed.

2-A. The defence, on the other hand, inter alia, was that there was neither fraud nor collusion and that consideration was paid to defendant No. 2. It was said that the land in suit was already in possession of defendant No. 1 as Ijaradar by virtue of three ijara deeds executed by defendant No. 2 in the years 1949 and 1952. It was said that under the sale deed dated 9-6-1959 (Ext. A/1) the amount covered by the aforesaid three ijara deeds were left with defendant No. 1 and the balance was paid to defendant No. 2. It was also the case of the contesting defendant that the restriction imposed under the gift deed dated 14-7-1944 relating to alienation of the property was void and illegal by virtue of Section 10 of the Transfer of Property Act.

3. The trial court came to the conclusion that the sale deed dated 9-6-59 (Ext. A/1) was neither the result of fraud nor collusion. According to it, consideration for this sale deed was paid to defendant No. 2. Further, according to the trial court, the stipulation in Ext. 1 prohibiting transfer or alienation by the donee or by her heirs was hit by Section 10 of the Transfer of Property Act and as such void. It accordingly held that the sale deed dated 9-6-1959 (Ext. A/1) was neither void nor invalid. Further, according to the trial court, the plaintiff had only a chance to succeed to the property on the death of her mother.

4. On appeal, the lower appellate court upheld the finding that Ext. A/1 was a genuine document inasmuch as it was not executed on account of any collusion or fraud and that consideration did pass under this document. It, however, was of the opinion that the condition or stipulation restricting the donee or her heirs was not bad inasmuch as such a restriction was permis-

sible under Section 126 of the Transfer of Property Act. It, therefore, allowed the appeal and decreed the suit. Thereafter this second appeal has been filed.

5. Mr. Laxman Saran Sinha, learned counsel for the appellant, contended that the view taken by the court below that under Section 126 a donee or his heirs can be completely restrained from alienating the property is bad. According to him, Section 126 is the general section which is controlled by Sec. 10 of the Transfer of Property Act which specifically mentions that where a property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him, from parting with or disposing of his interest in the property, the condition or limitation is void. In this case, as I have stated earlier, the limitation on transfer by the donee or by her heirs is absolute and complete. It is, therefore, covered by the language of Section 10. No doubt, under Section 126 the donor and the donee may agree that on the happening of any specified event which does not depend on the will of the donor, a gift shall be suspended or revoked. Mr. S. B. N. Singh, relying on the language of Section 126, urged that under Ext. A/1 the donor and donee agreed that in case the gifted land was transferred by the donee, then the gift will stand revoked. If Section 126 is read in isolation then the argument of Mr. Singh is correct, but in my view Section 126 cannot be read in isolation and has to be read along with Section 10 of the Transfer of Property Act which says that any stipulation completely restraining the donee from transferring the gifted property is void. If read together, which must be so read, the only reasonable conclusion that one can arrive at is that Section 126 is the general section which is controlled by Section 10 and if that is done, then it is obvious that the stipulation in Ext. 1 completely restricting the donee from alienating the gifted property is void. I am supported in the view that I have taken by the decision in the case of Mt. Brij Devi v. Shiva Nandan Prasad (AIR 1939 All 221).

6. There is yet another difficulty in the way of the plaintiff-respondent. Under the deed of gift it was defendant No. 2 who held the property absolutely and till her lifetime the plaintiff had

no interest in it. His only interest was spes successionis, i.e., expecting to succeed to the property in future. It is well settled that on that basis a suit cannot be lawfully maintained.

7. For the foregoing reasons, the appeal is allowed, the judgment and decree passed by the court of appeal below are set aside and the suit is dismissed.

Appeal allowed.

AIR 1982 PATNA 34

LALIT MOHAN SHARMA, J.

Rambujhawan Kumar, Petitioner v. Shiva Nandan Thakur, Opposite Party.

Civil Revn. No. 2167 of 1979, D/- 23-7-1981.

Bihar Money Lenders Act (22 of 1975), Ss. 7 (1) (a); 7 (5) — Suit by money lender for recovery of money advanced — Filing of copy of extracts from register of accounts regarding loan — Loan proved by plaintiff — Endorsement by any authority on copy is not necessary — Order dismissing suit for want of endorsement on copy is illegal.

(Paras 2, 3)

Md. Khaleel and Sudhakar Choudhary, for Petitioner.

ORDER :— The plaintiff-petitioner filed a small cause suit for recovery of a sum of Rs. 544/- on the basis of a promissory note executed on the 2nd of February, 1975. The loan was for Rupees 400/-. The remaining amount has been claimed by way of interest.

2. The suit was filed on the 31st of January, 1978. In spite of notice, the defendant did not appear to contest the case. The plaintiff examined himself and proved the loan. So far the merit of the claim is concerned, the Court below held in his favour. However, the suit has been dismissed for non-compliance of the provisions of Section 7 (5) of the Bihar Money Lenders Act, 1975, requiring a money lender plaintiff to file a copy of the relevant extracts from his register of accounts which has to be maintained under Section 7 (1) (a) of the Act. In this case the plaintiff-petitioner had, in fact, filed a copy of the relevant extract from his register

JY/KY/E624/81/AGM/MVJ

but the Court below has held that the provisions of Section 7 (5) were not fully satisfied as the extract did not bear any endorsement by any authority. Mr. Khaleel, appearing in support of the present application under Section 25 of the Provincial Small Cause Courts Act, 1887, contended that Sec. 7 (5) does not require any endorsement on the copy to be filed. He is correct. Sub-section (3) of Section 7 states that all the accounts maintained by a money lender and all documents in respect of loan advanced by him by which he may be in possession and his registration certificate shall be liable to be inspected and examined by such authority as may be prescribed by the State Government. But neither this sub-section nor any other provision appears to lay down that the copy to be filed by a plaintiff under Section 7 (5) has to be authenticated by any particular authority. It is another matter that the Court may feel doubtful about the correctness of the copy and in that case the plaintiff may be required to prove its authenticity by production of the original register or of any other evidence which may satisfy the Court. But that does not lead to the conclusion that the plaintiff must have the copy authenticated by any particular authority before filing the same in the Court.

3. In the present case, the plaintiff has pledged his oath not only for proving the advance of loan but also with respect to the copy which he has filed. The Court has accepted his evidence as reliable. The view in regard to the requirement of Sec. 7 (5) of the Act, on the basis of which the suit has been dismissed, is, therefore, clearly illegal. In the circumstances, this revision application is allowed, the decision of the Court below is set aside and the suit is decreed for the amount claimed with pendente lite and future interest at 6% per annum. The plaintiff will also get costs admissible for the Court below for ex parte trial. There will be no order as to the costs of this Court.

Revision application allowed.

AIR 1982 PATNA 35

NAGENDRA PRASAD SINGH AND
S. K. CHOUDHURI, JJ.

Radhey Shyam Singh and others,
Petitioners v. State of Bihar and others,
Respondents.

Civil Writ Jurm. Case No. 2817 of
1980, D/- 6-5-1981.

Bihar and Orissa Co-operative Societies Act (6 of 1935), Section 41 (1) — Supersession of Co-operative Bank by Registrar — Notification by State Government constituting Managing Committee of seven members till further orders or till stated date — Subsequent notification issued before stated date constituting a fresh committee excluding two previous members (petitioners) — Held, not illegal, as the first notification itself reserved the power to issue any subsequent notification — Petitioners did not acquire any legal right under first notification — Principles of natural justice not attracted — (Constitution of India, Article 226). (Paras 3, 4)

A. Bose and Shahjahan Ali, for Petitioners; Chuni Lal, Government Pleader No. 5 with S. K. P. Sinha, Jr. Counsel to Government Pleader No. 5, for Respondents.

S. K. CHOUDHURI, J.:— In this writ application filed under Articles 226 and 227 of the Constitution of India the petitioners pray for quashing the notification dated 4-11-1980 issued by the State Government by which a new Managing Committee of seven members had been constituted. The grievance of the petitioners is that their names ought to have been found in Annexure 1 and their names should not have been replaced by the names of respondents Nos. 4 and 5. It may be stated here that by a supplementary affidavit filed in this Court (sic) a subsequent notification dated 26th March, 1981 by which the life of the aforesaid Committee constituted under Annexure 1 has been extended till 15-4-1981. A copy of this notification has been made Annexure 6 to this supplementary affidavit.

2. It appears that Magadh Central Co-operative Bank Ltd., Gaya respondent No. 3, was superseded by the Registrar of Co-operative Societies under Section 41 (1) of the Bihar and Orissa

Co-operative Societies Act, 1935, on allegation of some charges of misconduct etc. This period of supersession was extended from time to time by the State Government and ultimately a Managing Committee consisting of seven members was constituted by notification dated 16th October, 1980. A copy of this is Annexure 2/1 to this application. The names of the two petitioners find place in the said Annexure against serial Nos. 6 and 4 respectively. This notification mentions that this Committee was constituted for the purpose of better management of the Bank and for calling a general meeting for holding the election. These seven members of the Committee had to continue till 31-3-1981, or until further orders. It appears that shortly thereafter on 4-11-1980, another notification was issued substituting the previous notification Annexure 2/1. This notification is also in the same terms as Annexure 2/1 but here the Managing Committee of seven members was constituted without the petitioners and in place of two petitioners the names of respondents Nos. 4 and 5 have been mentioned.

3. The grievance of the learned counsel appearing for the petitioners is that the Government has no power to issue the notification, Annexure 1, replacing the previous notification, Annexure 2/1, at any time before the expiry of the period of earlier notification, namely, 31-3-1981. G. P. 5, learned counsel appearing for the respondents Nos. 1, 2, & 3 however, contended that the first notification which was issued on 16-10-1980, itself reserves the power to issue any subsequent notification, as the previous notification itself mentions that the Committee was to continue until further orders or till 31-3-1981. According to the learned counsel, therefore, there is no illegality committed by respondent No. 1 in issuing Annexure 1 before the expiry of 31-3-1981. In my view the submission of the learned counsel appearing for respondents 1 to 3 is correct. This notification Annexure 1 does not, in fact, modify the previous notification contained in Annexure 2/1. It appears that it is a fresh notification issued by the State Government, respondent No. 1, constituting a fresh Committee consisting of seven members, names of which have been mentioned in Annexure 1. As

the notification, Annexure 2/1, itself states that the appointment of the Committee was to continue until further orders, the State Government had the power to issue the subsequent notification contained in Annexure 1. Accordingly, the contention of the learned counsel for the petitioners has no substance.

4. It was next contended that no opportunity of hearing was given before the names of the petitioners were removed from Annexure 2/1. I have already indicated above that it is not a case of removal of two members from Annexure 2/1 but, in fact, by issue of Annexure 1 the State Government has constituted a new Managing Committee for the purposes which have been mentioned in that notification. In that view of the matter, in my view, as the petitioners have not acquired any legal right under Annexure 2/1 they cannot challenge the issue of notification, Annexure 1, and, therefore, the decisions, which have been cited by the learned counsel for the petitioners that rule of natural justice has been infringed, have no application.

5. However, learned counsel for the petitioners pointed out that by Annexure 1 the Committee was constituted for the purpose of better management of the Bank and to call a general meeting for holding the election. The main purpose, according to the learned counsel for the petitioners, was to hold the election by calling a general meeting. The grievance of the petitioners is that though that Committee has been constituted as far back as on 4-11-1980 no meeting has yet been called for holding the election. Learned Government Pleader No. 5, however, could not dispute the fact that the seven-member Committee constituted under Annexure 1 was, in fact, constituted for the purpose of calling a general meeting and holding the election. As there is a specific direction in Annexure 1 itself that the Managing Committee of seven members is being constituted for the purpose of calling a general meeting for holding the election it is just and proper that no further delay should be made in calling the said general meeting for holding the election by the Committee as early as possible. Learned counsel appearing for the petitioners suggested

that no further delay should be made in calling the said general meeting and it should be done within two months from the date of the receipt of this order by the authority concerned. In my view the reasonable time within which the meeting should be called and election should be held is three months. In the circumstances, I direct the authority concerned to call the general meeting and hold the election within three months from the date of the receipt of this order. The Registrar, Co-operative, should see that this direction of the Court is followed. With the aforesaid direction this writ application is disposed of. Let a copy of this order be handed over to learned Government Pleader No. 5 for communication to the authority concerned mentioned in Annexure 1.

NAGENDRA PRASAD SINGH, J.:— I agree.

Order accordingly.

AIR 1982 PATNA 37

B. P. JHA AND U. C. SHARMA, JJ.

Dr. Jagdish Prasad, Appellant v. Satya Narain Singh and others, Respondents.

A. F. O. O. No. 210 of 1973, D/- 21-8-1981.*

(A) Limitation Act (36 of 1963), Sch. I, Art. 123 — Civil P. C. (1908), O. 9, R. 13 — Ex parte decree where defendant was duly served — Application for setting aside ex parte decree — Period of limitation cannot be counted from date of knowledge of decree. (Para 6)

(B) Bihar Consolidation of Holdings and Prevention of Fragmentation Act (22 of 1956), S. 4 (c) — Applicability — Provisions apply only to suit, appeal, reference or revision — Preliminary or final decree — Section does not apply.

The abatement will take place under S. 4 (c) in respect of a proceeding or suit pending before a court with respect to declaration of rights or interest in any land where the consolidation proceeding is going on. In the present case the suit commenced by filing the plaint and the suit came to an end when a

preliminary decree was passed. Therefore, neither the preliminary decree nor the final decree will abate under Sec. 4 (c) as there is no such provision under S. 4 (c). The Act envisages abatement of a suit, appeal, reference or revision. Preliminary decree or final decree will not come either within the purview of suit, appeal, reference or revision. Hence S. 4 (c) will not apply in the present case. Case law discussed. (Para 7)

Cases Referred : Chronological Paras

AIR 1981 SC 1450 : 1981 BBCJ 197	8
AIR 1981 Orissa 1 (FB)	7
1981 BBCJ (HC) 413	7
AIR 1980 SC 2051	8
AIR 1968 SC 714 : 1968 All LJ 46 : (1968) 2 SCJ 480	8

Janeshwar Prasad Singh, Uma Shankar Singh and Surendra Kumar Singh, for Appellant; S. C. Ghosh and Jagdish Pandey, for Respondents.

B. P. JHA, J.:— Defendant No. 2 has preferred an appeal under O. XLIII, R. 1 (d) of the Civil P. C. against an order dated 7th July, 1973, passed by the Subordinate Judge, Sasaram.

2. In the present case the plaintiffs filed a suit for partitioning the suit properties. Plaintiff No. 1 and his sons claimed one-fifth share in the suit properties. Ram Prasad Seth (defendant No. 1) had three sons, namely, plaintiff No. 1 and defendants Nos. 2 and 3. Defendant No. 7 was the wife of defendant No. 1 and mother of plaintiff No. 1 and defendants 2 and 3. It appears from the order sheet dated 11th Apr. 1969 of the trial Judge that summons and notices were served in respect of the suit on the defendants. It also appears from the order sheet dated 28th Jan. 1969, that defendant No. 1 (the father) and defendant No. 7 (the mother of plaintiff No. 1 and defendants 2 and 3) appeared through Shri Janki Raman Sharma, Advocate. In spite of service of summons defendant No. 2 did not appear to prosecute the suit. The suit was heard ex parte on 20th Nov. 1969. PW Sardar Satya Narain Singh was examined. He heard argument of the plaintiffs on 20th Nov. 1969, and directed to put up the case for orders on 21st Nov. 1969. On 21st Nov. 1969, the ex parte decree was passed.

3. It appears from the order dated 21st Nov. 1969, that Ram Prasad Seth had three sons, namely, the plaintiff

*From order of Lakshman Prasad Singh, Sub. J., Sasaram, D/- 7-7-1973.

No. 1 and defendants 2 and 3. It is for this reason that the court granted one-fifth share to plaintiff No. 1, one-fifth share to defendant No. 1 (father), one-fifth share to defendant No. 2 (son of Ram Prasad Seth), one-fifth share to defendant No. 3 (another son of Ram Prasad Seth) and one-fifth share to defendant No. 7 (wife of defendant No. 1 and mother of plaintiff No. 1 and defendants 2 and 3). In my opinion, the judgment is perfectly all right and in accordance with law.

4. Though the order was passed on 21st Nov. 1969, defendant No. 2 filed a petition on 28th Sept. 1970, under Order IX, R. 13 of the Civil P. C. for setting aside the ex parte decree. The application for setting the ex parte decree was dismissed for non-prosecution on 7th July, 1973. Defendant No. 2 had filed an application for adjournment on that date. The court below refused to grant the adjournment on the ground that the miscellaneous case was pending since 1970. Hence the application under O. IX, R. 13 of the Civil P. C. was rejected. It is against that order, the appellant (defendant No. 2) has preferred an appeal before this court.

5. In my opinion justice has been done to the appellant in the ex parte decree passed on 21st November, 1979. Even if the appellant would have contested the case, he would have got one-fifth share in the suit properties which he got in the ex parte decree. On the basis of the ex parte order, a preliminary decree was prepared. Thereafter we have been informed by learned counsel for the parties that a final decree has also been prepared. Against final decree there was a First Appeal, being First Appeal No. 429 of 1973 which was preferred by defendant No. 2. We have further been informed by learned counsel for the parties that the First Appeal was dismissed for non-prosecution by an order dated 7th Feb., 1979. We have also been informed by learned counsel for the appellant that a restoration petition is pending for disposal.

6. So far as the present appeal is concerned, in my opinion, the application filed under O. IX R. 13 of the Civil P. C. was barred by limitation. The ex parte decree was passed on 21st Nov., 1969 and the application under O. IX

R. 13 was filed on 28th Sept., 1970. Under Art. 123 of the Limitation Act defendant No. 2 was required to file an application for setting aside the decree within thirty days from the date of the decree or, where the summons or notice was duly served, then from the date of the knowledge to the applicant in respect of the decree. Admittedly, the application for setting aside the decree was filed after ten months. The applicant was entitled to get the benefit about knowledge of the decree only when summons or notice was not duly served. In the present case the order sheet dated 11th April, 1969, clearly suggests that the notice or summons was duly served upon the defendants including defendant No. 2. In this circumstance defendant No. 2 — the appellant, is not entitled to count the days of limitation from the date of knowledge of the decree. If it is so, the application of defendant No. 2 is barred by limitation. This appeal can be dismissed on this ground alone.

7. Learned counsel for the appellant contends that a consolidation proceeding is going on in the suit area and as such the appeal will abate under Sec. 4 (c) of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act. No doubt, under S. 4 (c), a suit, appeal, reference or revision abates if consolidation proceeding is going on in the suit area. Here the matter is quite different. In the present case, a preliminary decree was passed and thereafter a final decree was also passed. Against the final decree First Appeal No. 429 of 1973 was preferred by defendant No. 2 which was also dismissed for non-prosecution. The result will be that the final decree was also affirmed by the High Court and the suit was finally disposed of. The abatement will take place under S. 4 (c) in respect of a proceeding or suit pending before a Court with respect to declaration of rights or interest in any land where the consolidation proceeding is going on. In the present case the suit commenced by filing the plaint and the suit came to an end when a preliminary decree was passed. Therefore, neither the preliminary decree nor the final decree will abate under S. 4 (c) as there is no such provision under S. 4 (c) of the Act. The Act envisages abatement of a suit, appeal, reference or revision. Preliminary

decree or final decree will not come either within the purview of suit, appeal, reference or revision. Hence Section 4 (c) will not apply in the present case. This was the view of a Division Bench of this Court in Nathuni Ram v. Smt. Khira Devi (judgment dated 8th July, 1981, in F. A. No. 108 of 1967).^{*} In that case it has been held that the preparation of final decree is neither a suit nor a proceeding for declaration of any right in the suit and as such, such proceeding is not hit by S. 4 (c) of the Act. This view is also being supported by a Full Bench decision of Orissa High Court in Srinibas Jena v. Janardan Jena (AIR 1981 Orissa 1).

8. Learned counsel for the appellant relies on a Supreme Court decision in Ram Adhar Singh v. Ramroop Singh (AIR 1968 SC 714). In that case their Lordships have not come to the conclusion that either a preliminary decree or a final decree will abate while consolidation operation is going on in the suit area. Therefore, this decision does not apply to the facts of the present case. In another decision in Satyanarayan Prasad Sah v. State of Bihar (AIR 1980 SC 2051) their Lordships of the Supreme Court held that the High Court should not have nullified the decree of the trial Court while passing an order under S. 4 (c) of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act. This decision is against the appellant. This decision was again followed by the Supreme Court in Mossamat Bibi Rahmani Khatoon v. Harkoo Gope (1981 BBCJ 197): (AIR 1981 SC 1450). The decision in Satyanarayan Prasad Sah's case (supra) was neither distinguished nor overruled by the Supreme Court in Mossamat Bibi Rahmani Khatoon's case. In other words, the former decision was upheld by the later decision of the Supreme Court. In the operative portion of the judgment the Supreme Court held as follows at p. 1455 of AIR):—

".....the title of the appellants declared by the trial court in respect of Khata No. 458 (nakdi) has become unchallengeable at the hands of Brahmadeo or anyone claiming through him and the abatement of the second appeal will

have no impact on the title of the appellants to Khata No. 458.

In my opinion, the Supreme Court did not differ with the principle laid down in the former case of Satyanarayan Prasad Sah. Hence we are of the opinion that under S. 4 (c), a suit, an appeal, a reference or a revision will abate and neither a preliminary decree nor a final decree will abate. Hence, we dismiss the petition filed by the appellant under S. 4 (c) of the Act. Even if it is held that the appeal abates under S. 4 (c) of the Act, the effect will be that it will not help the party inasmuch as even if the appeal abates, the final decree, remains alive. The suit comes to an end when a preliminary decree is passed for the purpose of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act. Hence, in this circumstance, in any event, I dismiss the appeal.

9. In the result, the appeal is dismissed. The parties shall bear their own costs.

U. C. SHARMA, J.:— I agree that the appeal be dismissed.

Appeal dismissed

AIR 1982 PATNA 39

S. SARWAR ALI AND

U. C. SHARMA, JJ.

The Secretary, Bihar School Examination Board and another, Appellants v. Ehsan Ahmad Khan, Respondent.

Letters Patent Appeal No. 26 of 1979, D/- 16-4-1981.

Bihar School Examination Board Regulations (1964), Chap. V, Regn. 19 — Import of — Cancellation of result — No time limit for exercise of power under Regn. 19 — However, it must be exercised in a manner which is free from vice of arbitrariness.

Regn. 19 is only an enabling provision. It does not fix a period within which the power under it has to be exercised. However the power being discretionary must be exercised in a manner which is free from the vice of arbitrariness. Delayed action by itself does not amount to arbitrary exercise of power. If taking the totality of circumstances into consideration, the Court comes to the conclusion that the action

taken by the authorities in exercise of power under Regn. 19 can be characterised as arbitrary exercise of discretion, it would be open to the court to strike down the action taken under the said regulation. In the instant case, allegations initially levelled against petitioner were held to be unsubstantiated. Petitioner was continuing his studies and after a lapse of about a year, another set of allegations were levelled against him. Held in these circumstances delayed action taken by the Board was unreasonable. Action of Board was unsustainable in law. Decision in C. W. J. C No. 1972 of 1978, D/- 30-7-1979, (Pat.) affirmed. AIR 1956 Mad 309 and AIR 1976 SC 376, Distinguished. (Paras 5, 6)

Cases Referred : Chronological Paras

AIR 1976 SC 376 : (1976) 2 SCR 722 8

AIR 1971 Pat 371 : 1971 BL JR 8 5

AIR 1956 Mad 309 : (1956) 1 Mad LJ 25 4, 7

T. K. Jha and Pashupati Nath Jha, for Appellants; J. N. P. Verma, Amresh Lal and Ashok Kumar Verma, for Respondent.

SARWAR ALI, J.: — This Letters Patent Appeal is directed against the decision of B. S. Sinha, J. in C. W. J. C. 1972 of 1978.

2. The relevant facts giving rise to this appeal may be compactly stated. The respondent (petitioner in the writ case) appeared at the annual examination of the Bihar Secondary School Examination in the year 1976 and was declared to have passed the said examination in the first division. After passing the examination he got himself admitted in C. M. College, Darbhanga in I. Com class. The Bihar Secondary School Examination Board (the 'Board') received a letter from one Anil Kumar Verma alleging that the petitioner had passed in the examination by use of unfair means. Presumably on the basis of the said allegation the case of the petitioner was referred to the Unfair-means committee. A notice was issued to the petitioner by the Unfair-means committee asking him to show cause as to why his examination result should not be cancelled. The notice stated that on enquiry it had been found that the petitioner had sent out of the examination hall some of the leaves from the answer books which were answered by outsiders and the same were in-

cluded in the answer book of the petitioner. The writings in those sheets were different from the writing of the petitioner. The petitioner appeared before the committee. He was asked to write out some answers and read his own answer books. The committee found that the allegations as mentioned in the show cause notice were not substantiated. The Committee, however, in its report dated 26-12-1976 opined that in the opinion of the committee "there were some other types of irregularities" in the answer books, apart from those mentioned in the notice. Nothing happened for about a year. However on 26-11-1977 the petitioner received another communication to show cause as to why the result of the petitioner by Secondary School Examination 1976 (annual) should not be cancelled. The petitioner filed show cause but did not appear before the committee. There is some controversy between the parties as to when the petitioner had filed his show cause which is dated 6-12-1977. But that is not important in this case. The committee in its report dated 25-1-1978 opined that the petitioner had used unfair means at the examination. This report of the committee was approved by the Chairman of the Board on 9-2-1978. Thereafter a communique was issued in local daily newspaper 'The Indian Nation' dated 25-5-1978 stating that the result of the petitioner-respondent as declared is cancelled under the provisions of Regulation 19, Chapter V of Bihar School Examination Board Regulations, 1964. The respondent-petitioner had prayed in the writ application for the quashing of the said communique which was Annexure 2 to the writ application. The writ application was allowed and the impugned Annexure was quashed and set aside.

3. The learned single Judge held that although no time limit had been prescribed for taking action under Regn. 19 aforesaid, yet the power under the said Regulation had to be exercised within reasonable time. On the facts of the case it was held that in the circumstances the action taken against the petitioner must be held to have been taken after unexplained and extraordinary delay.

4. Learned counsel for the appellants contended:

(a) That the power under Regn. 19 was an unfettered power. Consequently the Board was within its jurisdiction to cancel the result of the petitioner;

(b) That the decision of the learned single Judge is based on the decision of Madras High Court in Registrar, University of Madras v. Sundara Shetti, (AIR 1956 Mad 309). This case was distinguishable from the present case.

5. Regn. 19 is as follows:—

"In any case where the result of the examination has been ascertained and published and it is found that such result has been affected by error, malpractice, fraud, or any other cause whereby an examinee has in the opinion of the Board been party to or privy to, or connived at such malpractice, fraud or improper conduct, the Board shall have power at any time, notwithstanding the issue of the certificate to amend the result of such examinee and to make such declaration as it may consider necessary, in that behalf."

Dealing with the import of the Regulation it was held in *Macan. Sharma v. Bihar School Examination Board*, 1971 BLJR 8: (AIR 1971 Pat 371 at p. 373). "The Regulation aforesaid is only enabling and does not require that in every case where an error is detected the same should be corrected irrespective of the consequences and irrespective of the effect of such a correction on the career of a student who on the basis of a duly published result, and without any fault on his part has prosecuted his studies". This enabling provision, no doubt, does not fix a period within which the power under the Regulation has to be exercised. However, the power being discretionary must be exercised in a manner which is free from the vice of arbitrariness. Delayed action under Regn. 19 by itself does not amount, in my view, to arbitrary exercise of power. Suppose someone has been guilty of fraud. He has also been careful enough to see that the same is not discovered. But when it is discovered, I do not think the authorities would be debarred from taking action under Regn. 19 merely on the ground that the action is being taken after a lapse of considerable time. It all depends on the circumstances of each case. It is neither advisable nor possible to lay down situations when an action taken under Regulation

19 after lapse of a considerable time could be said to be arbitrary exercise of discretionary power. It all depends on the task in hand. Thus, if taking the totality of the circumstances into consideration, the court comes to the conclusion that the action taken by the authorities in exercise of power under Regn. 19 can be characterised as arbitrary exercise of discretion, it would be open to the court to strike down the action taken under the aforesaid Regulation.

6. In the instant case the allegations initially levelled against the petitioner were held to be unsubstantiated. There was no reason for the petitioner to think that further action was under contemplation. He joined I. Com. course. He was continuing his studies with the firm convictions that the Board had nothing against him and yet after a lapse of about a year another set of allegations were levelled against the petitioner. Those circumstances, and taking other relevant circumstances mentioned in the judgment the learned single Judge came to the conclusion that this delayed action taken by the Board was unreasonable. I am not persuaded to take a different view from the one taken by the learned single Judge in the peculiar circumstances of the instant case. The action taken by the Board was thus unsustainable in law.

7. So far as the decision in *Sundara Shetti's case* (AIR 1956 Mad 309) is concerned, the decision is, no doubt, distinguishable as the decision was based on the principle of legal or equitable estoppel. Indeed, the learned single Judge has not based his decision on this case. He has only referred to it as in his view the decision lends some support to the view taken by him that delay in taking action by the authorities concerned is a relevant factor to be considered. I do not, therefore, think that the decision in the instant case is based on *Sundara Shetti's case*.

8. Learned counsel for the respondent relied on the decision of the Supreme Court in *Shree Krishan v. Kurukshetra University* (AIR 1976 SC 376). In this case the petitioner was permitted to appear at the examination after fulfilling the formalities. Later he was informed that since the percentage of lectures which he had to attend was short, his candidature stood cancelled.

This action was under challenge. It was held on interpretation of the relevant provision that this could not be done. The cancellation could only be before the examination. It was observed (at p. 380)". It is, therefore, manifest that once the appellant was allowed to take the examination, rightly or wrongly, then the statute which empowers the University to withdraw the candidature of the appellant has worked itself out and the applicant cannot be refused admission subsequently for any infirmity which should have been looked into before giving the applicant permission to appear." The relevant clause of the Ordinance specifically stated that the provisional certificate given by the competent authority could be withdrawn at any time before the examination, if the applicant fails to attend the prescribed course of lectures before the end of his term. The power being, thus only exercisable before the examination, the Supreme Court held that the certificate could not be cancelled after the student had appeared at the examination. The principle enunciated in this case has no relevance so far as the present case is concerned.

9. I am, therefore, of the view that sufficient grounds do not exit for interfering with the decision of the learned single Judge. The appeal is accordingly dismissed, but in the circumstances without costs.

U. C. SHARMA, J.— I agree
Appeal dismissed.

AIR 1982 PATNA 42

S. ALI AHMAD, J.

Kashi Choudhary, Appellant v. Mujataba Hassan and another, Respondents.

A. F. A. D. No. 179 of 1979, D/- 4-9-1981.*

Civil P. C. (5 of 1908), O. 7, Rr. 7, 8 — Suit for ejectment and arrears of rent — Title of house found with plaintiff — Defendant found to be licensee and not tenant — Suit sought to be dismissed as case of licensee was not mentioned — Equitable relief of ejectment can be granted.

*From decision of Nawal Kishore Prasad, Sub: J. Biharsharif, D/- 23-12-1978.

All that O. 7, R. 8 provides is that the plaintiff should state the grounds on which he seeks relief. It does not however mean that equitable relief under O. 7, R. 7 cannot be given if all grounds are not mentioned. (Para 8)

Where ejectment is sought on ground of default in payment of rent and the Court finds that the defendant was not a tenant but was a licensee, the suit itself need not fail for not mentioning the case of a licensee. In such a case, the Court has discretion under O. 7 R. 7 to grant an equitable relief of ejectment on the basis of title, AIR 1951 Pat 550, AIR 1954 Pat 128 and 1968 BLJR 467, Relied on. (Paras 5, 6)

Cases Referred : Chronological Paras
AIR 1976 Pat 229: 1976 Pat LJR 175 5
1968 BLJR 467 7
AIR 1954 Pat 128: 1953 BLJR 385 7
AIR 1951 Pat 550 5, 7

Girish Chandra Narain, for Appellant;
S. S. Asghar Hussain, for Respondents.

JUDGMENT:— This appeal by the defendant arises out of a suit filed by the plaintiff-respondents for a decree of eviction of the appellant and also for realisation of arrears of rent amounting to Rs. 925/- for the period from 1-5-1970 to 8-8-1973 at the rate of Rs. 25/- per month in respect of the suit house.

2. Shortly stated, the case of the plaintiff respondents was that the land over which the suit house stands belonged to one Mohammad Noor. The plaintiffs took settlement from Mohammad Noor and constructed a house over it. Thereafter, it is said, the plaintiffs gave the suit house on rent to the defendant. The defendant defaulted in payment of rent and, therefore, the suit was filed for the reliefs already mentioned earlier.

3. The defendant appeared and contested the suit. According to him, the house did not belong to the plaintiffs; rather it belonged to him. As such, according to the defendant, there was no relationship of landlord and tenant between them. According to the defendant, therefore, the plaintiffs were neither entitled to a decree for eviction nor for realisation of the arrears of rent amounting to Rs. 925/-.

4. Several issues were framed. One of the issues was as to whether the suit house belonged to the plaintiffs or to the defendant. The trial Court on an appreciation of the evidence on record

came to the conclusion that the suit house belonged to the plaintiffs. It also held that the plaintiffs gave the suit house on rent to the defendant and the defendant did not pay the rent as stipulated. It, therefore, decreed the suit in full. On appeal by the defendant, the lower appellate court upheld the finding recorded by the trial Court that the plaintiffs were the owners of the house. It, however, did not agree with the trial Court that there was a relationship of landlord and tenant between the parties. According to it, the appellant was only a licensee. On these findings, the lower appellate Court maintained the decree for eviction, but set aside the decree for realisation of Rs. 925/- being the rent from 1-5-1970 to 8-8-1973. It, however, granted a decree for damages for use and occupation of the suit house at the rate of 0-75 paise per day with effect from the day the decree was passed by the trial court.

5. The appellant in this appeal has challenged the decree for eviction. According to the learned counsel the lower appellate Court having held that there was no relationship of landlord and tenant between the parties, acted illegally in passing a decree for ejectment after recording a finding that the appellant was a licensee. According to the learned counsel, it was neither the evidence of the defendant nor of the plaintiffs that the defendant was a licensee. As such, according to the learned counsel, the Court had no jurisdiction to make out a third case. Further, learned counsel urged that the decree for eviction was sought on the ground that the defendant was a tenant and had defaulted in payment of rent. Since that was not proved, the suit had to be dismissed. In that connection learned counsel referred to the decision in *Abdul Latif v. Mahadeo Lal* (AIR 1976 Pat 229). In that case, Madan Mohan Prasad, J., held that in a suit for permanent injunction only, a decree for possession cannot be passed. This case, in my opinion, has no application to the facts of this case. Rather the case reported in *Mohammad Mian v. Jugeshwar Prasad* (AIR 1951 Pat 550) fully applies to the facts of this case. Reuben, J., had to deal with a case where a decree for eviction was sought against a tenant. The Courts held that the

defendant was not a tenant. But at the same time, held that the plaintiff had title to the suit property. On these facts, it was held that in such a situation, the Court had discretion under O. 7, R. 7 of Civil P. C. to grant an equitable relief of ejectment on the basis of title, provided the plaintiff has done nothing to disqualify him from receiving an equitable relief, and the issue of title has been raised and fairly tried.

6. Now in the present case also, as I have stated earlier, the title of the plaintiffs was denied and the defendant claimed title to the suit property in himself and issue regarding title was, therefore, framed. Both sides adduced full evidence on the question of title. The two Courts below concurrently found title with the plaintiff-respondents. But at the same time, the appellate Court also held that the plaintiffs had not been able to prove relationship of landlord and tenant. I do not see how this case can be distinguished from the case I have just referred to above.

7. Learned counsel for the appellant also could not distinguish this case. He, however, urged that the proposition mentioned in the above case needs re-examination. I do not think I can accede to this request. The case that I have just referred to above is a Division Bench case which was followed in the case of *Smt. Kasturi Devi v. Shripal Singh* (AIR 1954 Pat 128), by another Division Bench. Then against these two cases were relied upon by a learned single Judge in the case of *Gauri Sao v. Ramkishun Sao* (1968 BLJR 467). The law as laid down in the case of *Mohammad Mian v. Jugeshwar Prasad* (AIR 1951 Pat 550) has stood till about thirty years. I do not think there is any justification for me now to doubt its correctness.

8. Learned counsel also drew my attention to the provisions of O. 7, R. 8 of the Code of Civil Procedure, and on that basis contended that where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds, they shall be stated as far as may be separately and distinctly. According to the learned counsel, since the case of the licensee was not mentioned no relief can be given to the plaintiffs, treating the appellant as a licensee. All

that R. 8 of O. 7 of Civil P. C. provides is that the plaintiff should state the grounds on which he seeks relief. It does not mean that equitable relief under O. 7, R. 7 cannot be given if all the grounds are not mentioned. In fact, if the argument of the learned counsel is accepted, then there will be no scope for the Court to grant equitable relief.

9. A cross-objection has also been filed on behalf of the plaintiffs against that part of the decree by which their claim for arrears of rent for the period prior to the judgment passed by the trial Court was refused. Mr. Hussain in support of his cross-objection submitted that the appellant was living in the house even prior to the date when the decree was passed by the trial Court. He, therefore, contended that a decree for damages at least should have been passed with effect from 1st of May, 1970. This argument of Mr. Hussain has no substance. According to the finding recorded by the Court of appeal below, the appellant was not paying any rent to the plaintiffs, and if he was a licensee, as the finding goes, he cannot, by a decree passed by the Court, be compelled to pay for residing in the house.

10. For the aforesaid reasons I see no merit either in the appeal or in the cross-objection. Both of them are, therefore, dismissed; but without costs.

Appeal dismissed.

AIR 1982 PATNA 44

B. P. JHA AND U. C. SHARMA, JJ.

Satyanarain Mahto and another, Appellants v. Rameshwar Mahto and others, Respondents.

A. F. O. D. No. 667 of 1968, D/- 17-8-1981.*

Hindu Succession Act (30 of 1956), Ss. 8 and 6 Proviso, Explan. 2 — Death of Hindu father in 1959 — Widow, daughters, and sons left behind — All sons separated from father in 1950 — Explan. 2 does not apply — Property has to be divided equally according to S. 6 proviso.

Where a Hindu father who has separated from all his sons dies leaving be-

*From decision of P. N. Sanyal, 2nd Addl. Sub. J., Darbhanga, D/- 10-8-1968.

hind a widow, two daughters, one son and heirs of two predeceased sons, S. 8 and proviso to S. 6 would apply to the succession of the coparcenary property the deceased owned. The property has to be divided equally and each set of heirs has to take 1/6 share. (Para 6)

It is not correct to say that in view of Explan. 2 to S. 6, Proviso, because the deceased had separated from his sons, the sons or their heirs cannot claim a share in his property and that his widow shall be the sole successor. Under Explan. 2 the undivided person excludes the divided one from succession. In the instant case as all the sons had separated no one had preference over the others and therefore Explan. 2 did not apply. AIR 1972 Andh Pra 258, Rel. on. (Paras 4, 5, 6)

Cases Referred : Chronological Paras
AIR 1972 Andh Pra 258: (1972) 1 Andh
WR 306 4

T. K. Jha and Lala Sachindra Kumar, for Appellants; Ramanand Kumar, for Respondents.

JUDGMENT:— This appeal arises out of a partition suit. Originally, the plaintiffs claimed 1/6th share in the suit property. The suit property is a house in the town of Laheriasarai. One Janki Mahto had three sons, namely, Juri Mahto, Chulhai Mahto and Lakshmi Mahto. The heirs of Juri Mahto are the plaintiffs in this case. Lakshmi Mahto is defendant No. 1 and his two sons, namely, Satyanarain Mahto and Rajendra Mahto are defendants 1/a and 1/b (appellants). Chulhai Mahto died in 1960 leaving behind two daughters, namely, defendants 3 and 4 and a widow who is defendant No. 5. There are two daughters of Janki who are defendants 6 and 7. Defendant No. 2 was Most. Mushni, widow of Janki. Most. Mushni died during the pendency of the suit.

2. Admittedly, there was a partition by a registered deed of partition (Ext. 3) dated 11-7-1950. By this registered partition deed the properties of Janki Mahto were partitioned among Janki Mahto, Juri Mahto, Chulhai Mahto and Lakshmi Mahto. Each got 1/4th share in the joint family property. The house, which is in dispute in the present suit, was allotted to Janki Mahto. Admittedly, Janki Mahto died in the year 1959. Most. Mushni was living with him.

After the death of Janki, Most. Mushni executed a registered sale deed (Ext. B2-1) dated 20-11-1963 in favour of defendants 1/a and 1/b (appellants before this Court).

3. On these facts, the court below granted 1/6th share to the plaintiffs, 1/6th to Lakshmi, 1/6th to defendants 3, 4 and 5, 1/6th to defendant No. 6, 1/6th to defendant No. 7 and 1/6th to Most. Mushni. In other words, Janki died leaving behind six heirs, namely, heirs of Chulhai (defendants 3, 4 and 5), Lakshmi (defendant No. 1), plaintiffs Most. Mushni (widow of Janki), defendant No. 6 (daughter of Janki) and defendant No. 7 (another daughter of Janki). In other words, the court below granted equally 1/6th share to each of the above-mentioned six sets of heirs of Janki in the house in question. On these facts, the court below also held that the sale deed executed by Most. Mushni in favour of defendants 1/a and 1/b is a genuine document and for consideration. It is for this reason that the court below held that the 1/6th share held by Most. Mushni will devolve on defendants 1/a and 1/b (the appellants).

4. Against this judgment, defendants 1/a and 1/b have preferred this appeal to this Court. Learned counsel for the appellants contends that in view of Explan. 2 of S. 6 of the Hindu Succession Act, 1956 (hereinafter to be referred to as 'the Act') Most. Mushni was the sole heir of Janki. In other words, he means to say that the sons, who separated from Janki in 1950, will not be entitled to inherit any share after the death of Janki. According to him, the only heir of Janki will be Most. Mushni. We are unable to accept his contention. General law of inheritance is mentioned in S. 8 of the Act. According to S. 8, "the property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter:— (a) firstly, upon the heirs, being the relatives specified in class I of the Schedule;..." If there exists class I heir of the Schedule, then the property left by the father will equally be inherited by all the heirs mentioned in class I of the Schedule. According to S. 8, the six heirs of Janki will each get 1/6th share in the property left by him. In other words, his three sons, his two

daughters and Most. Mushni will each get 1/6th share in the property left by Janki. In other words, the house, which had fallen to the share of Janki, would be equally divided amongst all the six heirs of Janki according to S. 8 of the Act. Section 8 is general in nature. Section 6 of the Act is an exception to S. 8. Section 6 provides that if a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary. There is a proviso to S. 6 which provides that the principle of survivorship will not be governed if there is a surviving female relative as specified in class I of the Schedule. If the case comes within the proviso then the interest of the deceased in the Mitakshara coparcenary property shall devolve by intestate succession and not by survivorship. In the present case, learned counsel for the appellants relied upon Explan. 2 to S. 6 which runs as follows:

"Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein."

Learned counsel for the appellants contends that in view of the fact that Janki separated from his sons in the year 1950, the sons or their heirs, who had separated, will not be able to claim the share in the property left by Janki after his death. In our opinion, this is not the correct proposition. This point was correctly answered in *Ganta Appalanaidu v. Ganta Narayanamma* (AIR 1972 Andh Pra 258). Exactly, this was the question raised in that case.

5. We explain this point by giving an illustration. There was a separation between A, the father, and his two sons — B and C. B completely separated from his father. After partition, C remained joint with A. After the death of A, C will inherit the property by virtue of Explan. 2. B cannot lay any claim for partition in respect of the property left by A after his death. We give another example. There was a separation among A, B and C. A was the father and B and C were his sons. All the three were liv-

ing separately. A died leaving behind his widow and two sons — B and C. B and C along with the widow will be entitled to equal share in view of S. 8 of the Act.

6. It is a settled law that all the sons have a right to inherit the property left by their father though there is a separation. Each son will be entitled to equal share along with the other female relatives of class I as mentioned in the schedule. The only exception is the former illustration which was given earlier. In the present case each will get it in view of Explan. 1 of S. 6. Section 6 prescribes that the property will devolve by survivorship upon the surviving members of the coparcenary. The principle of survivorship will not apply to a case where there is a female relative mentioned in class I of the schedule of S. 8. If a female relative of class I is there then the property left by a male member in the coparcenary shall devolve equally upon the different members of class I of the schedule. In view of Explan. 1 each one will get equal share so far as class I heirs of the schedule are concerned. Explan. 2 will apply to a case where the former illustration applies. In the former illustration it has been shown that A died leaving behind his two sons — B and C. After separation, A and C remained joint. In this case Explan. 2 will apply and C will inherit the property left by A because he was living with A, and B had no right to lay any claim in respect of the property left by A. In a case of this type, only Explan. 2 will apply. Otherwise, in all the cases, after the father dies, all his heirs including his sons, daughters and widow will take equal share. We, therefore, reject the contention of the learned counsel for the appellants to the effect that Most. Mushni became the sole heir after the death of Janki. If Mushni was entitled to 1/6th share then she was entitled to transfer her 1/6th share to any other person. The court below was satisfied with the genuineness of transfer made by Mushni under Ext. B2-1 in favour of defendants 1/a and 1/b (appellants) in respect of her 1/6th share, and to that extent the share (i.e., 1/6th share) will devolve on appellants (defendants 1/a and 1/b). The other heirs, namely, the plaintiffs will get 1/6th share, defendants 3, 4 and

5 being the heirs of Chulhai will get 1/6th, defendant No. 6 as being the daughter of Janki will get 1/6th share, defendant No. 7 being another daughter of Janki will get 1/6th share and defendant No. 1, being the son of Janki will also get 1/6th, and defendants 1/a and 1/b (appellants) will get 1/6th, the share which was sold by Most. Mushni in favour of defendants 1/a and 1/b. The same view was expressed by the trial Judge to which we agree. In this view of the matter, we accept the testimonies of plaintiffs' witnesses and reject the testimonies of defendants' witnesses so far as this point is concerned.

7. DWs 9, 10 and 11 have stated that defendants 1/a and 1/b, after purchase, had constructed a new house. The statement of these witnesses has not been rejected by the court below. On the other hand, it appears from paragraph 21 of the judgment, that the trial court had accepted the correctness of the statement of the defendants' witnesses. It is, therefore, clear that after purchase defendants 1/a and 1/b have constructed a new house. Defendants 1/a and 1/b (appellants) were entitled to only 1/6th share in respect of the property sold by Most. Mushni. The Advocate-Commissioner is directed not to disturb the possession of defendants 1/a and 1/b (appellants) in respect of the new house. He will value the new house and give compensation of 1/6th share to each of the different sets of defendants and the plaintiffs. In other words, he will value the price of the new house and after deducting the valuation of 1/6th share, the balance of the valuation shall be equally divided, i.e., 1/6th to each of the parties, namely, 1/6th to the plaintiffs, 1/6th to defendants 3, 4 and 5, 1/6th to defendant No. 1, 1/6th to defendant No. 6 and 1/6th to defendant No. 7. In other words, 1/6th of the valuation, as indicated above, should be paid to each of the abovementioned parties after deducting 1/6th share which belongs to defendants 1/a and 1/b (appellants) by virtue of the sale deed (Ext. B2-1).

8. In the result, the appeal is dismissed with the modification and clarification made in respect of the new house. Parties will bear their own costs.
Appeal dismissed.

AIR 1982 PATNA 47

B. P. JHA, J.

Smt. Prem Kishori Devi Petitioner v.
State of Bihar, Opposite Party.

Civil Revn. No. 1020 of 1980, D/- 15-5-1981.*

Court-fees Act (7 of 187C), S. 7 (iv) (c) — Cases falling under S. 7 (iv) — Court has no power to interfere.

In the cases falling under S. 7 (iv) of the Court-fees Act liberty has been given to the plaintiff to state the valuation in the plaint. If such option is exercised by the plaintiff then in that case the court has no business to interfere with such valuation given in the plaint. AIR 1958 SC 245, Foll. (Para 5)

Cases Referred : Chronological Paras
AIR 1958 SC 245 : 1958 3CJ 47 4

Tara Kant Jha and Ramesh Jha, for Petitioner; C. K. Sinha, Govt. Pleader No. 4 and Anjani Kumar Sinha, Jr. Counsel to Govt. Pleader No. 4, for Opposite Party.

ORDER :— The civil revision petition has been filed by the plaintiff against an order dated 5-4-1980 passed by the Subordinate Judge, Katihar.

2. The plaintiff filed a suit for a declaration that the plaintiff is the kiyami raiyat of the suit land. The plaintiff also prayed to pass an order of permanent injunction restraining the State of Bihar from interfering with the khas possession of the plaintiff over the suit land. The plaintiff valued the suit at Rs. 5,350/-, as stated in paragraph No. 17 of the plaint, for the purpose of jurisdiction and court-fees. The defendant raised objection to the valuation. The court below held by the order dated 5-4-1980 that the valuation of the suit amounted to Rs. 2,40,000¹.

3. It is conceded by the learned counsel for the State that the suit will come within the purview of S. 7 (iv) (c) of the Court-fees Act. It is relevant to quote S. 7 (iv) (c), which is as follows:—

"7. The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows:—

xx xx xx

*Against order of Jugal Kishore Prasad, Sub. J., Katihar, D/- 5-4-1980.

HY/LY/D846/81/JDD

(iv) In suits:—

xx xx xx

(c) to obtain a declaratory decree or order, where consequential relief is prayed

xx xx xx

according to the amount at which the relief sought is valued in the plaint or memorandum of appeal.

In all such suits the plaintiff shall state the amount at which he values the relief sought."

If the case comes within the purview of S. 7 (iv) of the Court-fees Act then the court will accept the valuation given by the plaintiff in the plaint. In my opinion, liberty has been given to the plaintiff to state the valuation and such valuation shall be accepted by the court. The court has no authority to interfere with the valuation in cases falling under S. 7 (iv) (c) of the Court-fees Act on the ground that it is arbitrary or it is below the market value. No such power has been given to the court under the Act.

4. In this connection learned counsel for the petitioner relied upon a decision of the Supreme Court in Sathappa Chettiar v. Ramanathan Chettiar (AIR 1958 SC 245). It is relevant to quote a few portions of paragraphs Nos. 14 and 15 of that decision :

"14.....Section 7 further provides that in all suits falling under S. 7 (iv) the plaintiff shall state the amount at which the value of the relief is sought. If the scheme laid down for the computation of fees payable in suits covered by the several sub-sections of S. 7 is considered, it would be clear that, in respect of suits falling under sub-s. (iv), a departure has been made and liberty has been given to the plaintiff to value his claim for the purposes of court-fee. The theoretical basis of this provision appears to be that in case in which the plaintiff is given the option to value his claim, it is really difficult to value the claim with any precision or definiteness.

15. "...The computation of court-fees in suits falling under S. 7 (iv) of the Act depends upon the valuation that the plaintiff makes in respect of his claim. Once the plaintiff exercises his option and values his claim for the purpose of court-fees that determines the value for jurisdiction."

5. On the basis of the observations made above I hold that in cases falling

under S. 7 (iv) of the Court-fees Act liberty has been given to the plaintiff to state the valuation in the plaint. If such option is exercised by the plaintiff then in that case the court has no business to interfere with such valuation given in the plaint.

6. Learned counsel for the opposite party contends that the plaintiff has not been given an absolute right to place any valuation on her relief. I am unable to accept his argument in view of the Provisions of Sec. 7 (iv) of the Court-fees Act, (as quoted above), as well as on the basis of the decision of the Supreme Court. Hence, I direct the plaintiff to pay ad valorem court-fee on Rs. 5,350/-. I, therefore, set aside the order dated 5th April, 1980 by which the valuation was raised to Rupees 2,40,000/-.

7. In the result, the petition is allowed and the order dated 5th April, 1980 is set aside and the court below is directed to abide by the directions given in this judgment. Parties shall bear their own costs.

Petition allowed.

AIR 1982 PATNA 48

UDAY SINHA, J.

Lachandeo Sahni and another, Petitioners v. State of Bihar and others, Respondents.

Civil Writ Jurn. Case No. 555 of 1981, D/- 27-4-1981.

(A) Bihar and Orissa Co-operative Societies Act (6 of 1935), Ss. 48, 65-A — Election dispute — Matter pending before Deputy Registrar — Minister is competent to interfere.

Deputy Registrar exercising jurisdiction in election dispute is a court. However, where by an order the Deputy Registrar stayed the functioning of a newly elected Managing Committee until further orders, the Minister in exercise of powers under S. 65A would be competent to interfere with the order and stay the operation of the order passed by the Deputy Registrar. AIR 1967 SC 1494, Rel. on. (Para 3)

It could not be said that the Minister could not have called for the records of the case when he exercised the jurisdiction conferred upon him by S. 65A. The

State Government may of its own motion or on an application call for any records of any proceeding of any matter pending before the Registrar or his subordinate or any person acting under his authority and examine and pass such orders as may deem fit. (Para 3)

Further, it could not be said that the Minister could pass orders in terms of Sec. 65-A only in regard to executive orders passed by the Registrar or his subordinate as the expression "election" will also cover "election dispute" where an election has been challenged. 1979 BBCJ (HC) 109, Rel. on. (Para 3)

(B) Bihar and Orissa Co-operative Societies Act (6 of 1935), S. 65-A — Minister is executive functionary — However, he has jurisdiction to interfere in judicial matter by virtue of Section 65-A.

Minister is an executive functionary. But he has jurisdiction to interfere in judicial matters pending in the court of the Deputy Registrar as the law contained in S. 65-A explicitly lays down that the State Government, an executive functionary may pass such orders as it may deem fit. (Para 4)

(C) Bihar and Orissa Co-operative Societies Act (6 of 1935), S. 65-A — Expression "State Government" — It includes Minister. (Constitution of India, Arts. 166 (3) and 162).

For discharging the functions of the executive, the Governor has framed Rules of Executive Business in terms of Art. 166 (3) of the Constitution. Rule 21 in Part III of the Rules of Executive Business lays down that cases shall ordinarily be disposed of by or under the authority of the Minister-in-charge who may by means of standing orders give such directions as he thinks fit for the disposal of cases in the Department. R. 21 lays down that the Minister for the Department can dispose of certain matters. Therefore it could not be said that the expression "State Government" occurring in S. 65-A does not include the Minister for a particular Department. (Para 5)

Cases Referred: Chronological — Paras

1979 BBCJ (HC) 109 : 1979 BLJ 141 3.
AIR 1967 SC 1494 : 1967 Cri LJ 1380 :
(1967) 2 SCA 428.

A. Bose and Shahjahan Ali, for Petitioners; Subodh Kumar Sinha, J. C. to

A. G., for the State; Tara Kant Jha and Jagannath Jha, for Respondents.

ORDER :— This is an application under Arts. 226 and 227 of the Constitution for quashing annexure-1 to this application which is an order dated 30-1-1981, passed by Minister, Co-operation admitting a petition filed by Rameshwar Chaudhary of Ramgarhwa Fishermen's Co-operative Society and staying the operation of orders dated 8-1-1981 and 16-1-1981, passed by Deputy Registrar, Co-operative Societies, Tirhut Division.

2. There is a Co-operative Society by the name of Ramgarhwa Fishermen's Co-operative Society. The annual general meeting of the society was to be held on 21-12-1980. The elections for the Managing Committee of the Society were to be held on the same day. On 16-12-1980 Kunkun Sahni, a member of the Society filed an application before District Co-operative Officer, Motihari in which it was prayed that the meeting should be stayed, as all members had not been given notice of the annual general meeting. The District Co-operative Officer stayed the holding of the annual general meeting and election scheduled to be held on 21-12-1980. He registered a dispute in terms of S. 48 of the Bihar and Orissa Co-operative Societies Act (hereinafter referred to as 'the Act') and fixed 3-1-1981 as the date for hearing of the dispute. Despite the order for staying the holding of the elections passed by District Co-operative Officer, some of the members held annual general meeting on 21-12-1980 as scheduled. The result of the elections was challenged before Deputy Registrar, Co-operative Societies, Tirhut Division. The Deputy Registrar, Co-operative Societies by order dated 8-1-1981 heard the petitioner, admitted the dispute and issued notice of the dispute to the opposite party. Pending the final hearing of the dispute, the functioning of the newly elected Managing Committee was directed to remain stayed until further orders. The order of the Deputy Registrar is annexure-3 to this application. On 16-1-1981 the Deputy Registrar appointed the Assistant Registrar, Co-operative Societies as Special Officer of the Society. On 30-1-1981, respondent No. 5, Rameshwar Sahni filed an application before Minister, Co-operation in

which it was prayed that orders dated 8-1-1981 and 16-1-1981 (annexures 3 and 4) be set aside. On the very same day the Minister for Co-operation by annexure-1 admitted the petition of respondent No. 5 and stayed the operations of orders dated 8-1-1981 and 16-1-1981. The effect of the order of the Minister was that the newly elected Managing Committee was to function in place of the Special Officer. Being aggrieved by the order of the Minister for Co-operation contained in annexure-1 the petitioners have moved this Court by the present application for quashing annexure-1.

3. Learned counsel for the petitioners has contended that the Minister for Co-operation had no jurisdiction to call for the case records from a Court constituted under S. 48 of the Act. He relied upon *Thakur Jugal Kishore Sinha v. Sitamarhi Central Co-operative Bank Ltd.* (AIR 1967 SC 1494) for the proposition that the Deputy Registrar, Co-operative Societies in seisin of a dispute under S. 48 of the Act is a Court. The proposition thus urged is unexceptionable. A Deputy Registrar, Co-operative Societies hearing a dispute is certainly a Court. The further proposition, however, that the Minister could not have called for the records of the case is, however, difficult to accept. It is not in controversy that in passing the orders contained in annexure-1 the Minister exercised the jurisdiction conferred upon him by S. 65A of the Act which reads as follows :

"65-A. The power of the State Government to review the order of the Registrar — Notwithstanding anything to the contrary contained in this Act, the State Government may, of its own motion or on an application made to it by any party aggrieved by the constitution or reconstitution, amalgamation, election, supersession, liquidation or any other matter concerning working of the society call for any record of inspection or enquiry made under this Act or proceedings of any matter pending before the Registrar or his subordinate or any person acting under his authority and examine and pass such orders as it may deem fit."

A bare look at S. 65A of the Act, quoted above, shows that the State Government may of its own motion or on an application call for any record of any proceeding of any matter pending before the Registrar or his subordinate or any person acting under his authority and examine and pass such orders as may deem fit. The section also lays down that orders may be passed by the State Government in regard to election of any society besides other matters. The stand of learned counsel for the petitioners is that the Minister could pass orders in terms of S. 65A of the Act only in regard to Executive orders passed by the Registrar or his subordinates. I regret, it is difficult to accept the restricted meaning given to the word "election" occurring in Section 65A of the Act. The expression "election" must cover all aspects of the election including election dispute. The submission that the expression "election" in S. 65A cannot cover election disputes was precisely raised in *Hare Krishna Upadhyay v. State of Bihar* (1979 BB CJ (HC) 109). The Hon'ble the Chief Justice while disposing of that case held in unambiguous terms in para 12 of the judgment that the expression "election" will also cover "election dispute" where an election has been challenged. I find myself in complete agreement with the law laid down in *Hare Krishna Upadhyay's case* (supra). The submission urged on behalf of the petitioners that the Minister had no jurisdiction to interfere with the orders of the Deputy Registrar, Co-operative Societies has no substance and must be rejected.

4. Learned counsel for the petitioners further submitted that the Minister being an Executive functionary could have had no jurisdiction to interfere in a judicial matter pending in the Court of the Deputy Registrar. According to learned counsel for the petitioners, a judicial system would come to a naught, if an executive authority were to be permitted to forestall judicial proceedings and impose its own verdict. There is no scope for this submission in the face of the special provisions of S. 65A of the Act. The law contained in Section 65A of the Act explicitly lays down that the State Government, an Executive functionary, may pass such orders

as it may deem fit. The submission urged on behalf of the petitioner thus lacks substance and is hereby rejected.

5. It was then submitted on behalf of the petitioners that S. 65A of the Act empowered the State Government to pass appropriate orders and not the Minister. According to learned counsel for the petitioners, the Executive authority of the State Government vests in the Government and the Secretary of the Department and not in the Minister. According to learned counsel for the petitioners, therefore, the Secretary of the Department of Co-operation or the Governor could pass orders in terms of S. 65A of the Act, but not a Minister. This submission is also without substance and must be rejected. It is well known that the Governor functions on the aid and advice of Ministers. For discharging the functions of the executive, the Governor has framed Rules of Executive Business in terms of Article 166(3) of the Constitution. Rule 21 in Part III of the Rules of Executive Business lays down that cases shall ordinarily be disposed of by or under the authority of the Minister-in-charge who may by means of standing orders give such directions as he thinks fit for the disposal of cases in the Department. In the First Sch. to the Schedules is the list of the Departments. The Co-operative Department is listed as Number 19, R. 21 of the Rules of the Executive Business thus clearly lays down that the Minister for the Department can dispose of certain matters. In my view, therefore, it is difficult to hold that the expression "State Government" occurring in S. 65A of the Act does not include the Minister for a particular Department. In the instant case, the Minister has not set aside the orders of the Deputy Registrar, Co-operative Societies, but he has only stayed the operations of the orders passed by the Deputy Registrar. Taking a comprehensive view of the matter, I am of the view that the Minister for Co-operation had the jurisdiction to pass the orders contained in Annexure-1 whereby the operation of the order passed by the Deputy Registrar, Co-operative Societies was stayed.

6. For the reasons, stated above, I find no merit in this application and it is dismissed accordingly. In the circum-

stances of the case, there will be no order for costs.

Application dismissed.

AIR 1982 PATMA 51

S. K. JHA AND R. P. MANDAL, JJ.

Zakia Afaque Islamia College, Siwan, Petitioner v. State of Bihar and others, Respondents.

Civil Writ Juris. Case No. 1784 of 1981, D/- 19-8-1981.

(A) Bihar Universities Act (23 of 1976), S. 4 (19) — Bihar Non-Government Physical Training Colleges and Non-Government Teachers Training Colleges and Non-Government Primary Teachers Education Colleges (Control and Regulation) Second Ordinance (87 of 1980), S. 2 — Affiliation of College — Application for, rejected by State Government in view of Ordinance issued under Act — Ordinance not governing college run by applicant minority institution — Rejection of application, invalid. (Constitution of India, Art. 30).

Regulatory measures for affiliation for the purpose of uniformity, efficiency and excellence in educational courses cannot be said to infringe the provisions of Art. 30. If any condition or limitation by way of regulatory measure having a reasonable nexus with the proficiency or excellence in the standard of courses of study imposed by the Appropriate Authority is fulfilled then it cannot be said that a minority institution has got no legal right of affiliation in any faculty or courses of study. (Para 5)

Where no reason, no condition, no limitation, nothing germane to the question in issue with regard to the proficiency and excellence in the courses of study in the faculty concerned has been assigned while rejecting the application of the minority institution for affiliation of college, however, the only reason assigned was that since it was the policy of the State Government not to allow any non-Government institution to adopt or admit any student in the faculty of Education, namely, Bachelor of Education in view of the Ordinance issued by State Govt. under the Act, and moreover the provisions of the Ordinance did not govern the minority institutions declared so under Article 30, the rejection of the application would be invalid. (Paras 4, 5)

(B) Constitution of India, Art. 225 — Educational institution — Petition filed by

its Secretary as per its Rules — Maintainable. (Para 7)

Cases Referred: Chronological Paras
AIR 1980 SC 1042 5
(1979) C. W. J. C. No. 4892 of 1978, D/- 12-9-1979 (Patna), Managing Board of the Milli Talimi Mission, Bihar, Ranchi v. State of Bihar 3
AIR 1974 SC 1389 5

Dr. Sadanand Jha and H. Anzar, for Petitioner; Ramjanam Ojha, Parbhu Nath Roy and Chhatrapati Kumar Sinha, Govt. Pleader No. 4, for Respondents.

ORDER:— In this application under Articles 226 and 227 of the Constitution of India the petitioner, through its Secretary, is Zakia Afaque Islamia College, Siwan, in the district of Siwan, which has prayed for the issuance of a writ in the nature of mandamus directing respondent No. 2, namely, the Vice-Chancellor of the University of Bihar, Muzaffarpur, to affiliate the petitioner College in the Faculty of Education and/or any other writ/direction to issue to the respondents for an appropriate relief in this regard so as to permit the students of the petitioner College to take their Bachelor of Education examination of the Bihar University for the session 1980-81 and/or any other relief which the petitioner may be entitled, to on the facts and in the circumstances of the case.

2. Although, the hearing of the case has been protracted rather long, on account of the tenacity of the learned counsel for the University, the broad facts relevant for the disposal of this application are more or less admitted. It is worthwhile to mention here that initially at the time when interim relief was sought a counter-affidavit was filed on behalf of the University (for all practical purposes the Vice-Chancellor) that was already on record. By an order dated 17th July, 1981 a Bench of this Court, consisting of the learned the Chief Justice and P. S. Sahay, J., had directed that further counter-affidavit, if any, must be filed by the 30th July, 1981 after serving copies on the other side. This was not done. When the case was taken up for final hearing on 7th Aug., 1981 a counter-affidavit on behalf of the University and another counter-affidavit on behalf of the State of Bihar, respondent No. 1, were filed in course of the hearing. In view of the order of the Bench and also in view of the provisions of R. 6 of Chapter XXI-C of the Patna High Court Rules we had earlier rejected orally the prayer of the learned counsel appearing for the University as also for the State of Bihar to entertain those counter-affidavits. Since, how-

ever, on the 8th Aug., 1981 the case was adjourned on account of non-availability of the Bench to hear this case, when the matter was taken up on 17th Aug., 1981 both learned counsel for the University and the State prayed that since the date of the commencement of the examinations had been postponed and there had been now sufficient time for the petitioner to test the correctness of the statements made in the counter-affidavits which were sought to be entertained by this Court, their prayer to entertain these counter-affidavits may be accepted. We, accordingly, since no formal written order was passed and recorded in the order sheet, accepted the counter-affidavits as part of the records of the case. Be that as it may, these counter-affidavits are of no avail for the purpose of disposal of this writ application.

3. As we had indicated earlier, the relevant facts for the disposal of this writ application are short and simple. In the year 1971 Zakia Afaque Islamia College was established. After due correspondence with the University Authorities and the State of Bihar an order was passed by the State Government on 14th Jan., 1978 declaring this institution to be a Minority Institution; the order is contained in Annexure-5 to the writ application. The College was affiliated in all the faculties of courses of studies then in existence to the University. On 22nd June, 1980 an application was made by the petitioner-College to the University for affiliation in the faculty of Education; that application is marked Annexure-1 to the writ application. On 16th July, 1980 the Vice-Chancellor directed the petitioner-College to deposit the fee for the Inspector who admittedly under the law has to inspect and make a report with regard to affiliation in any faculty. On 19th July, 1980 the College deposited the fee. Nonetheless no Inspector was ever deputed to go and inspect the affairs with regard to the courses of study in the faculty of Bachelor of Education but on 23rd Dec., 1980 (vide Annexure-2 to the writ application) the Registrar of the University under the directions of the Vice-Chancellor wrote to the State Government as to whether the affiliation may be granted in the faculty with regard to the courses of Bachelor of Education to the College or not. This letter was admittedly purported to be a reference under sub-section (19) of S. 4 of the Bihar State Universities Act, 1976. It is worthwhile to quote here S. 4 (19) of the Act:

"4. There shall be the following purposes and powers of the University:—

(19) To affiliate or dis-affiliate Colleges

according to statutes subject to prior approval of the State Government."

It is also pertinent to point out here that from 1978 onwards several ordinances had been promulgated by the Governor of Bihar culminating in the last Ordinance, namely, Bihar Ordinance No. 87 of 1980 perpetuating the same thing from time to time. Section 2 of the Ordinance, *inter alia*, lays down that without the previous permission of the State Government which the State Government may accord on such terms and conditions as it may deem fit and whether previous permission had been accorded subject to such terms and conditions as may be determined by the State Government without fulfilling those terms and conditions organized, maintained, managed or promoted any School or College for undertaking, conducting, providing for or imparting physical training or physical education or teachers training or teachers education by way of training, admit or offer to admit to a course of studies led to an examination for the award of a degree, diploma or certificate in branches of teachers training or any allied branches of teachers training of any University or Body incorporated by any law of the Central or the State Government. As we have already stated earlier, this College was declared by the State Government to be a Minority Institution on 14th Jan., 1978. This question had once come up for consideration before another Bench of this Court as to whether the Ordinances in question emanating in 1978 and perpetuated from time to time till today would be applicable to the Minority Institutions governed by Art. 30 of the Constitution of India. In the case of the Managing Board of the Milli Talimi Mission, Bihar, Ranchi v. State of Bihar (C. W. J. C. No. 4892 of 1978) it was held by another Bench of this Court that the Ordinance did not apply to the Minority Institutions governed by Art. 30 of the Constitution. That judgment was delivered on 12-9-1979. It was only thereafter that the petitioner-College started courses of studies in the faculty of Education and as aforesaid applied for affiliation in that faculty to the University. The University rightly under the provisions of S. 4 (19) of the Universities Act, 1976, aforementioned, made a reference to the State Government. The State Government, without assigning any reason whatsoever, wrote back that in view of the Ordinance it was the general policy of the Government not to grant affiliation or recognise courses of studies in the faculty of Education (Training). That direction of the State Govern-

ment to the University is incorporated in Annexure-C to the counter-affidavit filed. The only reason assigned for non-affiliation of the courses of studies in this faculty to the petitioner-College is that since it was the policy of the State Government not to grant affiliation in the courses of studies in this faculty to any institution not under the control of the State Government, the application for affiliation should be rejected. The students had already been admitted and had already undergone more or less one year course of study in the faculty concerned after the judgment of this Court. In view of the State Government's decision taken in Annexure-C the petitioner-College was not granted affiliation. This is the main cause of action bringing the petitioner to this Court.

4. The only question for determination in this case, therefore, is as to whether the order of the State Government, as contained in Annexure-C to the counter-affidavit, and the order of refusal of the University to affiliate the petitioner-College in the faculty of Education are legally valid or not. It was argued very tenaciously by Mr. Ramjanam Ojha, the learned counsel for the University, that the Bench decision of this Court, referred to above, was made *ex concessis* by the learned Advocate General, appearing in that case, on behalf of the State of Bihar and, therefore, no legal sanctity should attach to such a judgment. It is true that concession on question of law is not binding in all subsequent cases in which such a question arises. We, therefore, proceed upon the assumption in favour of the respondents that the previous Bench decision of this Court may not be binding on us and so we, therefore, start from a scratch to see as to whether the provisions of the Ordinance apply to Minority Institutions governed by Article 30 of the Constitution. It is well established canon of construction of statutes that if two views are possible, namely, one which could render the statutory provisions *ultra vires* and the other which would maintain its validity, the construction which ought to be put upon such statutory provisions is that which will not render them *ultra vires*. There is nothing in the Ordinance which goes to show that it specifically governs the Minority Institutions declared so under Art. 30 of the Constitution. In our view, therefore, the construction which learned counsel for the University and learned Government Pleader, appearing on behalf of the State, seek to canvass before us that the provisions of the Ordinance would also govern the Minority Institutions must be

overruled. This is for the simple reason that, if the provision of S. 2 of the Ordinance or for that matter the entire Ordinance in question is to govern the Minority Institutions also there would be a likelihood of infringement of the provisions of Art. 30 of the Constitution.

5. Mr. Ram Janam Ojha, learned counsel for the University, argued rather vehemently that the petitioner-College had no legal right coupled with any legal obligation on the part either of the State Government or the University to have any courses of study in any faculty to be affiliated to the University. We are afraid, the argument is completely misconceived. It is true that there is no fundamental right of a Minority Institution to affiliation to a University. When a Minority Institution applies to a University to be affiliated, it expresses its choice to participate in the system of general education and courses of instruction prescribed by that University. It agrees to follow the uniform courses of study. Affiliation is regulating the educational character and content of the Minority Institutions. These regulations may be reasonable in the interest of general secular education and may also conduce to the improvement in the stature and strength of the Minority Institutions. Therefore, measures which will regulate the course of study, the qualifications and appointment of teachers, the conditions of employment of teachers, the health and hygiene of students, facilities for libraries and laboratories, are all matters germane to affiliation of Minority Institutions. Therefore, regulatory measures for affiliation for the purpose of uniformity, efficiency and excellence in educational courses cannot be said to infringe the provisions of Art. 30 of the Constitution (*vide Ahmedabad St. Xavier's College Society v. State of Gujarat*, AIR 1974 SC 1389). Although, therefore, there may not be a fundamental right for affiliation, there is certainly a legal right of affiliation subject to such regulatory measures and conditions and limitations germane to the question in issue. This contention of Mr. Ojha must, therefore, be overruled. If any condition or limitation by way of regulatory measure having a reasonable nexus with the proficiency or excellence in the standard of courses of study imposed by the appropriate authority is fulfilled then it cannot be said that a Minority Institution has got no legal right of affiliation in any faculty or courses of study. Otherwise the whole purpose of Art. 30 will be frustrated and rendered nugatory as held by the Supreme Court in the case of *All Saints High School v. Govt. of Andh. Pra.*

(AIR 1980 SC 1042). Article 30 by its very nature implies that where an affiliation is asked for, the University concerned cannot refuse the same without sufficient reason or try to impose such conditions as would completely destroy the autonomous administration of the educational Institutions. In the instant case no reason, no condition, no limitation, nothing germane to the question in issue with regard to the proficiency and excellence in the courses of study in the faculty concerned has been assigned whatsoever. The only reason assigned is that since it is the policy of the State Government not to allow any non-Government Institution to adopt or admit any student in the faculty of Education, namely, Bachelor of Education, the petitioner's application for affiliation is rejected. This is no valid reason whatsoever, specially in view of the fact, as we have already held earlier, that the provisions of the Ordinance do not govern the Minority Institutions.

6. Both Mr. Ojha, for the University, and Mr. Chatrapati Kumār Sinha, Government Pleader No. 4, on behalf of the State, then persuaded us to go through the counter-affidavit filed by them in course of the hearing of this writ application and pointed out that it had been asserted in the counter affidavits concerned that the petitioner College was not regulating its affairs in a proper manner and that there were adverse remarks of the then Inspector of Colleges from time to time. These assertions made in the counter-affidavits filed could not be rebutted by any rejoinder thereto on behalf of the petitioner since, as we have already said earlier, their prayer for entertainment of these counter-affidavits had earlier been rejected by us on 7th August, 1981 and it was only on 17th August, 1981, at the final hearing, that we granted them the indulgence of entertaining these counter-affidavits. Learned counsel for the petitioner, therefore, when called upon to meet these allegations, produced before us, after showing to the learned counsel for the University and the State, the latest inspection report of the Inspector of Colleges of the University of Bihar on the basis of an inspection made on 19th May, 1979 by the Inspector of Colleges in original. This report, *inter alia*, states:

"The results of the University examinations have been above the average. There is a proper academic atmosphere in the College. In a surprise visit in Part I (Inspector of Colleges, Arts and Commerce) found that several classes were going on even after 3 P. M. There is a team spirit among the teachers and

enthusiasm among the members of the Trust and the people. The College has a bright future."

In view of this report it is surprising enough to find that wild allegations have been made against the petitioner-College both by the University and the State Government in their counter-affidavits. Only more so, it does not stand to reason as to why when on 22nd June, 1980 (*vide* Annexure 1) an application was made to the University for affiliation in the faculty of education the Vice-Chancellor ordered on 16th July, 1980 that inspection fee be deposited by the College for the Inspector of Colleges to probe into the affairs of the College in this faculty and pursuant thereto the petitioner deposited the fee on 19th July, 1980 and yet no Inspector was ever sent to the College at all. Wherefrom then and from what sources, information adverse to this Institution, was received by the University and the State Government on account of which they now claim that the petitioner is not entitled to affiliation in the faculty of Education. On the contrary in spite of petitioner having deposited the inspection fee and no Inspector having been deputed by the University for the purpose germane to the question, the Vice-Chancellor directed that the matter be referred to the State Government under sub-section (19) of S. 4 of the 1976 Act. And that letter (Annexure 2) clearly states that the State Government's approval was sought in view of the Ordinance as to whether the State Government would accord its permission or approval to the affiliation of this Institution in the faculty of Education and the blanket order passed by the State Government, as contained in Annexure C, is to the effect that since it was the general policy of the State Government not to accord affiliation to any non-Government Institution in the faculty of Education, no affiliation should be granted. Assuming in favour of the respondents that the Ordinance applies even to the Minority Institutions under Art. 30 of the Constitution no condition has been imposed, no reasonable limitation has been put or for that matter no reason has been assigned at all having any nexus with the proficiency or excellence of the course of study in the faculty concerned of this Institution. Such an order cannot countenance any legal provision, for that would be frustrating the very purpose of Art. 30 of the Constitution.

7. Catching at the last straw, Mr. Ojha argued that the writ petition was not maintainable because it had been filed by an individual, namely, M. N. Ahmad Ghani, on behalf of the College and there was no aver-

ment in the petition that he was duly authorised by the Governing Body of the College to sue or to be sued on behalf of the Institution. Learned counsel for the petitioner, in course of his reply, when called upon to meet this point, produced the Constitution of the A. G. M. Trust Z. A. Islamia College, Siwan (Minority College affiliated to the University of Bihar, Muzaffarpur). It, inter alia, lays down the powers and duties of the office bearers including the Secretary. In Cl. (3) (h) of the Caption 'Powers and Duties of Office Bearers' it has been specifically laid down that the Secretary shall have the power to represent the Governing Body, the College, and also the Trust in cases relating to College, in all legal proceedings and to sign and to verify pleadings on their behalf, in such proceedings of the cases. This contention of learned counsel for the University also, therefore, is meritless.

8. For the foregoing reasons, we are constrained to allow this application, quash the order of the State Government as contained in Annexure-C to the counter-affidavit and we direct that a writ of mandamus do issue to the University of Bihar, respondent No. 2, to have an inspection report with regard to the faculty in question within one month from today and if no irregularity is found or no reason having any connection with the question at hand is assigned, to affiliate the petitioner-College in the faculty of Education. As a necessary corollary, the students having already been admitted and who have already undergone one year's course of study shall be permitted to sit at the ensuing examinations and so long as any final order is not passed the University is restrained from starting the examination in the faculty of Education. In the alternative we direct the University to permit such students as aforementioned to appear at the examination subject only to their final results being published after the report of the Inspector of Colleges or final order with regard to the affiliation by the University. On the facts and in the circumstances of the case the parties are directed to bear their own costs.

Petition allowed.

AIR-1982 PATNA 55

SHIVANUGRAH MARAIN, J.

Shashi Bhushan Prasad Singh and others,
Petitioners v. State of Bihar and another,
Respondents.

Civil Writ Jur. Case No 351 of 1981, D/-
30-7-1981.

JY/AZ/F936/81/JJS/SNV—JIN

Constitution of India, Arts. 14, 226 — Students of unrecognised School filing writ petition for directing Board to permit them to appear at examination — Direction given with rider that result be not declared — Application of other students to be added as parties — Rejected — Result of petitioners allowed to be declared — In respect of those seeking to be added as parties, Board directed to admit them to first available examination if possible — Meaning of direction — Board refusing admission to next examination — Direction if contravened — Art. 14 if violated.

In a writ petition filed by students of an unrecognised Teachers' Training School praying for direction to the authorities of State of Bihar and Bihar School Examination Board to permit them to appear at the Teachers' Training School Examination, interim order was passed directing authorities to permit the students to appear at the examination subject to the condition that their result would not be published pending the final orders on the writ petition. Some other students applied for being added as parties. Final order was passed in the writ petition directing the authorities that the result of the students that appeared and passed be declared. But the application of other students for being added as parties was rejected with observation that if those students are found to have been borne on the register of the institution, they ought to be given an opportunity of appearing at the first available examination and in the light of this observation it was directed that "the authorities will redress their grievance if legitimately possible." The act of Board in refusing those students to appear at the subsequent examination was assailed on the ground that the above order in writ petition amounted to direction to authorities to give opportunity to those students of appearing at first available examination.

Held that, (i) the above order of the Court could not be construed, as containing the direction to the Board to permit those students to appear at the first available examination if their names were found to be borne on the register of the School. Prayer to students to be added as parties was rejected and normally no relief is granted to person who is not party to litigation. (Para 6)

(ii) The authorities were given discretion in the matter of redressing the grievance, if it was legitimately possible. Merely because earlier observation had been made directing the authorities to allow the students to appear at the examination if their names were found to be borne on the register, the stu-

dents could not have absolute right to appear at the examination if they had not attended minimum number of lectures and had not obtained practical training in recognised institution which was, in view of the regulations the condition precedent for appearing at the examination. (Para 6)

(iii) The act of Board in not permitting them to appear could not also be assailed on the ground that right of equality guaranteed by Art. 14 was violated as those students had been discriminated by the Board vis-a-vis students who were petitioners in the above writ petition as they were permitted to appear at the examination by the order of the Court in writ petition. Those students and petitioners in that writ petition are not similarly situate. There was specific order of the Court granting permission to the petitioners to appear at the examination with the direction to the Board to declare their result. No such direction was issued in respect of the students who were not allowed to be added as parties. (Para 8)

(iv) It could not also be said that those students have been discriminated against one student who was also along with them and not allowed to be added as party, but who was permitted to appear at the examination by the Board when it was not established that the discrimination was intentional. AIR 1955 SC 191, AIR 1972 SC 865, Foll. (Para 9)

An executive act can be struck down as contravening Art. 14 only if there has been purposeful or intentional discrimination. Merely because an executive authority has granted to some person a benefit to which he was not entitled does not entitle other persons also not entitled to that benefit, a right to the aforesaid benefit. The rule of equality before the law or the equal protection of the laws under Art. 14 cannot be invoked in such cases. (Para 9)

Cases Referred: Chronological Paras

(1981) C. W. J. C. No. 351 of 1980, D/- 21-4-1981 (Pat) 5

(1977) C. W. J. C. No. 1097 of 1977 (Pat) 5

1, 2, 3, 4, 5, 6, 8
AIR 1972 SC 865 : (1972) 2 SCA 53 9

AIR 1955 SC 191 : 1955 Cri LJ 374 : 1955 All LJ 309 9

(1943) 88 L ed 497 : 321 US 1, Snowden v. Hughes 9

Baidyanath Prasad (for No. 2) and H. N. Sinha, for Petitioner; Tarkeshwar Dayal and Pashupati Nath Jha (for No. 2), for Respondents; S. N. Jha, Standing Counsel No. 2 and Sudhakar Choudhary, Jr. Counsel to Standing Counsel No. 2, for the State.

ORDER :— These 192 petitioners were students of the Arajkiya Shikshak Prashikshan Vidyalaya (Non-Government Teachers' Training School) at Hajipur, hereinafter called 'the School', during the session 1971-73. The School was not recognised by the Government of Bihar or the Bihar School Examination Board, hereinafter called 'the Board'. Fifty-seven students of the same School for the same session filed a writ application in this Court which was numbered as C. W. J. C. No. 1097 of 1977 for a direction to the authorities of the State of Bihar and the Board to permit them to appear at the Teachers' Training School Examination to be held in the year 1977. The application was admitted and an ad interim order was passed by this Court directing the authorities to permit the petitioners of that case to appear at the aforesaid examination, subject to the condition that their result would not be published pending the final orders on the writ application. During the pendency of that application, these 192 petitioners and one Awadhesh Prasad Sinha, who also was a student of the said School during the same session, filed an application for being added, as parties in C. W. J. C. No. 1097 of 1977. The application for addition of parties was ordered to be put up at the time of the hearing of the main application. That application was disposed of by order of this Court dt. 31-1-1978, a copy whereof is Annexure '1' to the present writ application. By that order, this Court directed that the result of those of the petitioners of that case who had appeared at the 1977 Examination and had passed, may be declared. So far as these petitioners and the other person who had applied to be added as parties were concerned, this Court rejected their application for being added as parties with a direction that the departmental authorities "will consider their case in the light of the observations made above and redress their grievances, if legitimately, possible". The relevant observations would be stated later on.

2. After the aforesaid decision, the Principal of the School accepted fees and application forms of the present petitioners for permission to appear at the 1978 Examination and forwarded the same to the District Education Officer, Vaishali. The District Education Officer by his letter dt. 4-1-1978, a copy of which was forwarded to the Principal of the School and is Annexure '2' to this writ application, reported to the Board that he had examined the records of the School in the light of the judgment of this Court in C. W. J. C. No. 1097 of 1977 and found that

the names of these students and other students numbering in all 250 had been duly entered in the Admission Register of the School between January 1971 and March 1971 and that all the students had undergone full training for two years and intimated that he had, therefore, countersigned the application forms for appearing at the examination and directed the Principal to forward the same to the Board, so that the students may be able to appear at the next training examination. Application forms along with fees were forwarded by the Principal to the Board. By letter No. 4085 dated 27-7-1970 Deputy Secretary of the Bihar School Examination Board (respondent No. 2) asked the Principal of the School to submit the application forms of the petitioners using the new forms which have been prescribed and not the old forms which had been utilised. In compliance with this direction, the Principal of the School re-sent the application forms of the petitioners on the new forms. Though the examination fees deposited were not returned, admit cards enabling the petitioners to appear at the examination were not issued and the petitioners were, therefore, unable to appear at the examination in that year. The petitioners made efforts to appear at the aforesaid examination held in the year 1979 and 1980 and the Principal forwarded their forms, but no admit cards were issued and the petitioners were unable to appear in the examinations of 1979 and 1980 also. The petitioners, thereafter, applied for permission to appear at the examination of 1981 and though the Principal recommended their case and sent the fees and forms to the Board, no reply was received from the Board and the petitioners on 12-2-1981 filed the present application in this Court for a direction to the respondents to allow the petitioners to sit at the 1981 Teachers Training School Examination.

3. According to the petitioners, though they have been denied permission to appear at the examination, Awadhesh Prasad Sinha who had also applied for along with these petitioners to be added as party petitioner in C. W. J. C. No. 1097 of 1977 had been allowed to appear and his result had also been published. Petitioner contended that in view of the judgment of this Court in C. W. J. C. No. 1097 of 1977 and the report of the District Education Officer, Vaishali, stating that the petitioners had completed their training and also in view of the fact that the Board had accepted the fees deposited by the petitioners, they had a right to appear at the examination. The petitioners further contend that their constitutional right to equality had

been infringed inasmuch as while other students, specially Awadhesh Prasad Sinha, who belonged to the same session of the School as the petitioners, had been permitted to appear at the examination, permission to appear at the Examination had been denied to the petitioners who are similarly situated.

4. Cause has been shown on behalf of the respondents and a counter-affidavit has also been filed by the Board (respondent No. 2). According to the respondent, the petitioners being students of an unrecognised institution had no legal right to appear at the examination aforesaid; that the only relaxation made by the Board in compliance with the decision of the Government of Bihar was in respect of the students of the session 1970-72 of 25 institutions subject to the condition that those institutions would not admit any further students at any time nor their students would be eligible to appear at any further examination. According to the respondent, the full facts could not be placed before this Court at the time C. W. J. C. No. 1097 of 1977 was decided and, therefore, some students of the session 1971-73 had been permitted to appear at those examinations. The case of the respondent, further, is that even in terms of the order of this Court in the aforesaid writ case, the petitioners were not entitled to appear at the examination as the direction of this Court in the aforesaid case was to redress the grievance of the petitioners, if legitimately possible, and that it was not legitimately possible to permit them to appear at the examination because these petitioners had not undergone the prescribed practical training for teachers in a recognised institution which was necessary for enabling students to appear at the examination. According to the respondents, if the petitioners had any right to appear at the examination under the orders of this Court in C. W. J. C. No. 1097 of 1977, that right was taken away and the judgment of this Court conferring the said right was superseded by Bihar Ordinance No. 61 of 1978. The charge of discrimination is also controverted and it is stated that the fees deposited would be refunded, if not already refunded.

5. It cannot be denied that the prayer of the petitioners cannot be allowed unless the petitioners have a legal right to obtain permission and there is cast upon the Board a legal duty to grant permission to the petitioners to appear at the aforesaid examination. For the reasons given by me in C. W. J. C. No. 351 of 1980 (disposed of on 21-4-1981), it must be held that apart from the order of this Court in C. W. J. C. No.

1097 of 1977 the petitioners who are students of an unrecognised training school have no right to be permitted to appear at the said examination. Therefore, unless the order of this Court in C. W. J. C. No. 1097 of 1977 has conferred upon the petitioners the right to permission to appear at the said examination, this application must fail. The petitioners contend that such a right was conferred and this plea is controverted on behalf of the respondents. It is, therefore, necessary to examine closely the judgment of this Court passed in C. W. J. C. No. 1097 of 1977, copy whereof is Annexure '1' to this writ application. I have already stated that these petitioners were not parties to that case and that their application to be added as parties was rejected by the judgment dated 3(31 ?)-1-1978 of this Court passed in that case "with the direction that the departmental authorities will consider their case in the light of the observations made above and redress their grievances, if legitimately possible". The observation of this Court in the said judgment which is relied upon by the petitioners run thus :—

"I would direct that the respondents concerned shall look into the legitimate grievance of the petitioners as well as of 193 candidates sought to be impleaded as parties and if factually they are found to have been borne on the register of the institution in question they ought to be given an opportunity of appearing at the first available examination after the communication of this order to them".

6. It is contended on behalf of the petitioners that the order of this Court read in the light of the aforesaid observation clearly amounts to a direction to the Board and the competent authorities to give an opportunity to the petitioners of appearing at first available examination, if factually the petitioners are found to have been borne on the register of the institution in question before 6th April, 1971. The report of the District Education Officer has been impugned on behalf of the respondents, but in my opinion, it is not necessary to go into that question, because in the facts and circumstances I am unable to construe the order of this Court as containing a direction to the Board and other competent authorities to permit the petitioners to appear at the next available examination if their names were found to be borne on the register of the School before 6th April, 1971. It must be remembered that the prayer of the petitioners to be added as parties had been rejected by this Court. Normally, no relief is granted to a person who is not a party to the litigation. Further, the operative portion of the order was to the effect that "the auth-

orities will consider their case and redress their grievance if legitimately possible" (emphasis supplied). The authorities were, therefore, given by this order a discretion in the matter of redressing their grievance and thus a discretion not to permit them to appear at the examination, if in the opinion of the authorities that was not legitimately possible. Merely because an earlier observation had been made that if factually they are found to have been borne on register of the institution they ought to be given an opportunity of appearing at the examination, I am unable to hold that his Lordship intended to confer upon these petitioners who were found to have been borne on the register of the institution on the relevant date an absolute right to appear at the examination even if they had not attended the minimum number of lectures and had not obtained the practical training, which it was incumbent upon them to obtain, in view of the regulations, as a pre-condition for appearing at the examination. By the order of this Court, the authorities had been given the discretion to determine if permission to appear could be legitimately granted to the petitioners and the enquiry into the question whether the permission to appear could be legitimately granted to the petitioners could not be reasonably restricted to the fact whether the petitioners were student of the School admitted before April 1971. The scope of the enquiry which by the aforesaid observation was specified as the determination of the date of admission to the School of the petitioners was clearly enlarged by the direction to redress grievances, if legitimately possible. I, therefore, hold that the petitioners did not by virtue of the order of this Court in C. W. J. C. No. 1097 of 1977, obtain any right to permission to appear at the first available examination. In view of the aforesaid conclusion it is not necessary to consider the argument on behalf of the respondent Board that the direction of this Court in C. W. J. C. No. 1097 of 1977 to admit the petitioners to the examination, if any, was superseded by Bihar Ordinance No. 61 of 1978.

7. As the petitioners had no legal right to permission to appear at the aforesaid examination, no order in the nature of mandamus compelling the Board to grant permission can be passed by this Court. In the facts and circumstances of this case, it cannot be held that the Board exercised its discretion of refusing to grant the permission prayed for by the petitioners without taking into account relevant considerations or on the basis of extraneous considerations. Indeed, it has not

been argued that the permission was refused on extraneous consideration or without taking into account relevant consideration, if the petitioners had not acquired a right to appear at the examination on the basis of the order of this Court in the previous writ application along with the report of the District Education Officer.

8. The act of the Board in not granting permission to the petitioners to appear at the examination has also been assailed as impugning the fundamental right to equality of the petitioners guaranteed by Art. 14 of the Constitution. It is asserted that the petitioners have been discriminated against by the Board vis-a-vis the other students of the School for the 1971-73 session who were petitioners in C. W. J. C. No. 1097 of 1977 and were permitted to appear at the examination by order of this Court passed in C. W. J. C. No. 1097 of 1977. This contention is plainly untenable because the petitioners in C. W. J. C. No. 1097 of 1977 and the petitioners in the present case are not similarly situated. In that case, there was an order of this Court granting permission to those persons for appearing at the examination and asking the Board to declare the result of those who had appeared at the aforesaid examination. As I have already said, no such direction in respect of the petitioners was issued by this Court.

9. It is also urged that the petitioners have been discriminated against vis-a-vis Awadhesh Prasad Sinha who was granted permission to appear at the examination. The discrimination alleged is not discrimination by legislative action but by executive action. It is well-settled that an executive act can be struck down as contravening Art. 14 of the Constitution only if there has been intentional or purposeful discrimination. In *Showden v. Hughes*, ((1943) 88 L Ed 497 at p. 503) Stone, C. J. said :

"The unlawful administration by State Officers of a State statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination".

The aforesaid observation of the Chief Justice of the Supreme Court of America was relied upon by S. R. Das, J., as he then was, speaking for the Supreme Court, in *Budhan Chowdhary's case* (AIR 1955 SC 191 at p. 195). It has not been established that the

petitioners have been intentionally or purposefully discriminated. At best what has been established by the petitioners is that Awadhesh Prasad Sinha was granted permission to appear at the examination. But to use the words of Frankfurter, J. in *Showden v. Hughes*, in a passage quoted with approval by S. R. Das, J. in *Budhan Chowdhary's case* (supra) "The Constitution does not assure ... immunity from merely erroneous action, whether by the Courts or the executive agencies of a State". Merely because an executive authority has granted to some person a benefit to which he was not entitled does not entitle other persons also not entitled to that benefit, a right to the aforesaid benefit. That rule of equality before the law or the equal protection of the laws under Art. 14 cannot be invoked in such a case. See the decision of the Supreme Court in *Narain Dass v. Improvement Trust, Amritsar* (AIR 1972 SC 865 at p. 871).

10. In the result, the application is without merit and is, accordingly dismissed. But in the circumstances of the case, there will be no order as to costs.

Application dismissed.

AIR 1982 PATNA 59

B. P. JHA, AND U. C. SHARMA, JJ.

Ram Chandra Mishra, Appellant v. Bihar State Board of Religious Trusts, Respondent.

A. F. O. D. No. 795 of 1971, D/- 18-9-1981.*

(A) Bihar Hindu Religious Trusts Act (1 of 1951), Ss. 2 (1), 43 — Trust whether public or private — Test to determine — Duty of Court to know intention of founder from deed of dedication.

In order to ascertain as to whether a trust is a public or private one, the Court should infer that the trust is a private one if the following conditions are fulfilled: (i) the beneficiaries are ascertained individuals. (ii) the grant has been made in favour of an individual and not in favour of a deity, (iii) the temple is situated within the campus of the residence, (iv) the revenue records or entries in the

*From decision of Sahdeo Singh, 3rd Addl. Sub J., Arrah, D/- 25-2-1971.

survey records suggest the land coming in possession of an individual person and not in the name of a deity. (Para 17)

In the following cases, an inference can be drawn that the temple along with the properties attached to it is a public trust: (i) the public visit the temple as a matter of right, (ii) the endowment is in the name of the deity and the beneficiaries are uncertain individuals or the public, (iii) the management is made through the agency of the public or the accounts of the temple are being scrutinised by the public on the basis of the dedication deed. (Para 18)

These are certain instances in order to test whether a trust is a public trust or a private trust. But, each case will depend on the facts and circumstances of the case. The Court will also have to examine the attending circumstances while deciding whether a trust is a private or public trust. The Court will have to look into the original document of the founder of the trust in order to know the intention of the founder. The intention of the founder is to be gathered from the deed of endowment and not from any other circumstance. (Paras 6, 13, 19)

Held, that the founder never intended that the temple would remain open for the worship of the public. According to the endowment, the beneficiaries were ascertained individuals. Therefore, the intention of the founder was that the temple of Ram, Lakshman & Janakiji and the properties attached to the temple would be treated as a private trust. AIR 1959 SC 951, AIR 1979 Patna 175, 1978 BLJ 397 and ILR (1978) 57 Patna 748, Followed.

(Paras 13, 19)

(B) Bihar Hindu Religious Trusts Act (1 of 1951), Ss. 2 (1), 43 — Deed of dedication providing that Sadhus or any other person visiting temple will be entertained by temple authorities — Not sufficient to prove temple is a public trust.

A mere fact that there is a provision in the endowment deed to the effect that sadhus and any other person visiting the temple will be given food and shelter, is not indicative of the temple being a public temple or a public trust or the properties attached to the temple being public trust properties. AIR 1971 SC 2057 Followed.

(Para 9)

(C) Bihar Hindu Religious Trusts Act (1 of 1951), Ss. 2 (1), 43 — Merely because

festivals are celebrated, it does not mean that temple is a public trust.

Merely because the festivals are celebrated, it does not mean that the temple is a public trust. In a private temple also, the shebait performs the festivals and other ceremonies which are part of the worship of the particular deity. It is usually seen that where there is a deity of Bhagwan Ramchandraji, the private trust owner also celebrates Janmastami, Ramnaumi etc. Merely because a festival is performed, no inference can be drawn by this fact itself that it is a public trust. These festivals are celebrated in connection with the worship of the deities concerned. It happens both in private and public trusts. AIR 1971 SC 2057, Followed.

(Para 10)

(D) Bihar Hindu Religious Trusts Act (1 of 1951), Ss. 2 (1), 43 — Temple cannot be said to be a public temple merely because there is no hindrance for public to worship deities in temple.

Merely because the public are freely admitted to the temple, the Court should not readily infer therefrom dedication to the public. It is a matter of common knowledge that even in private trust, no Hindu will turn out any person who will come to visit the temple. The important point for consideration is whether the public entered the temple as a matter of right or not? If on the evidence an inference can be drawn that the general public are freely admitted to in the temple as a matter of right, then certainly it is a public trust. The mere fact that the public are freely admitted to the temple cannot mean that the public are admitted as a matter of right and the Court should not readily infer therefrom that it is a public trust. AIR 1979 Patna 175 and ILR (1978) 57 Patna 748, Rel. on.

(Paras 12, 15)

Cases Referred: Chronological Paras

AIR 1979 Patna 175	6, 15
1978 BLJ 397 : 1978 BLJR. 195	13
ILR (1978) 57 Patna 748	15
AIR 1971 SC 2057	9, 10, 12
AIR 1959 SC 951	6
AIR 1943 Patna 135	9
AIR 1940 PC 7 : 67 Ind App 1 : 1940 All LJ 533	11, 12

Kailash Roy, Binod Kumar Roy, Nawal Kishore Sharma and Raghubansh Singh,

for Appellant; Dayanand Singh, for Respondent.

JUDGMENT :— The defendant has preferred an appeal before this Court against the judgment and decree of the trial Judge.

2. The Bihar State Board of Religious Trusts (hereinafter referred to as 'the Board') instituted a suit for a declaration that the Thakurbari and the properties mentioned in schedule A of the plaint are Hindu Public Trust properties and not private trust properties. It was also prayed that the Court be pleased to declare that the judgment passed by the authorities under S. 43 of the Bihar Hindu Religious Trusts Act 1951 (hereinafter referred to as 'the Act') in case No. 40 of 1963 (Ext. F) is illegal, void and inoperative.

3. On these facts, the trial Court decreed the suit of the plaintiff and declared the temple and the lands mentioned in schedule A in village Nagri to be the religious trust under S. 2 (1) of the Act. It is relevant at this stage to quote the definition of 'religious trust' as given under S. 2 (1) of the Act which runs as follows:

"'religious trust' means any express or constructive trust created or existing for any purpose recognised by Hindu Law to be religious, pious or charitable, but shall not include a trust created according to the Sikh religion or purely for the benefit of the Sikh community and a private endowment created for the worship of a family idol in which the public are not interested."

4. The definition given in S. 2 (1) of the Act clearly suggests that if a private endowment is created for the worship of a family idol in which the public are not interested, such an endowment shall not be a religious trust within the meaning of S. 2 (1) of the Act.

5. The simple point for consideration is whether the temple in village Nagri, Police Station Piro, in the district of Bhojpur and the properties mentioned in schedule A are "religious trust" properties or not?

6. In order to know as to whether a certain property or a temple is a religious trust within the meaning of S. 2 (1) of the

Act, the Court will have to look into the original document of the founder of the trust in order to know the intention of the founder. In the present case, the samarpanama (deed of dedication) is Ext. D. We have to gather the intention of the founder from Ext. D. The main test is whether the beneficiaries of the temple are ascertained individuals or the general public? If the answer is to the effect that the beneficiaries are ascertained individuals, then it will be a private trust. This view was taken by a Division Bench of this Court in Bihar State Board of Religious Trusts v. Baldeo Gir, (AIR 1979 Patna 175). This was also the view of the Supreme Court in the case of Ram Saroop Dasji v. S. P. Sahi (AIR 1959 SC 951). In that case, the Supreme Court has held that the essential distinction between a public trust and a private trust is that in the former, the beneficiaries are uncertain and fluctuating bodies of persons and in the latter the beneficiaries are definite and ascertained individuals. On a perusal of the samarpanama (Ext. D), it is clear that the beneficiaries of the Samarpanama are Ramchandra Mishra (defendant) and after his death, his family members. In other words, the beneficiaries are ascertained individuals, namely, Ramchandra Mishra (defendant) and, after his death, his family members. There is no mention in the deed that the public will have any right of worship of the deities, namely, Ram, Lakshman and Jankiji. There is no reliable evidence on the record that the temple of Ram, Lakshman and Jankiji was constructed with the public subscription. The evidence of the plaintiff's witnesses is that Ram Prasad Kuer executed a deed of endowment in favour of Ram, Lakshman and Jankiji, and Ramchandra Mishra (defendant) was appointed the shebait of the temple. It is also stated by almost all the witnesses except P. W. 1 that the temple was constructed by Ram Prasad Kuer. The finding of the Court below in paragraph No. 15 is that the temple was constructed on cadastral plot No. 1274 which belonged to the defendant. There is another finding of the trial Judge in paragraph No. 17 to the effect that the members of the family of the defendant are in occupation of the rooms which are within the precinct of the temple. This fact is also admitted by P. Ws. 3, 4, 6 and 15. P. W. 3 stated in paragraph No. 2 of his evidence that the family members of Ramchandra Mishra (defendant) reside in the temple.

7. On the basis of Ext. D as well as on the basis of the evidence and the finding, it is clear that the temple of Ram, Lakshman and Jankiji was constructed on the land belonging to the defendant. The family members of the defendant also reside within the precincts of the temple premises, (See paragraph 17 of the judgment). It is also clear from Ext. D that Ramchandra Mishra was appointed as Shebait of the temple in question by Ram Prasad Kuer. It is also clear from Ext. D that after the death of Ram Prasad Mishra, a fit person from amongst his family members will be selected with his consent for worshipping these deities. These facts clearly suggest that the temple and the properties of the temple are private trust properties.

8. It is contended by the learned Counsel for the respondent that it is clear from the deed of endowment (Ext. D) that sadhus and any other person who will visit will be entertained by the temple authorities. It is on this basis the learned Counsel for the respondent contends that it is a public trust. Learned Counsel for the respondent also contends that the temple in question is a public trust, because festivals are held on janmastami and other occasions. It is further contended by the learned Counsel for the respondent that there is no hindrance for the public to worship the deities in the temple.

9. The above three points raised by the learned Counsel for the respondent are covered by the decision of the Supreme Court in the case of the Bihar State Board of Religious Trust v. Biseshwar Das, (AIR 1971 SC 2057). So far as point No. 1 is concerned, their Lordships held in Para. No. 13 of the judgment that merely because sadhus and other persons visiting the temple are given food and shelter, this by itself is not indicative of the temple being a public temple or its properties being subject-matter of a public trust. In this connection, their Lordships have referred to the case of Ramsaran Das v. Jairamdas, (AIR 1943 Patna 135). We, therefore, hold that merely because there is a provision in the endowment deed to the effect that sadhus and any other person visiting the temple will be given food and shelter, it is not indicative of the temple being a public temple or a public trust or the properties attach-

ed to the temple being public trust properties.

10. So far as the next point raised by the learned Counsel for the respondent is concerned, the plaintiffs' witnesses have stated consistently that the festivals like janmastami etc. are celebrated in the temple and the public attend these festivals. In this connection, their Lordships of the Supreme Court in Biseshwar Das's case (supra) have held in para. No. 13 that the performance of the ceremonies is regarded as duties forming part of the worship of a particular deity. We are of opinion that merely because the festivals are celebrated, it does not mean that the temple is a public trust. In a private temple also, the shebait performs the festivals and other ceremonies which are, in our opinion, part of the worship of the particular deity. It is usually seen that where there is a deity of Bhagwan Ramchandraji, the private trust owner also celebrates janmastami, Ramnaumi etc. in the temple of Bhagwan Ramchandraji. Merely because a festival is performed, no inference can be drawn by this fact itself that it is a public trust. These festivals are celebrated in connection with the worship of the deities concerned. It happens both in private and public trusts.

11. In this connection, his Lordship of the Supreme Court relied upon the case of Bhagwan Din v. Gir Har Saroop (1940-67 Ind App 1) : (AIR 1940 PC 7). In this case, the Privy Council held as follows:

"Dedication to the public is not to be readily inferred when it is known that the temple property was acquired by grant to an individual or family. Such an inference, if made from the fact of user by the public, is hazardous, since it would not in general be consonant with Hindu sentiments or practice that worshippers should be turned away; and, as worship generally implies offerings of some kind, it is not to be expected that the managers of a private temple should in all circumstances desire to discourage popularity."

12. So far as the third point is concerned, we rely on Bhagwan Din's case (AIR 1940 PC 7) (supra) as well as on the case of Biseshwar Das (AIR 1971 SC 2057) (supra), and we hold that merely because the public are freely admitted to the temple, the Court should not readily infer therefrom dedication to the public. It is a matter of common knowledge that even

in private trust, no Hindu will turn out any person who will come to visit the temple. The important point for consideration is whether the public entered the temple as a matter of right or not? In the present case, there is no reliable evidence led on behalf of the plaintiff to suggest that the public had any right to visit the temple in question as a matter of right. The samarpanama (Ext. D) also does not suggest that the public will have any right to visit the temple. The samarpanama only shows that Ramchandra Mishra will act as shebait and will manage the temple in question. He will be responsible for doing rag-bhog to the deities. It is also mentioned in Ext. D that the founder of the private trust, namely, Ram Prasad Kuer would do rag-bhog of the deity and he would also maintain himself from the income of the private trust property. This fact itself suggests that it was a private trust in question.

13. It is a settled law that the intention of the founder can be inferred from the endowment deed. It has also been held in the State Board of Religious Trusts v. Sheo. Kumar Missir (1978 BLJ 397) that the intention of the founder is to be gathered from the deed of endowment and not from any other circumstance. The founder never intended that the temple would remain open for the worship of the public. According to the endowment, the beneficiaries are Ramchandra Mishra (defendant) and, after his death, his family members. Therefore, the intention of the founder was that the temple and the properties attached to the temple would be treated as a private trust.

14. The consistent evidence of the P. Ws. except P. W. 1 is that the temple was established by Ram Prasad Kuer, the founder of the Trust. It is also stated by the P. Ws. consistently that the public visit the temple and worship the deities. It is also stated by almost all the P. Ws. that sadhus are entertained in the temple and festivals are celebrated occasionally. Even if the evidence of the plaintiff is accepted as correct, then also no inference can be drawn that it is a public trust. In this connection, we have referred to the Supreme Court and Privy Council decisions to show that such a case will not fall within the purview of a public trust.

15. So far as the evidence of the D. Ws. is concerned, they have establish-

ed consistently that the temple is situated on the land of the defendant. The temple and the lands attached to the temple are being managed by the defendant and are in possession of the defendant. It is also stated consistently by the D. Ws. that the family members of the defendant reside within the premises of the temple. There is also a finding to this effect by the trial Judge that the family members reside within the premises of the temple. This fact itself clearly suggests that it is a private trust. This view has been held by a Division Bench of this Court in the case of Bihar State Board of Religious Trusts v. Baldeo Gir, (AIR 1979 Patna 175). This Court has laid down the following tests as to whether a particular trust is a private or public trust in a judgment of this Court in Bihar State Board of Religious Trust v. Lakshman Prasad Singh (First Appeal No. 362 of 1969 disposed of on 14th April, 1978)*:—

"In order to ascertain as to whether a trust is a private trust or a public trust, the test is whether the beneficiaries are definite and ascertained individuals or uncertain and fluctuating individuals. If the answer comes to the effect that the beneficiaries are definite and ascertained individuals then it is a private trust. If the beneficiaries are uncertain and general public then it is a public trust. If the beneficiaries of the trust are limited to the guru and the chelas of the guru, then also it is a private trust for the simple reason that the beneficiaries of the trust are ascertained individuals. The other test to decide as to whether a trust is a private or public trust is that whether the management of the trust is being controlled by the Shebait or by the public. If there is an averment in the deed of dedication to the effect that the income and expenditure account shall be scrutinised by a body consisting of the local persons each year, then it will be a public trust. If the day to day management is being controlled by the Shebait in respect of a family idol, then it will be deemed to be a private trust. The third test is whether the temple or the trust is situated within the campus of the residential building or at a public place. If the deity is situated inside the residential building, then an inference can be drawn that it is a private trust. If the deity is situated in a public place outside the residential

*Reported in ILR (1978) 57 Patna 748,

compound, then an inference can be drawn that it is a public trust. Each case will depend on the facts and circumstances of each case.

The Court should not draw inference on the basis of an individual circumstance but on the basis of the cumulative effect of all the circumstances in the case. An inference should not be ordinarily drawn that a trust is a public trust, merely because the Sadhus are entertained in the temple and the villagers attend the temple in a certain function. The Court should also be cautious in drawing the inference from the facts and circumstances of the case as a whole.

The main test is: Whether the beneficiaries of the temple are ascertained individuals or general public? If on the evidence an inference can be drawn that the general public are freely admitted in the temple as a matter of right, then certainly it is a public trust. The mere fact that the public are freely admitted to the temple cannot mean that the public are admitted as a matter of right and the Court should not readily infer therefrom that it is a public trust."

16. In the present case, the decisions, referred to above, are applicable, and, we hold that the temple in question along with the properties described in Schedule A is a private trust and not a public trust. We accept the defendant's evidence and reject the plaintiff's evidence.

17. To sum up, in order to ascertain as to whether a trust is a public or private one, the Court should infer that the trust is a private one if the following conditions are fulfilled:

(i) Whether the beneficiaries are ascertained individuals or uncertain and fluctuating individuals? If the answer comes that the beneficiaries are ascertained individuals, then it is a private trust; and, if the answer comes that the beneficiaries are uncertain and fluctuating individuals, then it is a public trust. (ii) If the grant has been made in favour of an individual and not in favour of a deity, the only irresistible conclusion is that the property or the temple is a private trust.

(iii) If the temple is situated within the campus of the residence, then also an inference can be drawn that it is a private trust.

(iv) If the revenue records or entries in the survey records suggest the land coming in possession of an individual person and not in the name of a deity, then an inference can be drawn that the temple and the properties attached to it constitute a private trust.

18. In the following cases, an inference can be drawn that the temple along with the properties attached to it is a public trust:

(i) If the public visit the temple as a matter of right.

(ii) If the endowment is in the name of the deity and the beneficiaries are uncertain individuals or the public, then it is a public trust.

(iii) If the management is made through the agency of the public or the accounts of the temple are being scrutinised by the public on the basis of the dedication deed, then it is a public trust.

19. These are certain instances which have been given above in order to test whether a trust is a public trust or a private trust. But, each case will depend on the facts and circumstances of the case. The Court will also have to examine the attending circumstances while deciding whether a trust is a private or public trust. Therefore, on the facts of this case and on the basis of the evidence on the record as well as on the basis of Ext. D, we are clearly of opinion that the temple in village Nagri is a private trust and the properties mentioned in the schedule of the plaint form a part of the private trust. We are further of the opinion that the deities were established by Ram Prasad Kuer, the founder, for his private worship and Ramchandra Mishra will continue to worship the deities established by Ram Prasad Kuer, and, as such, it is a private trust.

20. In the result, the appeal is allowed and the suit of the plaintiff is dismissed. The parties shall bear their own costs.

Appeal allowed.

AIR 1982 PATNA 65

LALIT MOHAN SEARMA, J.

Rajendra Prasad, Petitioner v. Most. Siba Devi and others, Opposite Parties
Civil Revn. No. 1727 of 1978, D/- 29-9-1981.*

Stamp Act (2 of 1899), S. 36 — "At any stage" — Interpretation of — Document alleged to be insufficiently stamped admitted in evidence — Objection to admission raised but overruled by trial Court — Admission cannot be questioned in revision even if filed immediately.

Where it was contended that S. 36 should be interpreted as barring re-examination of the question of the admission of a document at a subsequent stage in the litigation and not when the order admitting the document is immediately challenged.

Held that Section 36 lays down that the admission of an instrument shall not be called in question "at any stage" of the litigation. The expression "at any stage" does not suggest any exception to the rule by reference to time or manner in which the decision of the first court is challenged. It should be given wide connotation. It is not permissible to re-agitate the question of admission even by filing a revision application immediately. AIR 1969 SC 1238 and AIR 1961 SC 1655, Rel. on. (Para 5)

Cases Referred: Chronological Paras
AIR 1969 SC 1238: 1969 All LJ 1006 5
AIR 1961 SC 1655 5

Sachidanand Jha, for Petitioner;
Baidyanath Prasad No. 2, for Opposite Party No. 1.

ORDER:— The plaintiff-opposite party No. 1 has filed a suit for money on the basis of two Hundis. The defendant No. 2 — petitioner objected to the documents being taken in evidence on the ground that they are not sufficiently stamped. By the impugned order, the Court has overruled the objection.

2. Mr. Sachidanand Jha, appearing on behalf of the petitioner, contended that in view of the definitions of "Bill of exchange" and "Bill of exchange payable on demand" in Sections 2 (2) and 2 (3) of the Indian Stamp Act and Article 13 thereof, the hundis in question must be held to be subject to the mis-

chief of Section 35. Alternatively, he argued that since in the hundis, the drawer and drawee are the same person, it may have to be held that they are not bills of exchange at all, but in eye of law, are promissory notes; but again in view of the provision of the Act they cannot be admitted in evidence.

3. Mr. Baijnath Prasad No. 2, learned counsel for the opposite party, has taken a preliminary objection on the basis of Section 36 of the Indian Stamp Act which reads as follows:

"36. Where an instrument has been admitted in evidence, such admission shall not, except as provided in Section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped."

4. A number of decisions have been relied upon on behalf of the plaintiff. Mr. Jha pointed out that in all the reported cases, the admission of the documents was challenged in appeal from the final decision in the suit and no case decides the point where the order admitting the document itself is directly challenged in revision. He has attempted to interpret the section to bar the re-examination of the question at a subsequent stage in the litigation and not when the order of the court admitting the evidence is immediately challenged.

5. It is true that none of the cases cited before me is a case similar to the present one, but on that ground, I do not see any reason to take a different view. The section, as quoted above, says that the admission of an instrument shall not be called in question "at any stage" of the litigation. The expression does not suggest any exception to the rule by reference to time or manner in which the decision of the first court is challenged. As has been observed by the Supreme Court in *Hindustan Steel Ltd. v. Dilip Construction Co.* (AIR 1969 SC 1238), the Stamp Act is a fiscal measure enacted to secure revenue for the State on certain classes of instruments. It is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponents. The stringent provisions of the Act are conceived in interest of the revenue. With a view to defeat a technical objection by a party challenging the admission of a document, the legislature included Section 36 in the Act. The section

*Against order of S. N. Sinha, Sub. J., 2nd Court, Muzaffarpur, D/- 14-7-1978.

ought to be interpreted in a manner so that its object may be fully achieved. There does not appear, therefore, (any-reason?) to place a narrow meaning of the section. The expression "at any stage" should be given wide connotation. So I hold that the petitioner cannot be allowed to re-agitate the question even by filing a revision application immediately. The observation to the following effect made by the Supreme Court in *Javer Chand v. Pukhraj Surana* (AIR 1961 SC 1655), although in circumstances which may be distinguishable from the present case, may be usefully quoted (at p. 1657):

"Once a document has been admitted in evidence as aforesaid, it is not open either to the trial court itself or to a court of appeal or revision to go behind that order." (Emphasis added)

6. In the result, I hold that the preliminary objection taken by the plaintiff must prevail. In that view, it is not necessary to decide the point argued by Mr. Jha on the merits of the impugned order. The revision application is dismissed but without costs.

Revision dismissed.

AIR 1982 PATNA 66

S. SARWAR ALI AND S. NARAIN, JJ.

Samir Kumar Das and etc, etc., Petitioners v. State of Bihar and others, Respondents.

C. W. J. C. Nos. 403, 404 and 653 of 1981, D/- 22-5-1981.

(A) Constitution of India, Arts. 226, 14, 19 and 41 — Admission in Medical Colleges — Medical Colleges are covered by expression "State" in Art. 12 — Seats remaining vacant — Mandamus can be issued to compel performance of public duty.

The Medical Colleges in the State and the Patna Dental College are institutions maintained by or at least managed and controlled by the State Government, and are therefore instrumentality of the State and, therefore, 'State' within the meaning of the expression as used in Art. 12 and also Part IV of the Constitution. AIR 1979 Delhi 87, Foll. (Para 11)

According to the directive principles of policy contained in Part IV of the Constitution it is the duty of the

State to make provision for Medical education. The right to education in Art. 41 includes the right to medical education. The establishment and maintenance of medical colleges or institutions imparting medical education is not enough; provision must also be made for the admission to those institutions of people suitable for admission to those courses, selected on some reasonable principle. The duty of making effective provision for securing the right to education in Art. 41, therefore, includes the duty of admitting students to the available seats in the various medical colleges established or maintained or controlled by the State. It is true that the duty imposed upon the State by Art. 41 which forms part of the directive principles is not enforceable by any Court. But once the State, either by legislative or administrative action, provides facilities for medical education in performance of the duty imposed upon it by Art. 41, it has the legal duty, subject to availability of the seats in the institutions to make the right to medical education available to every eligible person desirous of exercising the right, selected, in case of limited number of seats, on some reasonable principle. It cannot arbitrarily refuse to fill up the seats in the various medical institutions and thus deny the opportunity to receive the medical education to a person desirous of and eligible for the same. If it does so it would be violating the fundamental right to equality guaranteed to that person by Art. 14 of the Constitution. It may, therefore, be reasonably concluded that when there are a number of vacant seats in the medical college established, maintained or controlled by the State, a public duty is imposed upon the State to fill up all the available seats in those medical colleges by persons seeking admission there-to who are eligible for admission and have been, in case of competition for the seats, selected on some rational principle, AIR 1981 SC 487, Foll.

(Paras 11, 12)

Further, it must be remembered that the establishment and maintenance of Medical and Dental Colleges involves enormous investment and the creation of the infra structure for medical education is a very costly affairs. And, it is well known that medical facilities in this country and, more so in this State, are poor and the number of trained medical personnel grossly inadequate and, there-

fore, the need of the people for trained medical personnel is clear and urgent. In the circumstances, it will be completely contrary to reason to assume that the State is under no duty to fill up all the seats in the Medical Colleges, the creation and maintenance of which has involved huge expenditure and which if filled would produce trained medical personnel who are badly needed.

(Para 12A)

(B) Constitution of India, Art. 226 — Admission in Medical Colleges — Some seats remaining vacant — Petitions for mandamus by some candidates — Candidates required to complete course of specified period to be eligible to appear at examination — Writ cannot be refused on ground that they would not be eligible to appear because of delay in admission.

The question whether the petitioners, if admitted, would be able to complete the course and qualify themselves to appear at Examination held for students admitted earlier in the session is completely irrelevant for what the petitioners are seeking to enforce is not their right to appear at the examination but their right to be considered for admission to those classes.

(Para 20)

Cases Referred: Chronological Paras

AIR 1981 SC 487	12
AIR 1981 Kant 22	14
AIR 1981 NOC 217: (1931) 1 Kant LJ 304	21
AIR 1979 Delhi 87	11
AIR 1971 Pat 43	10, 14
AIR 1968 Pat 3 (FB)	17, 20

Rewati Raman Saran and Miss Kamlesh Jain (in C. W. J. C. No. 403 of 1981); Radha Raman, Prabhakar Tekriwal, Prakash Tewary, Prashant Kumar and Roy Shivaji Nath (in C. W. J. C. No. 653 of 1981), and Biresh Chakraverty (in C. W. J. C. No. 904 of 1981), for Petitioners; K. P. Verma, Advocate General, R. N. Roy, Jr. Counsel to Advocate General (in C. W. J. C. No. 403 of 1981); K. P. Verma, Advocate General, R. P. Sinha, Jr. Counsel to Advocate General (in C. W. J. C. No. 653 of 1981); K. P. Verma, Advocate General and R. N. Das, Jr. Counsel to Advocate General (in C. W. J. C. No. 404 of 1981), for the State.

ORDER:— By a common order dated 5-5-1981, we allowed all these three applications in part, quashed the order of the Government of Bihar contained in

the letter dated 3-3-1981 of the Special Secretary to Government, Health Department, a copy whereof is Annexure-'A' to the counter-affidavit filed on behalf of the Respondents in C.W.J.C. No. 403/81 and directed the respondents to fill up the vacant seats in the First Year M. B. B. S. Class of the Medical Colleges in the State of Bihar and in the First Year B. D. S. Course of Patna Dental College for the Session 1979-80 on the basis of the result of the Pre-medical and Dental Test Bihar for the aforesaid Session and of an interview held on 15-12-1980 without further delay. We now proceed to give the reasons for that order.

2. Brij Kishore Prasad is the petitioner in C. W. J. C. No. 403/81. Samir Kumar Das and Satish Chandra Gupta are the petitioners in C.W.J.C. Nos. 404/81 and 653/81, respectively. The State of Bihar is the Respondent No. 1 in all the applications, and Dr. R. P. Singh, Principal of the Patna Dental College and Convenor of the Board of Principals for selecting candidates for admission to the 1st year course of the M. B. B. S. and B. D. S. Course for the session 1979-80 is Respondent No. 2 in C.W.J.C. Nos. 403 and 404 of 1981 and was also Respondent No. 2 in C.W.J.C. No. 653/81. The Director of Health Services, Bihar is respondent No. 3 in C. W. J. C. No. 403 of 1981.

3. Admission of students to the First Year of the M. B. B. S. Course of the various Medical Colleges in the State of Bihar, namely, Patna Medical College, Patna, Darbhanga Medical College, Laherasarai, Rajendra Medical College, Ranchi, Bhagalpur Medical College, Bhagalpur, Mahatma Gandhi Memorial Medical College, Jamshedpur, S. K. Medical College, Muzaffarpur, Nalanda Medical College, Patna Magadh Medical College, Gaya, Patliputra Medical College, Dhanbad and to the First Year B. D. S. Course of Patna Medical College, Agamkuan, Patna, is made on the basis of a combined test held for that purpose by the Board of Principals consisting of some of the Principals of the aforesaid colleges. For admission to the First Year M. B. B. S. Class of the aforesaid Pre Medical Colleges and the first year B. D. S. Class of the Dental College for the Session 1979-80, the State Government appointed a Board of Principals consisting of several Principals, including Shri R. P. Singh, Principal,

Patna Dental College, Patna, who was appointed as the Convenor of that Board. The Board issued a prospectus calling for applications from eligible candidates for admission to the aforesaid Courses for the Session 1979-80. Para 'A' of the Prospectus, copy whereof is Annexure-5 in C.W.J.C. No. 403/81 provided: Candidates for admission to the First Year M. B. B. S. Course and to the First Year B. D. S. Course shall have to appear at a competitive test and will be selected on the basis of merit according to the results of the test. The Prospectus specifies the conditions for eligibility for the competitive test, the last date for receipt of the application forms and the documents which were required to accompany the application forms. The Prospectus provided for issue of admit card, and fixed the date of the test examination. Para 'C' of the Prospectus provides "in all matters relating to the test and admission, the decision of the Board of the Principals shall be final — Para 'P' runs thus: "Candidates will be selected for admission strictly on the basis of merit as given (A), subject to reservations of seats as per Government rules. Para 'W' provides that in case of a candidate being selected provisionally for admission, interview letter will be sent by registered post". Para 'Y' declares "interview does not entitle a candidate for admission". 14% of seats, according to the Prospectus were reserved for Scheduled Caste, 9% for Scheduled Tribes, 10% for Backward Classes and 20% for ladies.

4. According to the averments in the petition in C.W.J.C. No. 403/81 which has not been controverted the total number of seats in the First Year M. B. B. S. Class in the various Medical Colleges aforesaid was 670 and the total number of seats in the First Year B.D.S. Course in Patna Dental College was 15. It appears all the three petitioners along with others appeared at the Pre-Medical and Dental Test 1979 which was held sometime in July 1979. The first list of successful candidates was published on 13-4-1980 and the second list on 12-10-1980. It appears that even after the successful candidates of the first and second lists had been admitted to the different

total number of seats that still remained vacant was 11 in the Patna Dental College and 37 in six of the aforesaid Medical Colleges. According to the counter-affidavit filed on behalf of the respondents in C. W. J. C. No. 403/81 which has been adopted in the other writ applications also, the number of vacant seats was about 29. According to the counter-affidavit filed on behalf of the respondents which on this point has not been controverted, these vacant seats originally belonged to the quota reserved for students belonging to the Scheduled Caste and Scheduled Tribe but were later on released by the Government for being filled up by general students.

5. It appears that to fill up these vacant seats, the Convenor of the Board of Principals issued a notice dated 4-12-1980 directing 62 of the candidates who had appeared at the test "to appear for an interview for scrutiny of documents etc. in connection with admission into First Year Class of Medical and Dental Colleges Bihar (Session 1979-80) on 15-12-1980 at 1 P. M. at I. M. A. Hall, south Gandhi Maidan, Patna". The notice required the candidates to bring the documents in original at the time of interview and stated that provisional selection and calling for interview would not entitle a candidate to admission. The 62 candidates, who were called for interview on 15-12-1980, were arranged in order of merit. Brij Kishore Prasad's position in the list was at serial 50 of the list and those of the petitioners in C. W. J. C. No. 653 of 1981 and 404/81 at serial Nos. 6 and 7, respectively. Admittedly, all the three petitioners appeared at the interview held on 15-12-1980 but the result of the interview held on 15-12-1980 was not announced in spite of representation made by the petitioners.

6. According to the petitioners, it is the public duty of the Board of Principals, and the State and the other authorities concerned to publish the result of the interview and to admit students to the remaining vacant seats in the different Medical Colleges and Patna Dental College on the basis of the admission test and the interview held and the respondents were in duty bound to publish the

the nature of Mandamus directing the respondents, the State of Bihar and the Principal, Patna Dental College, the Convener of the Board of Principal, who conducted the test to declare the result of the test and interview held on 15-12-1980 and pass other consequential order, namely, direct the admission of the petitioners to the vacant seats if they are eligible for admission on the basis of the result of the admission test and the interview held.

7. Cause has been shown on behalf of the respondents and a counter-affidavit on behalf of the respondent, State of Bihar, and the Convener of the Board of Principal and the Director of Health Services has been filed in C.W.J.C. No. 403/81, supplementary affidavits and supplementary counter-affidavits have also been filed. The counter-affidavits filed in C.W.J.C. No. 403/81 have been adopted by the respondents in the other cases also. The main ground on which the prayer for the relief claimed by the petitioners has been opposed on behalf of respondents is that the determination of the claims for admission of the 62 students who were called for interview and were interviewed by the Board of principals, would have taken a long time. The Session for the aforesaid first year M. B. B. S. Course which had commenced in July, 1980, had far advanced and the 62 students who were called for interview, if ultimately admitted, would not have been in a position to complete the necessary courses or attend the minimum number of classes prescribed for the first year M.B.B.S. Examination and the Government decided to stop any further admission to the First Year M. B. B. S. Class and the First year B. D. S. Course and dissolved the Board of Principal constituted for the purpose of selecting candidates for admission to the aforesaid classes for the 1979-80 session. The order of the Government stopping further admission and dissolving the Board of Principals has not been filed in this Court but the said order is mentioned in the letter dated 3-3-1981 of the Special Secretary to the Government of Bihar Health Department, addressed to the Advocate-General, Bihar a copy which has been annexed to the counter-affidavit of the respondents and marked Annexure-A.

8. The further case of the respondents is that the Medical Education, including the M. B. B. S. and B. D. S. Courses, is conducted under the supervision and direction of the Medical Council of India which has prescribed the course of study, the period of the courses and the conditions of eligibility to sit for the examination and if students who were not in a position to qualify themselves for the purpose of appearance at the M. B. B. S. Examination are admitted to the various colleges, the medical degree granted by the Universities to which the various colleges are affiliated may run the risk of de-recognition.

9. A rejoinder to the counter-affidavit was filed on behalf of the petitioner in C.W.J.C. No. 403 of 1981. According to the rejoinder the plea of the Government that the students were called for interview on 15-12-1980 could not be admitted because if admitted they could not have completed the course etc. was a mere pretence and the action of the Government taken at the instance of the Health Minister was completely arbitrary and discriminatory because some students were admitted to the different Medical Colleges in the State in October and December 1980 and even in January, 1981.

10. The first question for determination is if there is any public duty cast on the State of Bihar and the respondent convener of the Board of Principals to decide who are the persons eligible to be admitted and to fill up all the vacant seats in the different medical colleges of Bihar and also in the Patna Dental College for which applications were invited and admission test was held. It is well settled that an applicant for admission has a right to get his application considered in accordance with law. But, as pointed out by A. B. N. Sinha, J., speaking for a Bench of this Court in *Miss Zeenath Tej v. Principal of the Prince of Wales Medical College, Patna* (AIR 1971 Pat 43), "this right, however, cannot arise unless the following conditions are satisfied: (i) The applicant concerned must have actually applied for admission into an educational institution (ii) there must be vacancies in the class into which admission is sought for and, further there must be an obligation on the part of the authorities to fill up these vacancies". There is no doubt that

all the petitioners had actually applied for admission into the different medical colleges. There is also no doubt that a certain number of vacancies in those colleges exist. Though there is dispute about the exact number of vacancies even according to the respondents there are about 29 vacancies. The only question for decision in this connexion, therefore, is whether there is a duty or obligation imposed on the respondents, the authorities concerned, to fill up all the vacant seats in the medical colleges of the State of Bihar.

11. All the aforesaid medical Colleges and the Patna Dental College are institutions maintained by or least managed and controlled by the State Government, and are therefore instrumentalities of the State and, therefore, State within the meaning of the expression as used in Article 12 and also Part IV of the Constitution. The right to receive professional education being a pre-requisite for carrying on the medical profession has been held by the Delhi High Court to be a part of the fundamental right under Article 19 (1) (f) of the Constitution, vide the decision reported in AIR 1979 Delhi 87. Even if we do not go to that extent, there can be no doubt, that according to the directive principles of policy contained in Part IV of the Constitution, it is duty of the State to make provision for medical education. Article 41 of the Constitution commands: "The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education.....". It is obvious that the right to education in Article 41 includes the right to medical education. And the duty of effectively securing the aforesaid right to medical education, establishment and maintenance of medical colleges or institutions imparting medical education is not enough; provision must also be made for the admission to those institutions of people suitable for admission to those courses, selected on some reasonable principle. The duty of making effective provision for securing the right to education in Article 41, therefore, include the duty of admitting students to the available seats in the various medical colleges established or maintained or controlled by the State.

12. It is true that the duty imposed upon the State by Article 41 which forms part of the directive principles is not en-

forceable by any Court. But once the State, either by legislative or administrative action, provides facilities for medical education in performance of the duty imposed upon it by Article 41, it has the legal duty, subject to availability of the seats in the institutions, to make the right to medical education available to every eligible person desirous of exercising the right, selected, in case of limited number of seats, on some reasonable principle. It cannot arbitrarily refuse to fill up the seats in the various medical institutions and thus deny the opportunity to receive the medical education to a person desirous of and eligible for the same. If it does so, it would be violating the fundamental right to equality guaranteed to that person by Article 14 of the Constitution. It is, as was pointed out by Bhagwati, J., speaking for the Supreme Court in *Ajay Hasia v. Khalid Mujib Sehravardi* (AIR 1981 SC 487), "well settled that what Article 14 strikes at is arbitrariness, because an action that is arbitrary, must necessarily involve negation of equality" (at page 499 of the report). It may, therefore, be reasonably concluded that when there are a number of seats in the medical college established, maintained or controlled by the State, a public duty is imposed upon the State to fill up all the available seats in those medical colleges by persons seeking admission thereto who are eligible for admission and have been, in case of competition for the seats, selected on some rational principle.

12-A. Further, it must be remembered that the establishment and maintenance of medical and Dental Colleges involves enormous investment and the creation of the infrastructure for medical education is a very costly affair. And, it is well-known that medical facilities in this country and, more so in this State, are poor and the number of trained medical personnel grossly inadequate and, therefore, the need of the people for trained medical personnel is clear and urgent. In the circumstances, it will be completely contrary to reason to assume that the State is under no duty to fill up all the seats in the Medical Colleges, the creation and maintenance of which has involved huge expenditure and which if filled would produce trained medical personnel who are badly needed. It is in the light of these general considerations that we proceed

to examine the provisions of the Prospectus which regulate the admission.

13. We have already set out the relevant provisions of the Prospectus. It is manifest that the Prospectus required candidates eligible for admission to the First Year M.B.B.S. and B.D.S. Classes to file applications and to appear at the competitive test and, subject to the reservation in favour of certain classes of candidates, lays down—vide paragraph 'P' that "Candidates will be selected for admission strictly on the basis of merit" determined in accordance with the result of the competitive test. When paragraph 'P' of the Prospectus is construed in the light of the considerations mentioned above, the express provision that candidates "will be selected for admission strictly on the basis of merit" may well be interpreted to contain an implicit provision that the candidates who are eligible for admission on the basis of the merit shall not be denied admission to the seats available in the colleges. The Prospectus, therefore, considered in the light of the consideration referred to above, clearly imposed a duty on the State to fill up all available seats which are not reserved for a particular category of students, by eligible candidates selected by the Board of Principals, whose decision in all matters relating to the test and the admission is made final—vide Paragraph 'O'. This duty is in the nature of a public duty the performance of which can be compelled by a writ in the nature of mandamus.

14. I am fortified in this conclusion by the decision in *G. P. Hemantha Kumar v. Selection Committee for Admission to Govt. Medical College, Bangalore* (AIR 1981 Kant 22) in which relying on earlier decisions and the relevant rules for selection to the Medical Course, it was held by a learned single Judge of the Karnataka High Court that "if for any reason a seat had become vacant within the prescribed quota and that seat could be filled up by another candidate eligible for that seat, then the same could not be denied on any ground whatsoever as Medical Education being very important, no seat in the prescribed quota should go waste". I may also state that in *Zeenath Tej's case* (AIR 1971 Pat 43) (supra) also, the Bench of this Court on a consideration of the relevant rules and the ordinances held that there was an obligation on the authori-

ties of the Patna Universities to fill up all the casual vacancies during the session which might arise in the Prince of Wales Medical College, Patna, an institution maintained and controlled by the Patna University.

15. It was argued by the learned Advocate General appearing for respondents that none of the petitioners were entitled to be selected for admission on the basis of merit against the general seats and therefore, they had no legal right to be admitted or even considered for admission to the vacant seats which were reserved for candidates belonging to Scheduled Castes and Scheduled Tribes. In our opinion, if as in this case, the Government has taken a decision to dereserve some seats which were originally reserved for candidates belonging to the Scheduled Castes and the Scheduled Tribes and the reserved seats are thrown open for admission by students belonging to the general category, the dereserved seats stand on the same footing as other general seats, and a candidate has the same right in respect of those seats as he has in respect of the seats which were general seats from the very beginning. And, if he was entitled to be considered for admission to the original general seats, then he is equally entitled to be considered for admission to the dereserved seats and to be admitted, if selected against those seats. The petitioners, therefore, have a right to be considered for admission to the seats which are still vacant in the various Medical Colleges and Patna Dental Medical Colleges, unless there are any compelling circumstances which would dissuade this Court to refrain from directing the State Govt. to carry out its duty of filling up the vacant seats in the aforesaid colleges and considering the case of the petitioners for admission to those vacant seats.

16. One of the reasons given by the respondents for not filling up the vacant seats is that evaluation of the respective merits of the 62 candidates who were called for interview on 15-12-1980 would have been a time consuming process and could not have been completed within a reasonable time after the interview. In Paragraph '6' of the counter-affidavit it is stated that "the claims of all the 62 candidates who had all obtained 80 marks were to be scrutinised in serial according to merit for which their records of other examination etc. and rel-

evant papers have to be examined". This plea is clearly untenable because the relative merits of all the 62 students who were called for interview held on 15-12-1980 had already been assessed by the Board of Principals. This is clear from the notice dt. 4-12-1980, copy whereof is Annexure-4 to the supplementary-affidavit of the petition in C. W. J. C. No. 403/81, issued to the 62 candidates under the signature of respondent No. 2, the Convenor of the Board of Principals. The names of the 62 candidates who had been called for interview is arranged serially in order of merit in the list of candidates called for interview on 15-12-1980 which is appended to that notice. As I have stated, in the aforesaid merit list, the petitioners stand at serial Nos. 6, 7 and 50. Though a reference to the supplementary-affidavit has been made in the counter-affidavit filed on behalf of the respondents it has not been specifically denied therein that what is appended to the notice (Annexure-4) is the merit list of candidates called for interview, that is to say, the names of candidates called for interview had been arranged in order of merit, thus the merit of the candidates called for interview on 15-12-1980 had already been assessed. Further, it is clear from the notice (Annexure-4) that the candidates were directed to appear for interview "for scrutiny of documents etc. in connection with admission" and the candidates were required to bring documents in original at the time of the interview. The main purpose of the interview, therefore, was not assessment of the respective merits of the candidates called for interview but the verification of the certificates etc. submitted with reference to their originals.

17. The learned Advocate General appearing for the respondents referred to the provisions of Paragraph 'Y' of Prospectus and on that basis contended that the fact that the petitioners were called for interview did not entitle them to admission. That is so. But what the petitioners are seeking to enforce is not their right to admission but their right to have their applications for admission considered on merits in accordance with law. As was pointed out by Narasimham C. J., speaking for a Full Bench of this Court in Umesh Chandra Sinha v. V. N. Singh (AIR 1968 Pat 3), "the right of a candidate for due consideration of his application for admission on the basis of

valid law is distinct from the right of another candidate to be admitted on the basis of such law. The two rights are distinct and each of them is justiciable". (at page 7 of the report).

18. The learned Advocate General next argued that the decision of the State Government not to fill up the vacant seats in the Medical Colleges on the basis of the interview held on 15-12-1980 was, justified and legal because the students who would have been admitted, thereafter, would not have been able to complete the courses of study or be eligible to appear at the examination. On the other hand, it is argued on behalf of the petitioners that the question whether the petitioners, if admitted, would be able to complete the course and qualify themselves to appear at Examination held for students admitted earlier in the 1979-80 session is completely irrelevant for what the petitioners are seeking to enforce is not their right to appear at the examination but their right to be considered for admission to those classes. The learned counsel for all the three petitioners stated that all the petitioners were prepared to take all the risks involved in securing admission at such a belated stage.

19. The learned Advocate General is right to this extent that as the session commenced in July, 1980, the petitioners, if admitted on the basis of the interview held on 15 December, 1980 would not, in the normal course, be able to complete their courses and be eligible to sit at the regular examination held for the students of 1979-80 session. The Indian Medical Council (hereinafter called "the Council"), constituted under the Indian Medical Council Act, 1956, (hereinafter called 'the Act') has in its Recommendations on Undergraduate Medical Education adopted by the Medical Council of India in April, 1977 laid down that a student admitted to the Medical Curriculum "shall undergo a period of certified study extending over 4½ academic years from the date of commencement of his study for the subjects" and that "The first 18 months shall be occupied in the study of the Phase I subjects and no student shall be permitted to join Phase II group of subjects until he has passed in all the Phase I subjects"—vide Paragraph III of the Recommendations. Even though it has not been

shown that these recommendations have been incorporated in regulations framed in exercise of the power conferred on the Council by Section 22 of the Act, still no Medical institution in India can afford to permit students who have not completed the course of studies in the manner recommended by the Council to appear at a Medical examination. Under Section 19 of the Act, the Council has the power to recommend to the Central Government that the courses of study and examination to be undergone in any University or a medical institution in India in order to obtain a recognised medical qualification "are not such as to secure to persons holding such qualification the knowledge and skill requisite for the efficient practice of medicine" and on the basis of such recommendation, which will generally be accepted, the Central Government may, after following the procedure prescribed, derecognise the medical qualification granted by that institution after a specific date.

20. But the learned counsel for the petitioners are right in contending that the fact that the petitioners, if admitted, would not be eligible for appearing at the regular examination is irrelevant for the purposes of these cases. In the Full Bench Case of Umesh Chandra Sinha (AIR 1968 Pat 3) (supra) the claim of the petitioner of that case for consideration of his application for admission to the First Year M. B. B. S. class of the Patna Medical College was opposed by the learned Advocate General for the respondent on the ground that if the petitioner ultimately secured admission, he would not be able to complete the minimum percentage of attendance required by the rules of the University and that, consequently, he was not likely to be sent up for the examination. The argument was rejected and the Full Bench of this Court by its order passed on 10-4-1967 directed the admission of the petitioner, though the examination for the 1st year M. B. B. S. Course was to be held on 10-5-67. The reasons for rejecting this contention were stated thus: "At this stage we are not concerned with whether the petitioner will be sent up for the examination or else whether the failure to secure the minimum attendance will be condoned (if permissible) in view of the fact that the delay was due to circumstances beyond the control of the petitioner. These are matters to be dealt with by the authorities con-

cerned in accordance with the rules and regulations in force in the University. The petitioner is prepared to take all the risks involved in securing admission at such a belated stage. Once we hold that the offending provisions are unconstitutional, we should not deny him the appropriate relief merely because some other consequence may ensue later on". (at page 11 of the report).

In that case, the validity of certain provisions of an Ordinance governing the admission to the medical institution concerned was impugned and it was asserted that if those provisions were ignored, the petitioners had preferential claim for admission over those who had been admitted. On a parity of reasoning, if we hold, as we have done that the State Government and the other authorities are bound to fill up the vacant seats, and to consider the application of the petitioners for those vacant seats and admit them if they are entitled to admission we cannot deny the petitioners "the appropriate relief merely because some other consequence may ensue later on". It must be pointed out that for the late selection whoever else may be responsible, the petitioners are not and they cannot be blamed at all.

21. We may also refer to the decision in Anitha Chandraiah v. Selection Committee for M. B. B. S. ((1981) 1 Kant LJ 304): (AIR 1981 NOC 217) in which the refusal to admit the petitioners of that case who were selected for admission to the concerned Medical College was supported on the ground that the petitioners had sought admission after the admission to the College had closed. This ground was negatived for the reason". That for the late selection the petitioners cannot be blamed" and having been selected on merit for admission and being prepared to join college at his own risk, the petitioners could not be denied admission on the ground that admission to the College had closed. And the Karnataka High Court issued a writ in nature of mandamus directing the admission of the petitioner to the 1st year M. B. B. S. Course.

22. Further, according to the averments in the supplementary-affidavit filed on behalf of the petitioners in C. W. J. C. No. 403/81, several students were admitted to the first year M. B. B. S. course in the various medical colleges in December, 1980 and even in January and

February 1981. According to this supplementary-affidavit filed on 14-4-1981, Pradiip Kumar Agrawal was admitted in the Magadh Medical College, Gaya, on 17-12-1980, and Rajesh Nandan Sahay and Satish Chandra Prasad were admitted to the same college on 16-1-1981 and 2-1-1981, respectively. and Sanjeeb Kumar was admitted in the Patliputra Medical College, Dhanbad on 3-1-1981. According to the another supplementary affidavit, admission to the first year M. B. B. S. class in M. G. M. College, Jamshedpur of Syed Mobarak Ahmad was made on 4-2-1981 and that of Miss Rita Jha on 11-2-1981. These facts have not been controverted on behalf of the State though a counter-affidavit in rejoinder was filed on behalf of the respondents several days later, i.e. on 27-4-1981. Prima facie, in refusing to fill up the vacant seats on the ground of delay in admission, the respondents are making unfair discrimination against the petitioners.

23. The learned Advocate General also attempted to argue that if admissions are made at such a late (stage?) in the Medical Colleges, the medical degrees granted by the Universities of Bihar were likely to be derecognised by the Central Government on the recommendation of the Indian Medical Council because the admissions would be in contravention of the recommendations of the Medical Council. In our opinion, this argument is completely untenable. Our attention has not been drawn to any provision in the Act or to any regulation made by the Indian Medical Council or even to any recommendation of the Medical Council to the effect that admissions to the first year M. B. B. S. Course could not be made beyond a certain date. Reference in this connection has been made by the learned Advocate General only to the Recommendations of the Indian Medical Council aforesaid to the effect that every student shall undergo the prescribed period of certified study and that the first 18 months shall be occupied in the study of the phase I subjects and no students shall be permitted to join the Phase II group of subjects, until he has passed in all the phase I subjects. The prohibition aforesaid is not against admission of the students to the first year M. B. B. S. course but against their being permitted to join Phase II of subjects without studying Phase I sub-

jects for 18 months. By admitting students at a late stage, the college would not contravene any provision of paragraph 'I' of the Recommendation aforesaid. The provisions regulating admission to the Medical course are contained in paragraphs '1' and '2' of the aforesaid Recommendations and it has not been argued, and in our opinion rightly, that admission of the petitioners on the basis of the admission test for the determination of merit and interview would infringe any of those provisions. We may also note that the period of 18 months of study which according to Paragraph III (3) of the Recommendation aforesaid of the Council, shall be occupied in study of Phase I subject does not, as stated in the Recommendation of the inter-University and Board of Medical Regulation Committee in its meeting held on 20-9-1980. The recommendation is incorporated in the letter of the Deputy Secretary to the inter-University Board, a copy whereof is annexed as Annexure-8 to the reply to the counter-affidavit filed on behalf of the petitioner in C.W.J.C. No. 403/81 "apply to individual students, but it applies to the classes as a whole and is to be counted with effect from the date the classes commenced irrespective of when ("whom" is obviously mistake for whom) any individual student joins the classes". As the classes commenced in July, there will be no breach committed by the Colleges of this provision of the Recommendation aforesaid. This argument of the learned Advocate General must, therefore, be rejected.

24. The only other argument of the learned Advocate General which remains to be considered is that these petitions should be dismissed as the relief claimed, even if granted, would be futile. It is pointed out that if the petitioners are directed to be admitted to the various medical colleges and the Patna Dental College for the first year M. B. B. S. course or B. D. S. course for the Session 1979-80 how, they would not be in a position to complete the course of study or the required percentage of attendance and would be ineligible to sit at the examination and, therefore, their admission to the first year course for the 1979-80 session would serve no useful purpose. This argument ignores that though they may not be eligible to sit at the first examination held for the students of the first year M. B. B. S. class for the 1979-

80 session, the petitioner may become eligible to sit at subsequent examinations. Students who are not able to complete the requisite percentage of attendance and, therefore, are not permitted to appear at an examination do later on become eligible to sit at a subsequent examination. It must be remembered that it is difficult to secure admission in a medical college and the admission is not valueless even if the candidate admitted may not be in a position to complete the course within the minimum permissible period. If admitted, he would have a chance to complete the course and to qualify for a later examination. The application, therefore, cannot be rejected on the ground that it has become futile.

25. These are the reasons for the order passed by us in all the three applications on 5-5-1981.

Petition allowed.

AIR 1982 PATNA 75

HARI LAL AGRAWAL AND
NAZIR AHMAD, JJ.

Rameshwar Thakur and others. Petitioners v. Smt. Bhagwati Devi and others, Opposite Parties.

Civil Revn. No. 605 of 1980, D/- 7-12-1981.*

Civil P. C. (5 of 1908), Sections 2 (2), 115, Order 7, Rule 11 — Order rejecting plaint in view of Section 4 (b) of Bihar Consolidation of Holdings Act — It is a decree and appealable — Revision against such an order was incompetent. (Bihar Consolidation of Holdings and Prevention of Fragmentation Act (22 of 1956), Section 4 (b)).

Order VII, Rule 11 of the Civil P. C. contemplates various circumstances under which a plaint has to be rejected by the Court. (Para 4)

A suit had been instituted by the plaintiff for a declaration of title in respect of the deed of gift as being void and fraudulent, was rejected by the lower court under sub-section (b) of Section 4 of Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956. This order rejecting the plaint amounted to a decree and was appealable and, hence, it was held that revision against such an order was incompetent. Case

law discussed. 1980 BBCJ (HC) 252, Disting. (Para 5)

Cases Referred: Chronological Paras
1980 BBCJ (HC) 252 3
AIR 1976 Patna 74 5

Sadanand Jha, for Petitioners: Mahendra Prasad Pandey and Binod Krishna Jha, for Opposite Parties.

ORDER:— This application in revision is at the instance of the plaintiffs whose plaint in Title Suit No. 3 of 1979, instituted for a declaration in respect of the deed of gift as being void and fraudulent, etc., has been rejected by the learned Subordinate Judge by applying Section 4 (b) of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 (hereinafter to be referred to as "the Act") on the ground that, by virtue of the aforesaid provision the suit was not maintainable.

2. The Stamp Reporter had raised objection to the maintainability of this application under Section 115 of the Civil P. C. in view of the definition of the term 'decree' in Section 2 (2) read with Order VII, Rule 11 (d) of the Civil P. C. The question of maintainability was left open to be urged at the time of the final hearing of the application by the learned Judge admitting this application. Accordingly, when this application came up for hearing before a learned single Judge of this Court, he referred this case to a Division Bench and it is how it is placed before us.

3. The question of jurisdiction or maintainability of this application arises in this way that, if it is held that the impugned order was appealable then obviously that lay before the lower appellate Court and the present application in revision would be barred as provided under Section 115 (i) of the Code. In order to appreciate the question falling for our consideration it is necessary to refer to the relevant provisions of the Civil P. C. and the Act. Section 4 of the Act deals with the effects of the notification under Section 3 (i) and contemplates various consequences and one of the consequences is contemplated under clause (b) which reads as follows:—

"(b) No suit or other legal proceeding, in respect of any land in such areas shall be entertained in any Court, and in calculating period of limitation applicable to such suits and proceedings such period shall not be counted;

*From order of Uma Shanker, Sub. J., Banka, D/- 12-3-1980.

Provided that nothing in this clause shall apply to any proceeding under Section 48 (E) of the Bihar Tenancy Act, 1885 (Act 8 of 1885) and to the proceedings relating to recording the titles of Batiadars."

Section 37 of the Act also may be seen which creates a bar that no Civil Courts shall entertain any suit or application to vary or set aside any decision or order given or passed under this Act with respect to any other matter for which a proceeding could or ought to have been taken under this Act. On the facts of the present case, however, we are not concerned with the exclusion of the jurisdiction of the Civil Court as provided under Section 37 of the Act and, therefore, a Bench decision of this Court in the case of Narendra Kumar Verma v. State of Bihar, (1980 BBCJ (HC) 252), which has considered the scope and the implication of the bar under S. 37 of the Act, is not applicable to this case. We, therefore, need not discuss this authority in detail.

4. Order VII, Rule 11 of the Civil P. C. contemplates various circumstances under which a plaint has to be rejected by the Court and one of the circumstances is mentioned in clause (d) with which we are concerned in this case which reads as follows:—

"Where the suit appears from the statement in the plaint to be barred by any law."

This, at once, brings us to the definition of the term 'decree', i.e. to the definition section, namely, Section 2 (2), which includes "rejection of the plaint and determination of any question within Section 144..." within its fold.

4A. It is, therefore, obvious that an order rejecting the plaint has got to be treated as a decree and it will be subject to all those consequences applicable to a decree of the Civil Court, one of them being a right of appeal under S. 96. From the above provisions, it is quite apparent and obvious to us that the order under revision rejecting the plaint amounted to a decree within the meaning of Section 2 (2) of the Code and, therefore, was an appealable order and inasmuch as the valuation of the suit is less than rupees ten thousand, an appeal against the order lies before the District Court. Mr. Jha, however, advanced two arguments in support of this application. His first contention was that the only bar for the

Civil Courts was contemplated under Section 37 of the Act and this suit was outside the purview of that section. This argument has simply been noticed to be rejected as it is apparently so fallacious that it does not call for any longer discussion as the provisions contained under Section 4 (b) of the Act are quite apparent from the same.

5. The other argument of Mr. Jha was that clause (d) of Rule 11 did not apply to the petitioners' suit, inasmuch as the reliefs prayed for, did not attract the bar or restrictions contained under Section 4 (b) of the Act. We are afraid, this argument is not available to Mr. Jha at this stage, inasmuch as, this would be an argument on the merits of the order and can be entertained only by the Court where the plaintiffs should have gone against the same. Suffice it for us to say without making any observation whatsoever, to avoid any embarrassment to either party, that on the face of it, the order rejecting the plaint was clearly passed under Order VII, Rule 11. The effect of dismissal of a suit, as distinguished from the rejection of plaint, has already been indicated by one of us in the case of Shanti Pada Ganguli v. Union of India, (AIR 1976 Patna 74) and, therefore, it is not necessary to enter into this question. Mr. Jha, however, tried to refer to some decisions where the questions of court-fees had arisen. It is not necessary to refer to any of those cases, as the case of the petitioners does not attract the facts of those cases. We, therefore, do not want to encumber our judgment by referring to any of those decisions. We would accordingly answer the question against the petitioners and hold that the rejection of the plaint was within the ambit of Order VII, Rule 11 (d) of the Civil P. C. and, therefore, the order was appealable and this revision is incompetent. It is accordingly dismissed on the ground of maintainability, leaving it, however, open to the petitioners, if so advised, to file an appeal before the appropriate authority. There shall be no order as to costs.

Petition dismissed.

AIR 1982 PATNA 77

(RANCHI BENCH)

MEDINI PRASAD SINGH, J.

Smt. Tribeni Devi and others, Petitioners v. State of Bihar, Opposite Party.

Civil Revn. No. 318 of 1979 (R), D/- 30-7-1981.*

(A) Land Acquisition Act (1 of 1894), Sections 28, 34 — Interest under — When becomes payable — Calculation of interest — Method.

Section 28 could apply when the amount of compensation originally awarded has already been paid or deposited and when the Court awards excess amount then interest on that excess only is payable. But if the compensation which is awarded either by the Collector or by Court is not paid then interest would run on the entire amount and not only on the excess and it would run from the date of dispossession in view of Section 34. The method of calculation of interest has been shown by a chart in the instant case. (Paras 1, 3)

(B) Land Acquisition Act (1 of 1894), Section 34 — Interest under — Is payable on amount of compensation including solatium — Compensation includes solatium. (Para 4)

Cases Referred: Chronological Paras

AIR 1976 SC 1721 : (1977) 1 SCC 46	5
AIR 1973 SC 305 : (1973) 1 SCC 109	4
AIR 1972 SC 1417	1
AIR 1961 SC 908	3
AIR 1950 Cal 498	3
AIR 1928 PC 287	3

L. M. Singhvi, B. P. Rajgarhia, M. B. Banerjee and R. K. Marathia, for Petitioners; S. K. Mazumdar, Govt. Pleader No. 1 with V. S. Prasad, for the State.

ORDER:— This civil revision by the land-owner-petitioners springs from an order of the Judicial Commissioner, Ranchi dated 27 August 1979, dismissing Execution Case No. 78 of 1974 in full and

*From order of Anand Prasad Sinha, Judicial Commissioner, Ranchi, D/- 27-8-1979.

BZ/CZ/A714/82/AMG/SNV-H

final satisfaction of the decree and allowing an objection under Section 47 of the Civil P. C. The petitioners are aggrieved by the method of calculation of interest on the quantum of compensation adopted by the judicial Commissioner on the compensation amount awarded in the decree of the Supreme Court (see AIR 1972 SC 1417) and in respect of 4.65 acres of land acquired under the Land Acquisition Act, 1894, (briefly 'the Act'). The Supreme Court on 25 January 1972 modified the judgment and decree of this Court passed in First Appeal Nos. 437 and 438 of 1959 and ordered that the petitioners shall be entitled to a decree in respect of the lands acquired: (a) at the rate of Rupees 1,35,000/- only per acre for 4.65 acres; (b) 5% severance and 15% solatium on the aforesaid market value viz Rs. 1,35,000/- per acre for 4.65 acres; (c) interest at the rate of 6% per annum on the amount so due from the date of taking possession i. e. 23 December, 1954. It also awarded proportionate cost on the difference between the amounts decreed by the High Court and that ordered by it. It further ordered that its order be punctually observed and carried into execution by all concerned.

From the above it is quite clear that the Supreme Court fixed the market value at the rate of Rs. 1,35,000/- per acre and then gave 5% severance plus 15% solatium. This amount was to be calculated. It comes to this:

4.65 acres at Rs. 1,35,000/-	
per acre	Rs. 6,27,750/-
15 per cent solatium &	
5 per cent severance ...	Rs. 1,25,550/-

Total Rs. 7,53,300/-

On the amount so due interest at the rate of 6 per cent per annum has been given from the date of taking possession. The petitioners have given to this Court a calculation chart (prepared by Jiswal & Co. Chartered Accountants) which is Annexure-8. A chart of this nature was prepared as per direction of this court in Civil Revision No. 311 of 1978 (R) decided on 18 May 1979 and was filed in the executing Court. Annexure-8 is as follows:—

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A. I. R.

Cost of 4.65 acres of land @ Rs. 1,35,000
Add : 15% solatium plus severance 5%

Rs. 6,27,750.00
Due... Rs. 1,25,550.00

Rs. 7,53,300.00
Interest... Rs. Principal

Rs. 7,53,300.00

Interest on Rs. 7,53,300/- @ 6% from 23.9.1954
to 30.3.1955 (6 months 7 days).
Less paid on 30-3.1955

Rs. 23,477.85
Rs. 20,877.00

Due... 2,600.85 7,53,300.00

Interest on Rs. 7,53,300.00 @ 6% (from 1.4.1955
to 19.4.1955) (i.e. 18 days).

Due... Rs. 2,259.90

Less paid on 19.4.1955 Rs. 1,47,00.00

Due... Rs. 4,860.75 7,53,300.00
Rs. 4,860.75 1,42,138.25

Nil 6,11,160.75

Interest on Rs. 6,11,161/- @ 6% from 20.3.55 to
13.7.1961 (6 years 2 months 24 days).
Proportionate Cost of J. O.

Rs. 2,28,574.21
Rs. 614.00

Less paid on 13.7.61

Rs. 2,29,188.21 6,11,160.75
Rs. 21,727.58

Due... Rs. 2,07,460.63 6,11,160.75

Interest on Rs. 6,11,161/- @ 6% from 14.7.61 to
16.2.68. (6 years 7 months 2 days).
Proportionate Cost of H. O.

Rs. 2,41,612.31
Rs. 15,608.60

Less paid on 16.2.68 Rs. 6,46,833.12.

Due... Rs. 4,64,681.54 6,11,160.75
Rs. 4,64,681.54 1,82,151.58

Due... Nil 4,29,009.17

Interest on Rs. 4,29,009. @ 6% (from 17.2.68 to
5.5.80). (i.e. 12 years 2 months 19 days).
Add: Cost of S. O.
Add: Cost of Execution as awarded

Rs. 3,14,535.09
Rs. 18,734.00
Rs. 5,000.00

Less paid on 5.5.80

Due... Rs. 3,38,299.09 4,29,009.17
Rs. 1,42,844.30

Due... Rs. 1,95,454.79 4,29,009.17

Interest on Rs. 4,29,009/- @ 6% from 6.5.80 to
18.5.81 (1 year 12 days).

Rs. 26,598.55

Due... Rs. 2,22,053.34 4,29,009.17

Plus future interest till payment

Total Due... Rs. 6,51,062.51.

It may be mentioned that the above chart shows that the amount received by the petitioners from the State Government from time to time has been deducted first from interest and costs and the balance if any, has been appropriated towards the principal amount of compensation. That was the direction given in Civil Revision 311 of 1978 (R). The figures in the chart

have not been challenged but the learned counsel appearing for the State of Bihar has seriously challenged the method of calculation. It is to be noted that compensation went on increasing from court to court, first in the court of the Judicial Commissioner then further enhanced by the High Court and thereafter further enhanced by the Supreme Court,

On 27 October, 1954, the Collector awarded Rs. 1,20,419-6-11 in respect of the first acquisition of 2.35 acres and Rs. 47,648-13-6 in respect of second acquisition of 2 acres.

On 22nd August, 1959, the Judicial Commissioner, Ranchi on a reference under Section 18 of the Act maintained the market value of the acquired land awarded by the Collector but he did not grant solatium under Section 23 (2) of the Act. He further awarded 5% severance and 10% potential value.

On appeal the High Court awarded by its judgment dated 25 February, 1965, Rs. 90,000/- per acre for 4.65 acres. (a) 15% solatium on the market value; (b) 5% severance and (c) 10% potential value and interest at the rate of 6% per annum on the amount of enhanced compensation from 23rd September, 1954. On 25 January, 1972, the Supreme Court modified the decree of the High Court and awarded:

For 4.65 acres	Rs. 1,35,000/- per acre
15% Solatium and	amounting to
5% severance	1,25,550/- and
	6% interest besides costs.

The total amount of compensation thus being Rs. 7,53,300/-. The payments made by the judgment-debtor from time to time are:

on 30-3-1955	Rs. 20,877.00
on 19-4-1955	Rs. 1,47,000.00
on 13-7-1961	Rs. 21,727.58
on 16-2-1968	Rs. 6,46,833.12
on 5-5-1980	Rs. 1,42,844.30

2. Mr. L. M. Singhvi contended that his client was entitled to compensation amount as determined by the Supreme Court but the Judicial Commissioner has re-determined the matter sitting over the Supreme Court decree and also over the order of this Court passed in Civil Revision No. 311 of 1979 (R) and has illegally dismissed the execution case as being in full and final satisfaction of the decree. On the other hand, the submission of the learned counsel for the opposite party judgment-debtor is that the decree-holders are entitled to interest only on the enhanced amount determined by the courts from time to time as provided in Section 28 of the Act. It was submitted that the judgment-debtor went on paying from time to time and the same was paid only towards the principal

amount and not towards interest and costs. It was contended that the judgment-debtor all along paid towards what was found due by the Collector or by the Judicial Commissioner or by the High Court and that the decree-holder having appropriated the same towards the principal amount cannot turn back and say that payment was only towards interest. The very same contention was urged in the court below and it has been accepted by the Judicial Commissioner, Ranchi. In my opinion, this submission is not acceptable. If it is accepted, it will amount to going back upon the decree of the Supreme Court. As held by this Court in Civil Revision 311 of 1978 on 18th May, 1979, all the decrees of the Courts below merged in the decree of the Supreme Court. After that it was not the business of the Judicial Commissioner as an executing Court to go behind the decree of the Supreme Court and sit over it. He had no justification to go behind the order of this Court either, which was passed in Civil Revision 311 of 1978. As above said the Supreme Court has given a clear decree in favour of the petitioner-land owner. There is no ambiguity in it and there should have been no difficulty in calculating the amount. The Supreme Court makes the money payable from 23 September, 1954, but the Judicial Commissioner thinks as if it was due from 25 January, 1972, the date of the decree of the Supreme Court. The Supreme Court gave interest on the amount so due, that is, on the amount calculated under clauses (a) and (b) of the decree. The Judicial Commissioner ignored this direction and gave interest on the difference. The Supreme Court gave interest on the difference. The Supreme Court gave interest on the entire amount of compensation including 15% solatium and 5% severance but the Judicial Commissioner says that no interest can be paid on solatium or the severance under S. 28 of the Act. As regards the payment made from time to time by the State of Bihar (Judgment debtor), this court in Civil Revision 311 of 1978 (decided on 18 May, 1979) said that all such payments shall be adjusted first towards the cost and interest on the principal amount and if there is still some balance left then it will be appropriated towards the principal amount of compensation. In accordance with this direction a chart was prepared by the decree-holders and

it was supplied to the Judicial Commissioner. In this Court also a similar chart prepared by the Chartered Accountant has been given. But the Judicial Commissioner ignored the calculation chart of the decree-holders and has held that the judgment-debtor deposited Rupees 1,49,763/- in excess of the amount due. He has also said in his order that the Supreme Court struck down the decree granting 5% severance. In fact, the Supreme Court has granted a decree including the 5% severance also. The Judicial Commissioner has held that the Judgment-debtor deposited Rs. 12,33,239.64 but the decree-holders were entitled only to Rs. 9,79,288/- and hence the balance of Rs. 2,53,357.64 was excess. He, therefore, allowed the objection made by the judgment-debtor under section case (sic) in full and final satisfaction. I think, this order of the Judicial Commissioner is wholly unwarranted and without jurisdiction because it goes against the direction of the Supreme Court as also against the direction of this Court.

I have already pointed out that the Supreme Court awarded interest on solatium as well as severance also but the Judicial Commissioner says in its order that no interest is payable to the plaintiff-decree holders on that amount. This is a clear disregard of the direction of the Supreme Court and it shows a complete lack of understanding on the part of the Judicial Commissioner on the scope of the decree of the Supreme Court.

3. Mr. Mazumdar appearing for the State of Bihar contended that under S. 28 of the Act interest can be paid only on the excess amount of compensation. Section 28 runs thus:—

"28. Collector may be directed to pay interest on excess compensation.

If the sum which, in the opinion of the court, the Collector ought to have awarded as compensation is in excess of the sum which the Collector did award as compensation, the award of the Court may direct that the Collector shall pay interest on such excess at the rate of six per centum per annum from the date on which he took possession of the land to the date of payment of such excess into court."

It is true that under S. 28 of the Act the Collector can be directed to pay interest only on excess. But it is to be noticed

that there is another provision in the Act regarding payment of interest and that is S. 34. Under that section if the amount of compensation is not paid or is not deposited when possession of the land is taken then the Collector must pay that amount with interest thereon at the rate of 6 per cent per annum from the date of taking possession until the amount is paid or deposited. S. 34 runs as follows:—

"34. Payment of interest.— When the amount of such compensation is not paid or deposited on or before taking possession of land the Collector shall pay the amount awarded with interest thereon at the rate of six per cent per annum from the time of so taking possession until it shall have been so paid or deposited."

On a perusal of the above it is clear that S. 28 could apply when the amount originally awarded has already been paid or deposited and when the Court awards excess amount then interest on that excess only is payable. But if the compensation which is awarded either by the Collector or by Court is not paid then interest would run on the entire amount and not only on the excess and it would run from the date of dispossession. It is to be borne in mind that the Supreme Court decree does not mention S. 28 or 34 of the Act, it gives interest on the amount found due. In that view of the matter also the interest is clearly payable on the whole amount found due after calculation under clauses (a) and (b) of the decree of the Supreme Court, less the payment made by Judgment-debtor from time to time. There cannot be any justification to go behind that decree. The right to receive interest takes the place of the right to retain possession (see the case of Satinder Singh v. Umrao Singh, AIR 1961 SC 908). In *Ingle Wood Pulp and Paper Co. Ltd. v. New Brunswick Electric Power Commission*, AIR 1928 PC 287, interest was allowed on the whole amount which was found due. The same principle was followed in *Province of Bengal v. Pran Kissen Law & Co.* AIR 1950 Cal 498. But the question does not arise for determination in view of the clear mandate of the decree of the Supreme Court allowing interest on the entire amount due including the solatium and severance from the date of taking possession. The Judicial Commissioner, Ranchi being the executing Court had no jurisdiction to go behind that decree and to re-

determine the matter afresh. He had merely to calculate the interest as per direction of the Supreme Court.

4. Counsel for the judgment-debtor next urged that the Judicial Commissioner is right in refusing interest on solatium and in support of this contention he has relied on (1973) 1 SCC 109: AIR 1973 SC 305 (Union of India v. Ram Mehar). The argument is not well conceived. In the said case what fell for consideration before their Lordships was the provision of S. 4 (3) of the Act (Amendment and Validation Act, 1967). Grover, J. speaking for the Bench made it clear at the very outset that the sole point for determination was with regard to the true meaning and construction of the expression "market value" employed in the aforesaid provision. Therefore, it is manifest that what was construed in the said judgment was the term 'market value' as used in the Amending and Validation Act. It was in that particular context that their Lordships observed that "market value" did not include within it the amount of solatium and, therefore, the rate of interest prescribed by S. 4 (3) was confined to the market value of land alone. Ram Mehar's case, therefore, is of no aid whatsoever to the State of Bihar. On a depth examination of the facts of that case it will appear that the observations made in that case rather help the petitioner-landowners. In that case their Lordships have made (sic) it clear, compensation. It was observed (para 6):

".....The additional amount of 15% certainly forms part of the amount of compensation because under S. 23 the compensation is to consist of what is provided for in sub-sec. (1) and the additional amount of 15% on the market value of the land acquired. But compensation and market value are distinct expressions and have been used as such in the Acquisition Act....."

And again.—

".....If market value and compensation were intended by the legislature to have the same meaning it is difficult to comprehend why the word 'compensation' in Ss. 28 and 34 and not 'market value' was used. The key to the meaning of the word 'compensation' is to be found in S. 23 (1) and that consists (a) of the market value of the land and (b) the sum of 15% on such market value which

is stated to be the consideration for the compulsory nature of the acquisition. Market value is, therefore, only one of the components in the determination of the amount of compensation....."

In view of the above observation it must be held that 15% solatium is an integral part of the amount of compensation and interest is payable on the same. I have, already pointed out that the Supreme Court in the present case has given a clear direction to pay interest on that amount also.

5. Counsel next relied on (1977) 1 SCC 46: (AIR 1976 SC 1721) (State of Gujarat v. Gujarat Revenue Tribunal) for the purpose of showing that the amount of solatium of 15% awarded under S. 23 (2) of the Act, strictly speaking, was not a part of the award of compensation as it was not to be mentioned in the prescribed form under S. 26 (1). That was a case dealing with Jagir's Abolition Act, 1953 and Bombay Taluqdari Tenure Abolition Act, 1949 and the amount of compensation was to be determined according to the provisions of these Acts. The facts of that case are quite different and are of no help for deciding the present case. The central fact in the present case remains that 15% solatium was awarded to the present petitioner-landowners by the Supreme Court and interest was also allowed thereon. The Judicial Commissioner has acted, I think, without jurisdiction in thinking that the compensation will not include the amount of solatium and severance. That view is contrary to the decision of the Supreme Court. His order is not only without jurisdiction but it has occasioned a failure of justice and caused irreparable injury to the decree-holder owners. It is a colossal disregard of the order of the Supreme Court and of this Court as well. As a result of the order under challenge great injustice has been done to the petitioners. The acquisition was made in 1954 but even by 1981 the landowners have not yet received their full compensation amount with interest thereon due to prolonged litigation. In the words of V. R. Krishna Iyer, J. "This provokes the comment that litigation is far too long lived to hold any realistic promise of fruits to the parties to the dispute."

6. On a consideration of the submissions raised on behalf of the parties I

am of the opinion that the order of the Judicial Commissioner, Ranchi dated 27th August, 1979 is illegal, without jurisdiction and has caused irreparable injury to the petitioners and it must be set aside. It is, accordingly, set aside. The revision petition is allowed. I am further of the opinion that the calculation chart (Annexure-8) filed in this Court on behalf of the petitioner-land-owners is in accordance with the decree of the Supreme Court and it is accepted as correct. It follows that the petitioner-decree-holders are entitled to the balance of compensation and further interest as per chart Annexure-8. The Judicial Commissioner, Ranchi, as executing court, before whom also such an account was filed by the decree-holder, must now proceed with the execution case (Execution case 78 of 1974) for the balance amount which is now due to the decree-holders. There shall be no order as to costs of this civil revision.

Petition allowed.

AIR 1982 PATNA 82

K. B. N. SINGH C. J. AND

P. S. SAHAY, J.

Kateya Gram Panchayat, Petitioner v. The State of Bihar and others, Respondents.

Civil Writ Jurisdiction Case No. 1256 of 1981, D/- 11-12-1981.

Bihar Panchayat Samitis and Zilla Parishads Act (6 of 1962), Ss. 41, 53, 65 — Govt. Notification under S. 65. D/- 18-11-1980, Items 2 and 8 — Settling of roadside flanks by auction by Zilla Parishad for vending articles — Zilla Parishad not competent.

Where the Zilla Parishad settled road-side flanks for vending articles the settlement was liable to be set aside in the absence of any notification under S. 65 giving such power to the Zilla Parishad. (Para. 10)

There is no manner of doubt that if there is a bazar held on the Zilla Parishad lands, the right to settle the same vests in the Panchayat Samiti under Item No. 8 of the Notification and the roads vest in the Zilla Parishad. Zilla Parishad has been given powers and functions enumerated in S. 41 and there is no mention of tolls and taxes. Its powers under S. 53 (6) no doubt, refer

to "proceeds from tax or fees, which the Zilla Parishad may under any law levy", but there is no provision under which the Zilla Parishad may levy tax or fees in respect of the road-side flanks or Hats and Bazars on the road-side lands. The notification also does not confer such power on the Zilla Parishad. Inferring such power in favour of the Panchayat Samiti, in view of Item No. 8 of the Notification would be creating a clash between the authorities in whom the road and the road-side flanks vest and in matters of which the responsibility rests with the Zilla Parishads, and the Panchayat Samitis. This would also be beyond the purview of Item No. 8 of the Notification which only refers to those lands on which Hats and Bazars are held. (Paras 8 and 10)

Cases Referred: Chronological Paras
AIR 1961 Pat 442 11

Thakur Prasad and Ravi Shankar Prasad, for Petitioner; S. N. Jha, Standing Counsel No. 2 and S. K. Verma, Jr. Counsel to Standing Counsel No. 2 (for Nos. 1 to 3) and Prabha Shankar Mishra and Yadu Vansh Giri (for No. 4), for Respondents.

P. S. SAHAY, J.:— The petitioner has moved this Court under Arts. 226 and 227 of the Constitution of India for quashing Annexure '2' order dated 9-4-1981 of the Secretary, Zilla Parishad Gopalganj, Respondent No. 2, settling the road-side flanks for vending articles in favour of respondent No. 4.

2. An interesting point which has to be answered by us is whether the Zilla Parishad or the Panchayat Samiti has the right to settle the road-side flanks for vending articles. In order to appreciate the point it will be necessary to state some relevant facts. The petitioner, Kateya Gram Panchayat, consists of village Kateya, Rampur and Betwania and Shri Shivji Prasad is the Mukhiya of the said Gram Panchayat. There is a Bazar in Kateya and hat is held bi-weekly on Wednesday and Saturday in which articles of daily consumption like food-grains, vegetables, oil, tobacco and clothes etc. are sold and there are about 480 permanent and semi-permanent shops in the said Bazar. Prior to the vesting of the estate the aforesaid hat was a part of the Zamindari of Hathwa Raj, and after the vesting the State of Bihar settled it every year under government instruction. In the middle of Kateya

Bazar there is a District Board Road which was formerly maintained by District Board. After the taking over of the District Board it was maintained by the Government. On the road-side flanks of this road persons sit and sell articles like vegetables, foodgrain, tobacco etc.

3. According to the petitioner during the last 25 years Kateya Hat and also Bazar which is held on the flanks of the District Board road was settled either with the Gram Panchayat or with the Co-operative Society and on their refusal settlement was made with individuals. For the year 1979-80, 1980-81 roadside flanks shops were settled with Kateya Gram Panchayat on reserved jama of Rs. 851/- and the management of Kateya hat and this roadside shops was managed by the Gram Panchayat. The Zilla Parishad held an auction for the year 1981-82, the period starting from 1-4-1981 to 31-3-1982, for Kateya hat for which a sum of Rs. 13,130/- was offered by respondent No. 4 who was the highest bidder. The petitioner (Gram Panchayat) also offered the same amount which was accepted. A copy of the order has been filed along with petition and marked as Annexure '1'. The Deputy Development Commissioner directed the Secretary of the Zila Parishad, respondent No. 2, to finalise the settlement of the road-side flanks shops with respondent No. 4 who was the highest bidder. The petitioner appeared before respondent No. 2 and prayed for settlement of the roadside flanks shops in view of the fact that the settlement of the Kateya hat has been made with the Gram Panchayat but respondent No. 2 rejected the prayer of the petitioner and ordered that the settlement should be made with respondent No. 4. A copy of the order dated 9-4-1981 has been filed and marked as Annexure '2'. The petitioner had also relied on a Government letter dated 12-3-1980 that hats and bazars should also be settled with the local Gram Panchayat or the local co-operative Society provided that the Panchayat Officer makes such recommendation. A copy of the letter has been filed and marked as Annexure '5'. Order of Deputy Development Commissioner has been filed in which a decision was taken that the roadside flanks shops should be settled with Manjha Gram Panchayat, which is a different Gram Panchayat, so that there may not be dispute between the parties

in collecting tolls. A copy of the order has been filed and marked as Annexure '4'. By notification dated 18th November, 1980, issued by the State Government the properties and functions which were formerly vested in the District Board were transferred to the Zila Parishad and Panchayat Samiti. A copy of that notification has been filed and marked as Annexure '5'. The petitioner has also filed a copy of the petition dated 17-2-1981 (Annexure '6') by which the petitioner had filed an application before the Chairman of the Zila Parishad for the settlement of the road-side flank shops. Similar petitions were also filed on 27-2-1981 and 9-3-1981 before the Chairman and the Zila Parishad Engineer (Annexures '7' and '8'). It has also been stated in the petition that it has been the government policy to settle the hat and the road-side flank shops with one and the same person in order to avoid confrontation and confusion and on that basis settlements from the year 1977 to 1980 were made with the petitioner. It has been submitted on behalf of the petitioner that whenever vehicles carrying goods entered into Kateya hat and parked on the District Board Road respondent No. 4 compelled the truck or tractor and cart owner and other traders to pay tolls for which there was an apprehension of breach of peace and a proceeding under Section 107 of the Criminal P. C. had to be started. A copy of the petition filed before Officer-in-charge of Police Station has been filed and marked as Annexure '11'. The petitioner has moved this Court for quashing the order as contained in Annexure '2' settling road-side shops in favour of respondent No. 4. The application was admitted on 6-5-1981 and an interim order was passed that during the pendency of the application the Gram Panchayat shall maintain proper accounts.

4. Counter affidavits have been filed on behalf of Zila Parishad and also on behalf of respondent No. 4 to which reply and supplementary affidavits have been filed on behalf of the petitioner. In the counter-affidavit filed on behalf of respondent Nos. 2 and 3 it has been asserted that after the vesting of the Zamindari there was an understanding between the Revenue Department and the District Board that the hats and bazars which are held side by side on Government land and lands of the Dis-

trict Board would be settled by Revenue Department and proportionate amount on the basis of the area covered would be deposited in the District Board fund and this arrangement continued till 1977-78. Regarding the settlement of the road side flank shops on the District Board Road it has been asserted on behalf of respondent Nos. 2 and 3 that it is the Zila Parishad who has the power to settle those shops as they have to maintain it. It has further been stated that the distance between Kateya hat and the road-side flanks is about 100 yards and the Zila Parishad held an auction and had made a settlement with respondent no. 4 who was the highest bidder. In the counter-affidavit filed by respondent No. 4 the settlement made in his favour has been justified and it has been asserted that it is Zila Parishad which has the power to settle the road-side flanks shops and after depositing the bid amount a receipt was granted (Annexure 'A'). The aforesaid settlement was also approved by the District Development Commissioner on 21-4-1981 and 27-4-1981. It has further been stated that the petitioner Gram Panchayat has not participated in the bid and, therefore, the writ application on its behalf, is not maintainable.

5. Mr. Thakur Prasad, appearing on behalf of the petitioner, has contended that by virtue of the notification contained in Annexure '5' the Zila Parishad has no power to settle shops even on Zila Parishad's road and this power has been given to Panchayat Samiti and in that view of the matter the settlement made in favour of respondent No. 4 by Annexure '2' is fit to be quashed. Learned Standing Counsel No. 2, appearing on behalf of the State, has challenged this contention of Mr. Prasad and in support of the same has relied on some of the provisions of the Act which I shall discuss in detail later. Appearing on behalf of respondent No. 4, Shri Prabha Shankar Mishra, has, however, submitted that the road admittedly belongs to the Zila Parishad and they have to maintain the same and thus the Zila Parishad alone has the right to settle the road-side flank shops which according to him was in the form of a licence. It was, therefore, neither a fee nor a toll and the money realised from those persons was merely contractual not covered by provisions of any statute. He has further

submitted that neither the State nor the Panchayat Samiti has the power to settle the road-side flank shops belonging to the Zila Parishad and in this connection has relied on some of the provisions of the Act. Mr. Mishra has further contended that the Gram Panchayat had prayed before the Zila Parishad for settlement and having not obtained the same, now cannot be allowed to challenge the power of the Zila Parishad to settle those shops. This submission, in my opinion, is devoid of any substance and has to be rejected. The petitioner, no doubt, had prayed for settlement which was ultimately rejected but still it can challenge the settlement made in favour of the respondent No. 4 for the simple reason that it also claimed settlement. In my opinion, therefore, the writ is maintainable on behalf of Gram Panchayat.

6. On the background of the submissions made by the learned counsel for the parties, it will be necessary to refer to some of the provisions of the Bihar Panchayat Samitis and Zila Parishads, Act, 1961 (hereinafter referred to as 'the Act'), in order to resolve the controversy between them. Panchayat Samiti is defined under Section 2 (k) which means a Samiti constituted under Section 4 by the State Government for a block with effect from the date from which they are notified. Zila Parishad is defined under Section 2 (o) which means a Zila Parishad constituted under Section 35. Under Section 35 the Zila Parishad for a district is constituted with effect from the date of the notification. Power and functions of Panchayat Samiti have been defined in Section 13 which reads as follows:—

"Section 13. Power and functions of Panchayat Samiti — (1) Subject to the provisions of this Act the Panchayat Samiti shall exercise all the powers conferred on, and perform all the functions entrusted to it, by or under this Act and such other powers and functions as may be conferred on and entrusted to it, by the State Government for carrying out the purposes of this Act, and shall also exercise and perform such of the powers and functions of the District Board including the power to levy any tax or fees as may be transferred to it under this Act.

Provided that it shall not exercise the powers or perform the functions expressly assigned by or under this Act or

any other law to its Pramukh or to the Block Development Officer or to the Zila Parishad or any other authority.

(2) In particular, the Panchayat Samiti may, subject to the policy which may from time to time be laid down by Government, exercise the powers and perform the functions specified in the Schedule."

The Panchayat Samiti has a power to levy tax under Section 13A of the Act and sub-clause (iv) is relevant and runs as follows:—

"Section 13A. Levy of taxes:— Subject to any rule or any general or special order of the State Government in this behalf, a Panchayat Samiti may levy the following taxes or fees, namely:—

X X X X

(iv) — a toll, at rates fixed by the Panchayat Samiti subject to limits prescribed by the State Government, on hats, fairs, markets and ferries within the jurisdiction of the Panchayat Samiti and owned and maintained by it."

The different sources of the income of Panchayat Samiti have been enumerated in Section 26 of the Act. We are concerned with sub-clause (ix) which is as follows:—

"S. 26. Income of Panchayat Samiti:— The sources of a panchayat samiti shall consist of:—

X X X X

(ix) — income arising from leases granted by the panchayat samiti of public ferries, fairs, hats and the like, transferred to the panchayat samiti"

Powers and functions of the Zila Parishad have been enumerated in S. 41 of the Act and it may be mentioned that no power has been given to them to collect tolls or taxes. There is also no mention of tax and tolls in S. 53 of the Act wherein income from the different heads of Zila Parishads have been enumerated. The District Board has been defined under S. 2 (e) of the Act which means a district board constituted under the Bihar and Orissa Local Self-Government Act of 1885. District Boards are abolished from the date of the notification and after such abolition the assets and liabilities devolve on the Zila Parishads and the Panchayat Samiti. It will be relevant to quote S. 66 which is as follows:—

"Section 66. Abolition of district boards:—

(1) Notwithstanding anything in the Bihar and Orissa Local Self-Government Act of 1885 (Ben. Act 3 of 1885) or any other law for the time being in force, the State Government may, by notification in the Official Gazette, abolish any district board with effect from such date as may be specified therein.

(2) On the abolition of a district board under sub-section (1) all assets vesting in and all liabilities subsisting against it on the date of abolition under the Bihar and Orissa Local Self-Government Act of 1885 (Ben. Act 3 of 1885) or any other law for the time being in force, shall devolve on the Zila Parishad of that district on the Panchayat Samiti functioning therein or on both to such extent and in such manner as the State Government may by order, direct.

(3) The officers and employees of the abolished district board shall be absorbed in the establishment of the Zila Parishad or the Panchayat Samiti or otherwise as the State Government may deem fit."

Transfer of powers and functions of the District Board to the Panchayat Samiti and Zila Parishad has to be made by notification under S. 65 of the Act. Rules are framed under S. 75 and the Panchayat Samiti and the Zila Parishad have been given powers to frame their own bye-laws. Now, it will be relevant to consider the notification (Annexure '5') issued by the State Government under S. 65 of the Act and on which strong reliance has been placed by the learned counsel appearing on behalf of the petitioner. By this notification District Boards were abolished in a number of districts including Gopalganj, where Kateya hat is situated, and the powers and functions exercised by the District Boards were divided and distributed between the Zila Parishads and the Panchayat Samitis. There are 13 items mentioned therein and items Nos. 2 and 8 are relevant which are as follows:—

	Powers exercised by Zila Parishad.	To whom power transferred.
Item No. (2) Roads of Zila Parishad		Zila Parishad.
Item No (8) Hats and Bazar held on land of Zila Parishad.		Panchayat Samiti.

7. From the aforesaid notification it is clear that the Zila Parishad has to maintain the roads belonging to the Zila Parishad, and the Panchayat Samiti has been given the right to settle the Hats

and Bazars which are held on the lands belonging to the Zila Parishad. The question for consideration is as to who has the right to settle the shops of the road-side flanks of the roads belonging to the Zila Parishad — whether the Zila Parishad or the Panchayat Samiti.

8. There cannot be any manner of doubt that if there is a Bazar held on the Zila Parishad lands, the right to settle the same vests in the Panchayat Samiti under Item No. 8 of the Notification (Annexure '5'), issued under S. 65 of the Act, and the roads of Zila Parishad vest in the Zila Parishad. Zila Parishad has been given powers and functions enumerated in S. 41 of the Act and there is no mention of tolls and taxes. Its powers under S. 53 (6) of the Act, no doubt, refer to "proceeds from tax or fees, which the Zila Parishad may under any law levy", but no provision of the Act has been brought to our notice under which the Zila Parishad may levy tax or fees in respect of the road-side flank or Hats and Bazars on the road-side lands. The notification under S. 65 of the Act (Annexure 5) also does not confer such power on the Zila Parishad.

9. The powers and functions of the Panchayat Samiti have been enumerated under Ss. 13, 13A (iv) and 26 (ix) of the Act in this regard. The question is whether the power to realise tolls and taxes from Hats or Bazars, which vests in the Panchayat Samiti, is also given in relation to road-side shops in favour of the Panchayat Samiti or not.

10. Roads having been vested in the Zila Parishad, it is the Zila Parishad which is responsible for the maintenance of the roads and making the same safe and secure for use by the vehicular traffic as well as pedestrians. Road-side flanks are also part of the roads and the authority which has the control over the roads has also the control over the road-side flanks, for their better management and use. In absence of any specific mention that the right to hold Hats and Bazars not only extends over the lands over which Hats and Bazars are held, but also on the road-side flanks (which vest in the Zila Parishad), no such power can be inferred in favour of the Panchayat Samiti. It is another matter that the Zila Parishad may not have such right to hold Hats and Bazars on its road-side flanks. There cannot be any manner of doubt that the road-side

flanks are really meant for use by the pedestrians over the metalled or unmetalled portions of the roads. It may be that in some cases these flanks may be very wide, so as to allow holding of Hats even without the detriment to the travelling public, particularly pedestrians. The question arises, whether, in such a situation, the Zila Parishad could hold Hats and Bazars on such wide road-side flanks. In absence of any notification under S. 65 of the Act by the State Government giving such power to the Zila Parishad in respect of such wider road-side flanks, it will not be possible to hold that the Zila Parishad has that right. The roads and the road-side flanks primarily exist for use of the travelling public and unless the road-side flanks are sufficiently wide, the question of holding shops and Hats on such flanks does not arise. Where the road-side flanks are sufficiently wide, the state Government may appropriately authorise the Zila Parishad under S. 65 of the Act by proper notifications, for augmenting its income, to hold Hats and Bazars on such road-side flanks, over which the Panchayat Samiti has no power to hold Hats or Bazars. Inferring such power in favour of the Panchayat Samiti, in view of Item No. 8 of the Notification, quoted above, would be creating a clash between the authorities in whom the road and the road-side flanks vest and in matters of which the responsibility rests with the Zila Parishads, and the Panchayat Samitis. This would also be beyond the purview of Item No. 8 of the Notification (Annexure 5), which only refers to those lands on which Hats and Bazars are held, i.e., on the lands of the Zila Parishad. Such a clash has to be avoided. It is the settled principle of interpretation that an interpretation which makes the provision workable has to be preferred to that which creates clash or confusion.

11. Learned counsel appearing on behalf of the petitioner has relied on a Bench decision of this Court in the case of Madan Gopal Rungra v. State of Bihar (AIR 1961 Patna 442). In that case, the deed of lease was executed by the Collector for working the iron mines and trucks had to pass across the bed of river Koel. The State Government gave the right to collect tolls to certain individual, who started collecting tolls on trucks pass on payment of

money. That was challenged in this Court that the State Government had no power to give lease to individuals to collect tolls not authorised by law. It was contended on behalf of the State that it was done in exercise of the administrative powers and in that view of the matter the writ petition was not maintainable. The argument was repelled and this Court held that the right to collect tolls from the vehicles passing from the river shall only be granted by the legislature and for this the legislative authority authorises for imposition of such tolls. The Collector had no power to lease out those roads to individuals for collecting tolls from the trucks passing across the river. Article 265 of the Constitution reads as follows:—

"No tax shall be levied or collected, except by authority of law."

It is not necessary to go into this question, as the case can be disposed of on the interpretation of the notification under S. 65 of the Act (Annexure '5'). The argument of Mr. Prabha Shanker Mishra, appearing on behalf of Respondent No. 4, in this regard may, however, be noted. He has urged that by settling the road-side flank shops, the Zila Parishad was neither collecting tolls nor fees, for the use of the flanks of the roads, but it was in the nature of a licence merely contractual, not under the provisions of any statute. Mr. Mishra has also submitted that the writ petitioner has taken settlement from the State Government and not from the Panchayat Samiti, and, therefore, the settlement was bad. This contention of Mr. Mishra has to be rejected, as the settlement made in favour of the Gram Panchayat of Kateya is not under challenge in this writ application.

12. Thus, on a careful consideration of all the points raised in this case, I find that the petitioner has made out a case for interference by this Court in exercise of its writ jurisdiction. Let a writ of certiorari be issued, quashing the order dated the 9th April, 1981, contained in Annexure '2', making settlement in favour of Respondent No. 4. There will, however, be no order as to costs. Before parting, I may, however, observe that as this question may arise in respect of other Zila Parishads also, the State Government may look into the

matter for finding out an appropriate solution of the question.

K. B. N. SINGH, C. J.:— I agree,
Petition allowed.

AIR 1982 PATNA 87

HARI LAL AGRAWAL AND
NAZIR AHMAD, JJ.

Ramanand Thakur, Petitioner v. Parmanand Thakur, Opposite Party.

Civil Revn. No. 675 of 1980, D/- 4-12-1981.*

Succession Act (39 of 1925), Ss. 276 and 278 — Limitation Act (36 of 1963), Art. 137 — Applicability — Applications for grant of Probate or Letters of Administration are not governed by any Article of the Limitation Act.

Though Art. 137 of the Limitation Act applies to any petition or application filed under any Act so far as the applications for grant of a Probate or Letters of Administration are concerned, they are not governed by any Article of the Limitation Act. AIR 1959 Cal 81; (1894) ILR 17 Mad 379 and AIR 1977 SC 282, Rel. on. (Para 5)

In the case of an application for grant of Probate or Letters of Administration, it is difficult to find out as to when the right to apply accrues and unless that date can be fixed, there is no question of starting of the period of limitation. The right to apply for a Probate accrues from day to day so long as the will remains unprobated. In other words, the right to apply accrues every day and the cause of action for an application for Probate arises every moment so long as the will remains unprobated and, therefore, for such an application there is no period of limitation. (Para 5)

Cases	Referred:	Chronological	Paras
AIR 1977 SC 282			4
AIR 1959 Cal 81			5
(1894) ILR 17 Mad 379			5

Madhusudan Singh, for Petitioner; Devendra Narain Sinha, for Opposite Party.

ORDER:— This application arises out of a probate proceeding for the grant of probate of a will. The objector who is the petitioner before us took an objection that the application filed for probate of the will executed by one Munna Lal Thakur, who died on 12-10-1968, was barred by Limitation

* Against order of M. P. Sinha, District J., Monghyr, D/- 10-3-1980.

BZ/BZ/A788/82/VCD/MVJ

under Art. 137 of the Limitation Act 1963 inasmuch as having been filed on 11-7-1979 beyond the prescribed period of three years under said Article.

2. The learned District Judge following a decision of the Calcutta High Court has rejected this plea. Accordingly the objector has come to this Court and a learned single Judge before whom the case was placed for hearing has referred it to a Division Bench.

3. Article 137 of the new Limitation Act is the residuary Article like Art. 181 of the old Limitation Act but with certain modification in the language and its classification which in our view is of great importance. Article 181 was placed in the Third Division dealing with the application, but Art. 137 has been placed separately although under the Third Division in a separate part to govern "other applications" apparently thereby indicating the intention of the legislature that the expression application was not confined to the types of cases where the other articles under the Third Division were placed. Apart from the change of the division, the words used in Art. 137 are also slightly different. The words "any other application" under Art. 137 cannot be said on the principle of *ejusdem generis* applies only to applications under the Code of Civil Procedure other than those mentioned in Part I of the Third Division. In the old Limitation Act the word "application" was not defined and all that was defined was the expression "applicant". The changed definition of the words "applicant" and introduction of the definition of the word "application" in S. 2 (a) and 2 (b) of the 1973 Act indicates the object of the Limitation Act to include petitions under special laws other than the Code of Civil Procedure. It was on this account that the operation of Art. 181 was limited to applications made under the Civil Procedure Code particularly in view of the fact that all the other applications in the division in which Article 181 was placed referred to the applications under the Code of Civil Procedure and, therefore, almost all the High Courts including the Supreme Court had taken the view that the "applications" referred to in Article 181, by the application of the doctrine of *ejusdem generis* applied only to the applications under the Code of Civil Procedure.

4. The Supreme Court in the case of Kerala S. E. Board v. T. P. Kunhaliumma, (AIR 1977 SC 282) has noticed the differences pointed out above and has overruled its earlier view that Art. 137 applied only to application made under the Code of Civil Procedure.

5. But notwithstanding the taking of this view of the legal position regarding the construction of Art. 137, the petitioner in our considered opinion still must fail inasmuch as in the case of the application for grant of Probate or Letters of Administration, it is difficult to find out as to when the right to apply accrues because unless that date can be fixed, there is no question of starting of the period of limitation. Although we could not find any decision on this question of our own High Court, we find this question having been discussed by a Bench of the Calcutta High Court in the case of Kalinath v. Nagenra Nath, (AIR 1959 Cal 81) though it was a case under the old Limitation Act where the learned Judges were confronted with Art. 181 of the Limitation Act. The argument advanced in that case was that the starting point for computing the period of limitation would be the date when the executor for the first time became aware of the will. This argument was rejected as Mr. Madhusudan Singh had contended that the starting date for the said purpose would be the date of the death of the testator. We are unable to accept this contention as the right to apply for a probate accrues from day to day so long as the will remains unprobated. In other words, the right to apply accrues every day and the cause of action for an application for probate arises every moment so long as the will remains unprobated and, therefore, for such an application there is no period of limitation and for taking this view we find full support from the Calcutta case which also finds support from the view taken by the Madras High Court in the case of Gnanamutku Upadesi v. Vana Koilpillai Nadan, ((1894) ILR 17 Mad 379). Therefore, while holding that the Art. 137 of the new Limitation Act applies to any petition or application filed under any Act, we do not feel any difficulty to come to the conclusion that so far as the application for grant of a Probate or Letters of Administration is concerned, they are not governed by any Article of the Limitation Act. The application accordingly fails and, is hereby dismissed, but in the circumstances, we shall leave the parties to bear their own costs.

Revision dismissed.

AIR 1982 PATNA 89

FULL BENCH

K. B. N. SINGH, C. J.,
BIRENDRA PRASAD SINHA AND
PREM SHANKAR SAHAY, JJ.

Imamul Hassan Choudhary, Petitioner v.
State of Bihar and others Respondents.

Civil Writ Jurn. Case No. 3468 of 1980,
D/- 10-12-1981.

Bihar Land Reforms (Fixation of Ceiling Areas and Acquisition of Surplus Land) Act (12 of 1962), Ss. 5, 2 (g) and 2 (k) — “Land holder” — “Raiyat” — Major son of a Muslim land-holder is not entitled to a separate unit — He has no right or interest in property in lifetime of his father. C. W. J. C. No. 202 of 1978, D/- 27-2-1980 (Pat), Overruled. (Muslim Law — Right of heirs in property).

For becoming a raiyat the person concerned must have a right to hold the land for the purposes of cultivation. Unlike Hindu Law, estate of a deceased Mohamedan if he has died intestate, devolves on his heirs at the moment of his death. Under the Mohamedan Law, birth right is not recognised. The right of an heir apparent or presumptive comes into existence for the first time on the death of the ancestor, and he is not entitled until then to any interest in the property to which he would succeed as an heir if he survived the ancestor. (Para 5)

A land-holder in order to constitute a family holds the land in his own right and as a raiyat. A Muslim son or daughter does not have any right or interest in the property in the lifetime of his or her father. According to the Muslim Law, they acquire the right only in the event of the death of the father. It cannot, therefore, be said that a Muslim major son also becomes a land-holder within the lifetime of his father within the meaning of this Act and constitutes a family as defined under S. 2 (g). The distinction was noticed by the framers of the law while inserting the explanation of the definition of the word “land-holder” in Section 2 (g) of the Act. A member of undivided Hindu family acquires a right by birth and becomes entitled to a share in the land. He is deemed to be a land-holder for the purposes of the Act whether or not a partition has taken place before the commencement of this Act. C. W. J. C. No. 202 of 1978, D/- 27-2-1980 (Pat), Overruled; (1889) ILR 11 All 456, Rel. on.

(Paras 6, 8)

Cases Referred: Chronological Paras
(1980) C. W. J. C. No. 202 of 1978, D/- 27-2-1980 (Patna), Shekh Abdul Aziz v. State of Bihar 3, 7
(1889) ILR 11 All 456 : 9 All WN 109 5

Mazhar Hussain and Arun Kumar Singh No. 2, for Petitioner; Chunnilal, Govt. Pleader No. 5 and R. C. Sinha, Jr. Counsel to Govt. Pleader No. 5, for Respondents.

BIRENDRA PRASAD SINHA, J.:— The question for consideration in this case is whether a major son of a Muslim land-holder is entitled to a separate unit under the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (hereinafter referred to as ‘the Act’).

2. A proceeding under the Act was started against the petitioner in Ceiling Case No. 113/73-74. A draft statement was published declaring 185.68 acres of land of Class III as belonging to the petitioner. Out of this, 160.68 acres were declared to be surplus and the petitioner was allowed to retain 25 acres only. The petitioner then filed an objection under Section 10 (3) of the Act before the Land Reform Deputy Collector, Katihar. One of the objections was that he had a major son named Mohammad Naushad and he should also be allowed a separate unit. The learned Sub-divisional Officer, Katihar, by his order dated 27-11-1976, overruled the objections and held that the petitioner’s son Mohammed Naushad was not major as on 9-9-1970. The petitioner thereupon preferred an appeal before the Additional Collector, Katihar, which was numbered as Ceiling Appeal No. 607/79-80. The Additional Collector held that although the petitioner’s son, Mohammed Naushad was major as on 9-9-1970, he was not entitled to a separate unit, as in Muslim Laws, the principle of coparcenary would not apply. The petitioner then filed a revision application before the Member, Board of Revenue, Bihar, which was registered and numbered as Revision Case No. 14 of 1980. The Additional Member, Board of Revenue, by resolution dated 10th Sept., 1980, dismissed the revision application holding that the Muslim Laws did not recognise any interest of the sons during the lifetime of the father and, therefore, Muslim major son was not entitled to a separate unit. The petitioner has filed this writ application challenging the orders contained in Annexures 2, 3 and 4 passed by the authorities referred to above and has, inter alia, claimed that a Muslim major son is also entitled for a separate unit under the Act.

3. While admitting this application the matter was referred to a Full Bench, in view

of a Bench decision of this Court in *Shekh Abdul Aziz v. State of Bihar*, C. W. J. C. No. 202 of 1978, decided on 27-2-1980 by B. P. Jha and M. P. Varma, JJ.

4. Mr. Mazhar Hussain, learned counsel appearing on behalf of the petitioner, relying upon the above decision contended that every major son of a Muslim land-holder constitutes a family under the Ceiling Act and was, therefore, entitled to a separate unit. This was seriously resisted by the learned counsel appearing on behalf of the State, who submitted that in Muslim Law a son has no right in the property during the lifetime of his father and, therefore, he cannot become a land-holder within the meaning of the Act. Before proceeding to deal with the question raised in this case, I would like to refer to some of the provisions of the Act. Section 2 (ee) defines the word "family" which "means and includes a person his or her spouse and minor children". Sec. 2 (g) defines the word "land-holder". It reads as follows:—

"Land-holder" means a family, as defined in Clause (ee) holding land as raiyat or as under-raiyat and includes a mortgagee of land in possession."

Explanation: (i) A member of an undivided Hindu family having or being entitled to a share in land shall be deemed to be a land-holder for the purposes of this Act as if there had been partition in the family immediately before the commencement of this Act.

(ii) In this clause, the word 'person' includes any company, institution, trust, association or body of individuals whether incorporated or not. The word "Raiyat" has been defined in S. 2 (k) of the Act, which reads as follows:—

(k) "raiyyat" means primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself, or by members of his family or by hired servants or with aid of partners, and includes also the successors-in-interest of persons who have acquired such a right and includes, in the district of Santhal Parganas, a village headman in respect of his private land, if any, but does not include in the areas to which the Chotanagpur Tenancy Act, 1908 (Ben. Act VI of 1908), applies a Mundari Khuntkatidar or a Bhuinhar."

Section 4 of the Act fixes ceiling area of land for one family consisting of not more than 5 members for the purposes of the Act. Section 5 creates a family unit, for the purposes of the Act. According to Section 5, it shall not be lawful for any family to hold, except as otherwise provided in this Act, land in excess of the ceiling area.

5. The question is whether a Muslim son can be said to be a raiyat during the lifetime of his father, for becoming a land-holder within the meaning of S. 2 (g) of the Act. For becoming a raiyat the person concerned must have a right to hold the land for the purposes of cultivation. Unlike Hindu Law, estate of a deceased Mohamedan if he has died intestate, devolves on his heirs at the moment of his death. Under the Mohamedan Law, birth right is not recognised. The right of an heir apparent or presumptive comes into existence for the first time on the death of the ancestor, and he is not entitled until then to any interest in the property to which he would succeed as an heir if he survived the ancestor. In the case of *Hasan Ali v. Nazo*, (1889) ILR 11 All 456, it was held that the "Mohamedan Law does not recognise any ... interest expectant on the death of another, and till that death occurs which by force of that law gives birth to the right as heir to the person entitled to it according to the rules of succession, he possesses no right at all." Unlike this, in Hindu Law a joint Hindu family consists of all persons lineally descended from a common ancestor, and includes their wives and unmarried daughters. A Hindu coparcenary is a much narrower body than the joint family. It includes only those persons who acquire by birth an interest in the joint or coparcenary property. These are the sons, grandsons and great-grandsons of the holder of the joint property for the time being, in other words, the three generations next to the holder in unbroken male descent. The essence of a coparcenary under the Mitakshara law is a unity of ownership. The ownership of the coparcenary property is in the whole body of coparceners. The interest of a coparcenary is fluctuating one and is capable of being enlarged or diminished in the event of deaths or births in the family as the case may be. It is only on partition that he becomes entitled to a definite share. Until a partition takes place the rights of each coparcener consist in a common possession and common enjoyment of the coparcenary property. The coparcenary property is held in collective ownership by all the coparceners in a quasi-corporate capacity.

6. Now again reverting to the provisions of the Act, it will be noticed that a land-holder in order to constitute a family holds the land in his own right and as a raiyat. As has been seen above a Muslim son or daughter does not have any right or interest in the property in the lifetime of his or her father. According to the Muslim Law, they

acquire the right only in the event of the death of the father. It cannot, therefore, be held that a Muslim major son also becomes a land-holder within the lifetime of his father within the meaning of this Act and constitutes a family as defined under S. 2 (g) of the Act. The distinction was noticed by the framers of the law while inserting the explanation of the definition of the word "land-holder" in Section 2 (g) of the Act. A member of undivided Hindu family acquires a right by birth and becomes entitled to a share in the land. He is deemed to be land-holder for the purposes of the Act, whether or not a partition has taken place before the commencement of this Act. Mr. Chunnilal, learned Government Pleader appearing on behalf of the State, submitted that by successive amendments in the Act the meaning of the word "land-holder" was narrowed down, the idea being to lower down the ceiling area. By an amendment made in 1973 the word 'family' was substituted in place of the word 'person' in Section 2 (g) as well as in S. 5. He submitted that what was material was the word 'land-holder' and not the word 'family'. Since a Muslim son or daughter could not become a land-holder in the lifetime of his or her father, it is apparent that he cannot claim a separate unit like a major son of a Hindu family.

7. In the case of Sk. Abdul Aziz, (C. W. J. C. No. 202 of 1978) (Supra) it was held that "In Muslim family also sons and daughters are entitled to a separate unit in ceiling cases." No reasons have been assigned for giving such a decision and, in my opinion, that case has been wrongly decided.

8. The respondents-authorities were right in holding that a Muslim major son was not entitled to a separate unit and their findings are affirmed.

9. Learned counsel appearing on behalf of the petitioner also submitted, although half-heartedly, that the lands given to Kali Asthan and Idgah should have been excluded and that the lands should have been classified as Class IV or Class V instead of Class III. It appears that no registered document or any letter of acceptance from the Wakf Board had been filed in support of the claim that certain lands have been gifted to the Madrasa and Idgah even though sufficient time has been given to the petitioner for this purpose. It cannot be said that the respondents-authorities were wrong in rejecting such claim of the petitioner on this score. As regards the classification of the lands, the petitioner did not seem to have produced any document showing that the lands were of

inferior quality and should have been classified as Class IV or V. On the other hand, there were various reports from the Revenue authorities that the lands were of Class III. The question seems to have been decided by the respondents-authorities after giving reasonable opportunities to the petitioner and looking into the various reports of the Revenue authorities and it is not possible for this Court to interfere with the findings of the Revenue authorities on this point.

10. The result is that this application fails and is accordingly, dismissed but without costs.

K. B. N. SINGH, C. J.:— I agree.

P. S. SAHAY, J.:— I also agree.

Application dismissed.

AIR 1982 PATNA 91

NAGENDRA PRASAD SINGH AND

P. S. SAHAY, JJ.

M/s. Shriram Bearing Limited, Ranchi etc. etc. Petitioners v. Bihar State Electricity Board, Patna and others, Respondents.

Civil Writ Jurm. Cases Nos. 1237, 1528, 1529, 1462, 1535, 1572, 1533 and 1236 of 1981 (R), D/- 8-12-1981.

(A) Electricity (Supply) Act (54 of 1948), Ss. 49 and 18 — Bihar State Electricity Board Tariff, D/- 1-4-1979, Cls. 16.7.2 and 16.7.3 — Rate of surcharge — Adjustment — Clauses are not ultra vires.

Clauses 16.7.2 and 16.7.3 of the Tariff cannot be held to be ultra vires on the ground that there is no express provision under Section 49 authorising the Board to adjust rate of the fuel surcharge having regard to the rise in the cost of the fuel. In view of Section 49 (1) the Board may supply electricity to any person upon such terms and conditions as the Board thinks fit. Sub-sec. (2) of S. 49, however, provides a guideline while fixing a uniform Tariff and factors mentioned therein have to be taken into account. One of the facts which has been impressed in sub-section (2) of S. 49 as well as under S. 18 is that supply and distribution of electricity should be in most efficient and economical manner. But in view of sub-section (1), the Board can certainly incorporate a provision in the Tariff framed by it enabling it to adjust the fuel surcharge having regard to the cost of fuel.

(Para 6)

(B) Electricity (Supply) Act (54 of 1948), Ss. 49 and 59 — Bihar State Electricity Board Tariff, D/- 1-4-1979, Cl. 16.7.2 —

BZ/CZ/A787/82/MVJ

Formula contained in Cl. 16.7.2 is not discriminatory and invalid. (Constitution of India, Art. 14).

The Board under S. 49 read with S. 59 is empowered to frame Tariff and adjust the same in order to meet its genuine expenses and to run the business. The variations in the cost of fuel have to be borne by some or all. As there is a difference in the rate of supply of energy it cannot be said unreasonable on the part of the Board to decide to realise the fuel surcharge only from consumers who are being supplied electricity at a cheaper rate for industrial purposes. Therefore, the formula contained in Cl. 16.7.2 is not invalid on ground that it is discriminatory. (Para 7)

(C) Electricity (Supply) Act (54 of 1948), Ss. 49 and 59 — Bihar State Electricity Board Tariff, D/- 1-4-1979, Cls. 16.7.2 and 16.7.3 — Clauses are complimentary and must be read harmoniously.

Clause 16.7.2, which contains the formula meant for calculating the fuel surcharge, says in so many words that note has to be taken of the units purchased from D. V. C., Orissa and U. P. State Electricity Boards, and of the increase of the rate of purchase from the aforesaid sources taking 1977-78 as the base year. Both the clauses are complimentary and they have to be read in a harmonious manner. It is difficult to accept the contention that for purpose of calculation of fuel surcharge, only the fuel surcharge, if any, paid to the D. V. C., Orissa and U. P. State Electricity Boards have to be taken into account. (Para 9)

(D) Electricity (Supply) Act (54 of 1948), Ss. 49 and 59 — Bihar State Electricity Board Tariff dated 1-4-1979, Cls. 16.7.2 and 16.7.3 — Clauses are not repugnant to each other. (Constitution of India, Art. 254).

There is no repugnancy or conflict between the two clauses. Even Clause 16.7.3, in respect of energy from other sources says, "the actual fuel surcharge of and units purchased from respective sources will apply". For accepting the contention of the petitioners the word 'and' has to be read as 'on', which is not possible. On a proper reading of the clause the actual fuel surcharge as well as the units purchased from respective sources have to be taken note of and in that view of the matter it is consistent with Cl. 16.7.2. AIR 1961 SC 112 and AIR 1947 PC 94, Ref. (Para 10)

(E) Electricity (Supply) Act (54 of 1948), Ss. 49 and 59 — Bihar State Electricity Board Tariff dated 1-4-1979, Cls. 16.7.2 and 16.7.3 — Fuel surcharge — Power of Board to

raise rate of charge. (Interpretation of Statutes — Marginal Note).

Fuel surcharge is in substance a surcharge and its scope cannot be circumscribed by its nomenclature. Every surcharge is an extra charge, and, as such, part of Tariff. It could not be contended on the basis of the marginal note of Cl. 16.7 that the Board in garb of levying fuel surcharge cannot increase the general charge of the electric supply. In other words, according to the petitioners the Board has to raise rate of fuel surcharge only taking note of increase in the rate of the fuel. (Para 11)

It is well known that marginal note cannot take away the effect of the substantive provision. AIR 1980 SC 1682 and AIR 1979 SC 289, Foll. (Para 11)

If Clauses 16.7.2 and 16.7.3 require the Board to not only take note of the rise of the cost of fuel but also to take into account increase in the average unit rate of purchase of energy from D. V. C., Orissa and U. P. State Electricity Boards, then that substantive provision cannot be held to be invalid because the clause has been labelled as fuel surcharge. (Para 11)

(F) Electricity (Supply) Act (54 of 1948), Ss. 51, 59 — Bihar State Electricity Board Tariff dated 1-4-1979, Cl. 16.7.4 — Bill for fuel surcharge — Clause 16.7.4 is not mandatory — Provisional bill submitted after expiry of financial year is not illegal.

From the language of Cl. 16.7.4 it cannot be held that if bills are submitted after the financial year in question, they shall be per se invalid. It cannot be disputed that the clause read with S. 51 of the Act enables the Board to issue provisional bill before the final rate of fuel surcharge has been determined, and in that sense it is for the benefit of the Board and an exception to the general rule, that the bill must be a final one. Of course, in some cases where such bills have been submitted after a long lapse of time which causes prejudice to the person concerned, he may seek appropriate remedy. However, it is expected that the Board should exercise power of submitting provisional bills in accordance with the procedure prescribed by the Tariff itself and not as and when they like. (Para 13)

It is apparent from Cl. 16.7.4 that till actual calculation of the fuel surcharge for a financial year in the manner laid down in the Tariff is made, a fuel surcharge during that financial year will be levied at a rate provisionally calculated. This is an enabling provision under which the Board can issue a provisional bill and difference, if any, with

the final bill, can be adjusted later. It also pre-supposes that such bills are submitted within the financial year in question. To that extent there has been a breach of the provision in the instant cases. But Cl. 16.7.4 cannot be held to be mandatory so as to nullify the bills solely on this ground. It is well known that merely because a Statute provides a time limit for performance of an act or duty, such provision cannot be held to be mandatory. If from other circumstances it can be established that Statute fixed the time limit within which the act or duty must be performed, the matter would be different.

(Para 12)

(G) Electricity (Supply) Act (54 of 1948), Ss. 49 and 59 — Bihar State Electricity Board Tariff dated 1-4-1979, Cl. 16.7.3, sub-cl. (a) and (b).

The method provided for calculating the rate of fuel surcharge at the Thermal Power Stations requires the percentage variation below 0.5 to be ignored and 0.5 and above to be added. The Board while calculating the final amount of fuel surcharge payable by the petitioners had to ignore the variation of 0.15% and 0.42%. It could not be contended that it was up to the Board to ignore the variation of 0.5% for purpose of mathematical calculation, but it was not obligatory.

(Para 15)

Cases Referred: Chronological Paras

AIR 1980 SC 1682	11
AIR 1979 SC 289	11
AIR 1976 SC 127	11
AIR 1968 SC 991	4
AIR 1961 SC 112 : (1961) 1 Cri LJ 173	10
AIR 1947 PC 94	10

L. K. Bajla, A. S. Dayal, Hari Shankar and Prabha Shanker Mishra, for Petitioners; A. K. Sen, Sr. Advocate, S. K. Kapoor, Bar-at-Law, R. N. Jhunjhurwala, Attorney-at-Law, G. C. Bharuka and Navaniti Prasad Singh, for Intervenor; R. B. Mahato, Addl. Advocate General, Harendra Prasad, Jr. Counsel to Addl. Advocate General and Shok Haran Singh, for Respondents.

NAGENDRA PRASAD SINGH, J.:

The petitioners in these writ applications have questioned the authority of the respondent-Bihar State Electricity Board to issue bills in respect of fuel surcharge at an enhanced rate for the financial years 1979-80 and 1980-81.

2. The petitioners Companies have factories in the different parts of the State of Bihar for which they have entered into agreements with the Bihar State Electricity Board (hereinafter to be referred to as 'the Board') for supply of high tension line. From time to time notifications relating to tariff have been

issued by the respondent-Board in the exercise of powers conferred on them by Ss. 46 and 49 of the Electricity (Supply) Act, 1948 (hereinafter to be referred to as 'the Act'). The last tariff, which is in force, was issued on 1-4-1979 setting out the details of the charges which a consumer of the electric energy has to pay. The petitioners are required to pay fuel surcharge as well. In the year 1979 fuel surcharge at a provisional rate of 1 paise per unit was levied which was subsequently increased to 3 paise per unit. However, in the final bill submitted for the financial year 1979-80 it was raised from 3 paise per unit to 6.242 paise per unit. Along with the final bill of fuel surcharge for the year 1979-80 a provisional bill of fuel surcharge for financial year 1980-81 was also submitted to the petitioners Companies at the rate of 8 paise per unit. According to the petitioners, the increase in the rate of fuel surcharge has neither sanction of law nor it has been arrived at in accordance with the procedure prescribed under the aforesaid tariff.

3. The Board has been constituted under Section 5 of the Act and one of the functions of the Board as provided in S. 18 of the Act is to arrange in co-ordination with the generating companies operating in the State, for supply of electricity that may be required within the State, and for transmission and distribution of the same "in the most efficient and economical manner". Section 46 of the Act provides "that a Tariff to be known as Grid Tariff shall in accordance with any requirements made in this behalf be fixed from time to time by the Board." Section 49 vests power in the Board to supply electricity to any person upon such terms and conditions as the Board thinks fit and may for the purpose of such supply frame uniform Tariff. Sub-section (2) of S. 49 lays down that while fixing uniform tariff the Board shall have regard to factors mentioned therein, i.e., the nature of supply, purposes for which it is required, coordinated supply and distribution of electricity within the State in most efficient and economical manner. Section 51 authorises the Board to submit provisional bills. Section 59 enables the Board to "adjust its tariffs so as to ensure that the total revenues in any year of account shall, after meeting all expenses properly chargeable to revenue ... leave such surplus, as the State Government may, from time to time, specify". Section 61 requires the Board to submit in February to the State Government a statement in prescribed form of estimated capital and revenue receipts and expenditure for the

ensuing year. The State Government has to lay the said statement on the table of the State Legislature. Some of the provisions vest supervisory power in the State Government.

4. In view of Ss. 49 and 59, there is no escape from the conclusion that the Board can frame uniform tariff for supply of electricity to the consumers and can also adjust its tariffs so as to ensure that after meeting all expenses detailed in S. 59, leave such surplus as the State Government may, from time to time, specify. The nature of the power under S. 49 has been examined by the Supreme Court in the case of Maharashtra State Electricity Board v. Kalyan Borough Municipality, (AIR 1968 SC 991) where it was pointed out that under S. 49, as it now stands, "the Legislature has empowered the Board to frame uniform Tariff and it has also indicated the factors to be taken into account in fixing uniform tariff." It was also held that S. 49 does not give an unguided and arbitrary power to the Board to fix the tariffs as it likes. After referring to different provisions it was observed (at p. 1001):

"... all these provisions have the effect of properly guiding the activities of the Board, in its dealings with the consumers including the levy of tariffs. Section 49 itself is hedged in by various restrictions and directions which the Board will have to comply in the matter of framing uniform tariffs or in the matter of fixing different tariffs, and that section, also in our opinion, provides a proper guideline for framing uniform tariffs and different tariffs." Learned counsel appearing for the petitioners in different writ applications, perhaps, in view of the aforesaid provision did not seriously challenge the power of the Board to issue Tariff dated 1st April, 1979 (hereinafter to be referred to as the Tariff) which is in force at present.

5. The word 'Tariff' according to the Chambers's dictionary, means 'list of charges'. According to the Words and Phrases (Butter Worth) 'tariff' means 'book of rates'. The Tariff in question contains provisions in respect of terms and conditions of supply of electricity, regarding payment of bills, rebate, interest, surcharge and fuel surcharge. In the Schedule to the said Tariff, charges in respect of different types of electric supply e.g. domestic service, low tension industrial service, irrigation and agriculture service, high tension service, etc. have been specified. The provision regarding the fuel surcharge is contained in Cls. 16.7 to 16.7.4. Cl. 16.7.1 is as follows:—

"Tariff rates of L. T. Industrial Service, H. T. Service, E. H. T. Service and Railway Traction Service are subject to fuel surcharge which shall be determined in the following manner i.e., all consumers of the aforesaid categories shall be required to pay fuel surcharge at a rate to be determined every year in accordance with the formula given below, in addition to the other charges as laid down in the Tariff Schedule."

Clause 16.7.2 contains formula for determining the fuel surcharge applicable during the financial year in paise per unit. By a mathematical formula the average of fuel surcharge in paise per unit has to be determined taking into account—

(i) the rate of the fuel surcharge in paise per unit computed for Board's generation at Patratu and Barauni Thermal Power Stations during the financial year.

(ii) Units purchased from D. V. C., Orissa and U. P. State Electricity Boards during the year.

(iii) Increase in the average unit rate of purchase of energy from the D. V. C., Orissa and U. P. State Electricity Boards, during the year for which surcharge is to be calculated. The said increase is to be calculated with respect to the base year 1977-78.

(iv) Units sent out from Patratu and Barauni Thermal Power Stations and units sold out of the units sent out from the aforesaid Thermal Power Stations.

(v) Units sold out of purchases from D. V. C., Orissa and U. P. State Electricity Boards.

The relevant portion of Cl. 16.7.3 is as follows:

"At the end of each year, the fuel surcharge in respect of energy generated from Board's own generating Station at Patratu and Barauni Thermal Power Stations shall be computed in the manner indicated below. For energy purchased from other sources, the actual fuel surcharge of and units purchased from respective source will apply." After that there are two sub-cl. (a) and (b) containing a formula for calculating the fuel surcharge at the two Thermal Power Stations at Patratu and Barauni. The calculation is linked with the rate of fuel supplied to those two Thermal Power Stations. I shall refer to clause 16.7.4 later.

6. Mr. P. S. Mishra appearing for the petitioner in one of the cases took a stand that the Tariff in question has been issued under Section 49 of the Act and unless the said section authorises the Board to make Tariff containing a provision for adjustment of the rate of the fuel surcharge with the rise

of the price of fuel it was not open to the Board to make provisions like Cls. 16.7.2 and 16.7.3 aforesaid. In this connection, reference was made to S. 46 of the Act which is a provision regarding Grid Tariff which is applicable in cases of supply of electricity to other licensees, meaning thereby the persons licensed under the Indian Electricity Supply Act, 1910 to supply energy (vide the definition under S. 2 (6)). Sub sec. (6) of S. 46 says that Grid Tariff issued under that section may contain provisions for "adjustment of price having regard to the power factor of supply taken or the cost of fuel or both". According to Mr. Mishra whereas a specific provision has been made in S. 46 (6) enabling the Board to make Grid Tariff containing provision for adjustment of price having regard to the power factor or cost of fuel, no such provision has been made under S. 49 which is applicable to the cases of petitioners and from that it should be inferred that the framers of the Act never authorised the Board to make Tariff under S. 49 containing provisions for adjustment of price of energy having regard to the rise of the cost of fuel. Section 46, as I have already pointed out, is applicable to licensees who generate and supply electricity which is in a sense a parallel body to the Board, and, as such, the provision regarding adjustment of price of energy was specifically incorporated in S. 46 itself. Section 49 although does not contain any such specific provision, but it vests a discretion in the Board while fixing the terms and conditions of supply of energy. Sub-sec. (1) of S. 49 which is relevant, is as follows:—

"Subject to the provisions of this Act and all requirements, if any, made in this behalf, the Board may supply electricity to any person not being a licensee upon such terms and conditions as the Board thinks fit and may for the purposes of such supply frame uniform Tariffs".

In view of the aforesaid sub-section the Board may supply electricity to any person upon such terms and conditions as the Board thinks fit. Sub-sec. (2) of S. 49, however, provides a guideline while fixing a uniform Tariff and factors mentioned therein have to be taken into account. One of the facts which has been impressed in sub-sec. (2) of S. 49 as well as under S. 18 that supply and distribution of electricity should be in most efficient and economical manner. But in view of sub-sec. (1), the Board can certainly incorporate a provision in the Tariff framed by it enabling it to adjust the fuel surcharge having regard to the cost of fuel. In my view, the Cls. 16.7.2 and 16.7.3 of the Tariff

cannot be held to be ultra vires on the ground that there is no express provision under Section 49 authorising the Board to adjust rate of the fuel surcharge having regard to the rise in the cost of the fuel.

7. Mr. P. S. Mishra then challenged the validity of Cl. 16.7.2 which contains the formula for determining fuel surcharge during the financial year in question. He urged that from the said formula it will appear that the Board has to calculate the fuel surcharge in paise per unit for its generation at Patratu and Barauni Thermal Power Stations, according to the Cl. 16.7.3. Then the total units sent out from these two Thermal Power Stations have to be taken note of. Thereafter, increase in the average units rate of purchase of energy from D. V. C., Orissa and U. P. State Electricity Boards have to be calculated along with the units purchased from those three agencies. It was submitted that although the total amount of fuel surcharge is to be worked out with reference to total units generated or purchase from the aforesaid 5 sources, but it has to be realised only from the consumers of L. T. Industrial Service, H. T. Service, E. H. T. Service and Railway Traction Service, the types of electricity consumed by the petitioners. This, according to the learned counsel, is an arbitrary formula where burden of others has been saddled on the petitioners. On a first impression this argument appeared to be attractive. Learned Additional Advocate General appearing for the respondent-Board admitted that according to the formula the fuel surcharge has to be determined with reference to the total units generated and purchased, but it has to be paid by the consumers of particular types of energy which have been detailed in Cl. 16.7.1. In this connection, he has drawn our attention to the Schedule of the Tariff and pointed out that the charge of the types of energy which the petitioner-Companies are consuming is much lower than the charge payable for consumption by other citizens, for domestic, commercial, or irrigation purposes, who have not to pay the fuel surcharge. From the Tariff Schedule it appears that the energy charge for domestic service is 38 and 43 paise per unit, for the commercial service at 48 and 58 paise per unit, whereas the L. T. Industrial Service is 34 and 36 paise per unit, for H. T. Service between 24.80 to 29.80 paise per unit and the E. H. T. service between 20 to 25 paise per unit. The stand of the Board appears to be that the total amount of the fuel surcharge for the whole State is linked with the rise of price of fuel which is worked out with refer-

ence to the total unit generated and purchased, but is leviable only on the consumers of L. T. Industrial Service, H. T. Service, E. H. T. Service and Railway Traction service as mentioned in Cl. 16.7.1 because the general rate of charge for supply of these types of energy is much lower. In my opinion, the Board under S. 49 read with S. 59 is empowered to frame Tariff and adjust the same in order to meet its genuine expenses and to run the business. The variations in the cost of fuel have to be borne by some or all. As there is a difference in the rate of supply of energy it cannot be said to be unreasonable on the part of the Board to decide to realise the fuel surcharge only from consumers who are being supplied electricity at a cheaper rate for industrial purposes. If the argument of the petitioners is accepted then consumers of domestic service, commercial service can as well make out a case of discrimination as to why they are being asked to pay at a higher rate. In my view, the formula in question cannot be held to be invalid on this ground.

8. Different counsel appearing for the petitioners in different writ applications then challenged the correctness of different bills issued to different petitioners saying that they have not been issued in accordance with the Tariff in question. Mr. A. K. Sen, learned counsel appearing in one of the cases submitted that on a plain reading of Cl. 16.7.3 at the end of year the fuel surcharge in respect of energy generated at Patratu and Barauni Thermal Power Stations have to be computed according to formula given therein which is linked with the cost of the fuel delivered to the said Thermal Power Stations, meaning thereby coal, etc. Similarly, in respect of the energy purchased from other sources, i. e., from D. V. C., Orissa and U. P. State Electricity Boards, only 'actual fuel surcharge' paid over the purchase of such units has to be taken note of and not the cost of purchase of such units. In other words, according to the petitioners, the respondent Board while submitting the bills for fuel surcharge has calculated the rate of the fuel surcharge not on the basis of the actual fuel surcharge paid to D. V. C., Orissa and U. P. State Electricity Boards, but on the basis of the price paid for units of electricity purchased from them and because of that they have increased the rate from 3 paise per unit to 8 paise per unit.

9. In support of the aforesaid contention reference was made on behalf of the petitioners to Cl. 16.7.3 where it has been mentioned that "for energy purchased from other

sources actual fuel charge of and units purchased from the respective sources will apply". According to the petitioners, on a proper reading there is no scope of taking note if the price paid for the units purchased from the three sources mentioned above. No doubt, the aforesaid expressions are little ambiguous and it would have been better that the Board had framed the aforesaid clause in a more specific and explicit manner. However, if the said clause is read along with Cl. 16.7.2, then, in my opinion, there is no ambiguity on that account. Cl. 16.7.2, which contains the formula meant for calculating the fuel surcharge, says in so many words that note has to be taken of the units purchased from D. V. C., Orissa and U. P. State Electricity Boards, and of the increase of the rate of purchase from the aforesaid sources taking 1977-78 as the base year. Both the clauses are complimentary and they have to be read in a harmonious manner. In my view, it is difficult to accept the contention that for purpose of calculation of fuel surcharge, only the fuel surcharge, if any, paid to the D. V. C., Orissa and U. P. State Electricity Boards has to be taken into account.

10. It was then submitted that there is a conflict and repugnancy between Cls. 16.7.2 and 16.7.3 inasmuch as Cl. 16.7.3 directs the Board to take into account only the fuel surcharge paid to the three sources aforesaid whereas Cl. 16.7.2 takes into account units purchased from them and increase in the rate of supply of electricity by them. According to the petitioners, in such a situation, Cl. 16.7.3 shall prevail over Cl. 16.7.2. In this connection reference was made to the cases of K. M. Nanavati v. State of Bombay, (AIR 1961 SC 112) and the King v. Dominion Engineering Co. Ltd., (AIR 1947 PC 94), where it has been pointed out that where two sections are repugnant, the last should prevail. In my view, there is no repugnancy or conflict between the two clauses. Even Cl. 16.7.3, in respect of energy from other sources says, "the actual fuel surcharge of and units purchased from respective sources will apply". For accepting the contention of the petitioners the word 'and' has to be read as 'on', which, in my opinion, is not possible. On a proper reading of the said clause the actual fuel surcharge as well as the units purchased from respective sources have to be taken note of and in that view of the matter it is consistent with Cl. 16.7.2.

11. Mr. S. K. Kapoor in one of the writ applications urged that from marginal note of Cl. 16.7 it will appear that it contains a provision for fuel surcharge and the Board

in garb of levying fuel surcharge cannot increase the general charge of the electric supply. In other words, according to the petitioners the Board has to raise rate of fuel surcharge only taking note of increase in the rate of the fuel. It is difficult to accept this contention as well. Fuel surcharge is in substance a surcharge and its scope cannot be circumscribed by its nomenclature. Every surcharge is an extra charge, and, as such, part of Tariff. The Supreme Court in the case of Birsra Stone Lime Co. Ltd. v. Orissa Textile Mills Ltd., (AIR 1976 SC 127) observed as follows (at p. 130):—

“The word surcharge is not defined in the Act, but etymologically, *in*er alia, surcharge stands for an additional or extra charge or payment (see Shorter Oxford English Dictionary). Surcharge is thus a superadded charge, a charge over and above the usual or current dues. Although, therefore, in the present case it is in the form of a surcharge, it is in substance an addition to the stipulated rates of tariff. The nomenclature, therefore, does not alter the position.”

It is well known that marginal note cannot take away the effect of the substantive provision. Reference in this connection may be made to the cases of Tara Prasad Singh v. Union of India (AIR 1980 SC 1682) and Board of Muslim Wakfs, Rajasthan v. Radha Kishan (AIR 1979 SC 289). If Cls. 16.7.2 and 16.7.3 require the Board to not only take note of the rise of the cost of fuel but also to take into account increase in the average unit rate of purchase of energy from D. V. C., Orissa and U. P. State Electricity Boards, then the said substantive provision cannot be held to be invalid because the clause has been labelled as fuel surcharge.

12. On behalf of the petitioners, provisional bill for fuel surcharge for the financial year 1980-81 was challenged on the ground that they have been submitted in May, 1981 after expiry of the financial year which is not permissible in view of Cl. 16.7.4 of the Tariff. The said Cl. 16.7.4 is as follows:—

“The fuel surcharge for a financial year shall be calculated by the Board after the expiry of the financial year. Till actual calculation of the fuel surcharge for a financial year, in the manner laid down hereinbefore, is made, a fuel surcharge during that financial year will be levied at a rate provisionally calculated on monthly or quarterly or half yearly basis as decided by the Board. In case of short or excess realisation, the same shall be adjusted in the next bill to be served on the consumer.”

From the aforesaid clause it is apparent that till actual calculation of the fuel surcharge for a financial year in the manner laid down in the Tariff is made, a fuel surcharge during that financial year will be levied at a rate provisionally calculated. This is an enabling provision under which the Board can issue a provisional bill and difference, if any, with the final bill, can be adjusted later. It also presupposes that such bills are submitted within the financial year in question. To that extent there has been a breach of the said provision in the present cases. But, can such provisional bills be quashed or be declared to be invalid being in contravention of requirement of Cl. 16.7.4? This leads to the question whether the said provision is mandatory or directory. In my view, it cannot be held to be mandatory so as to nullify the bills solely on this ground. It is well known that merely because a Statute provides a time limit for performance of an act or duty, such provision cannot be held to be mandatory. If from other circumstances it can be established that Statute fixed the time limit within which the act or duty must be performed, the matter shall be different.

13. In my view, from the language of Cl. 16.7.4 it cannot be held that if such bills are submitted after the financial year in question, they shall be per se invalid. It cannot be disputed that the said clause read with S. 51 of the Act enables the Board to issue provisional bill before the final rate of fuel surcharge has been determined, and in that sense it is for the benefit of the Board and an exception to the general rule, that the bill must be a final one. I am not able to appreciate as to how the petitioners can make grievance of submission of such bills after the expiry of the financial year. Of course, in some cases where such bills have been submitted after a long lapse of time which causes prejudice to the person concerned, he may seek appropriate remedy. However, it is expected that the Board should exercise power of submitting provisional bills in accordance with the procedure prescribed by the Tariff itself and not as and when they liked.

14. So far as the increase in the rate of provisional bill is concerned, it has been stated on behalf of the respondent Board in the original counter-affidavit as well as in the supplementary counter-affidavit that the price of coal and other oil required for generation of electricity has gone up during the financial year 1980-81 and taking that factor into consideration the provisional rate of fuel

surcharge for the financial year 1980-81 was fixed at 0.8 paise per unit which is subject to final adjustment on actual calculation of the rate. Clause 16.7.4 vests power in the Board to calculate provisionally the rate of fuel surcharge on monthly, quarterly or half-yearly basis and it says, "in case of short or excess realisation the same shall be adjusted in the next bill to be served". In my view, the provisional bills cannot be quashed holding them to be invalid. However, I direct that the Board shall issue final bills to the petitioners for the year 1980-81 as early as possible adjusting the amount of provisional bills.

15. During the hearing of these writ applications a controversy arose as to whether the final calculation of the rate of fuel surcharge for the year 1979-80 at the rate of 6.242 paise per unit was in accordance with Cl. 16.7.2 and Cl. 16.7.3. On behalf of the petitioners it was asserted that it should be 6.227 paise per unit. The Board was directed to file an affidavit stating the mode of calculation and pursuant to that direction a chart was filed on behalf of the Board along with an affidavit. From the chart it appeared that the increase in the basic cost of the fuel for Patratu and Barauni Thermal Power Stations in accordance with sub-cl. (a) and (b) of Cl. 16.7.3, the Board had been arrived at 27.15% and 15.42%, respectively. The aforesaid sub-cl. (a) and (b) require the Board to calculate the variation in cost of fuel as follows:—

"Percentage variation of 0.5 and above will be treated as the next higher percentage and percentage variation below 0.5 will be ignored."

According to the aforesaid provision 0.15% in the case of Patratu and 0.42% in case of Barauni should have been ignored. Admittedly, this has not been done. Learned Additional Advocate General stated that rate of increase in fuel has been worked out with reference to the actual increase as directed by the aforesaid sub-cl. (a) and (b). He submitted that it was up to the Board to ignore the variation of 0.5% for purpose of mathematical calculation, but it was not obligatory. It is difficult to accept this contention. The method provided for calculating the rate of fuel surcharge at the two Thermal Power Stations requires the percentage variation below 0.5 to be ignored and 0.5 and above to be added. How it can be urged that it is not obligatory to follow the said direction? In my opinion, the Board while calculating the final amount of fuel surcharge payable by these petitioners had to

ignore the variation of 0.15% and 0.42% aforesaid.

16. Now the question is as to whether on this ground the bills submitted to the different petitioners have to be quashed. Learned Additional Advocate General referred to the chart aforesaid and pointed out that at the rate of 6.242 paise per unit the total fuel surcharge payable by different consumers in the State of Bihar shall be Rs. 11,99,78,714 whereas according to the rate of 6.227 paise per unit, i.e., after ignoring the variation of 0.15% and 0.42% it shall be Rs. 11,96,98,992, i.e., the difference will be of Rs. 2,79,722 in the whole State of Bihar which will be an insignificant amount vis-a-vis different petitioners. The petitionerwise difference will be that the petitioner in C. W. J. C. No. 1237 shall have to pay Rs. 446.16 paise, in excess, petitioner in C. W. J. C. No. 1528 shall have to pay Rs. 33.52 paise, petitioner in C. W. J. C. No. 1529 shall have to pay Rs. 83.70, petitioner in C. W. J. C. No. 1462 shall have to pay Rs. 37.78 paise, petitioner in C. W. J. C. No. 1535 shall have to pay Rs. 60.67 paise, petitioner in C. W. J. C. No. 1572 shall have to pay Rs. 30.80 paise, petitioner in C. W. J. C. No. 1533 shall have to pay Rs. 25.05 paise and petitioner in C. W. J. C. No. 1236 shall have to pay Rs. 128.51 paise in excess, for the financial year 1979-80. Comparing the excess amount charged with reference to the amount of total bills which is of several thousand rupees in each case, the amount charged in excess is not a substantial amount so as to saddle the petitioners with an unreasonable burden. Learned Additional General appearing on behalf of the Board gave an undertaking that this excess amount which has been charged under a bona fide mistake, shall be adjusted in the next bill which shall be submitted to the petitioners. In view of this undertaking, I do not consider it necessary to quash the bills submitted to the petitioners for different periods.

17. The writ applications are, accordingly, dismissed. In the circumstances of the case, however, parties shall bear their own costs.

P. S. SAHAY, J.:— I agree.

Petitions dismissed.

AIR 1982 PATNA 99

(RANCHI BENCH)

SHIVANUGRAH NARAIN AND
UMESH CHANDRA SHARMA, JJ.

M/s. Harish Tara Refractories Private Ltd.,
Ranchi, Petitioner v. State of Bihar and
others, Respondents.

Civil Writ Jurn. Case No. 317 of 1977 (R),
D/- 23-4-1980.

Mines and Minerals (Regulation and Development) Act (1957), S. 30 — Mineral Concession Rules (1960), Rr. 54, 24 — Application for grant of mining lease — Central Govt. remanding application for disposal within 100 days to State Govt. — No order passed by State Govt. within 100 days — Application cannot be deemed to have dismissed on expiry of 100 days — Revision against State Govt.'s order passed after expiry of 100 days held was maintainable.

The petitioner, a Company carrying on mining business filed an application for grant of mining lease. The application was refused by the State Govt. The petitioner thereupon filed a revision to the Central Govt. The Central Government allowed the revision set aside the order of the State Govt. and directed the State Govt. to dispose of the petitioner's application on merits within 100 days. However no order was passed by the State Govt. within the period of 100 days stipulated by Central Govt. It was only after the expiry of that period that the State Govt. communicated its decision to the petitioner that as no order could be passed within 100 days the application for lease stood dismissed. The petitioner filed another revision to the Central Govt. against this order of the State Govt. within 3 months of the State Govt. order. The revision was however refused by the Central Govt. on the ground that as no order was passed by the State Govt. on the petitioner's application within the period stipulated by it (Central Govt.) in its remand order on the expiry of that period the petitioner's application stood automatically dismissed and as the revision was filed more than three months after such deemed rejection of petitioner's application it was barred by limitation.

Held, the dismissal of the revision by the Central Govt. was illegal. The period of 100 days specified in the remand order of the Central Government could not be regarded as the statutory period specified in R. 24 (1). And, therefore, the application of the petitioner for grant of a mining lease could not

be deemed to have been refused by the State Govt. by virtue of R. 24 (3) on the expiry of the period specified in the order of the Central Government. (Para 9)

The only period specified in the rules for disposal of an application for the grant of a mining lease is the period specified by R. 24 (1). The Explanation to R. 54 does not in terms specify the period within which if no order is passed on the application the Govt. shall be deemed to have refused it. The period is merely indicated by the expression "the period specified in respect thereof in the Rules. By reading R. 24 and the Explanation to R. 54 together, it becomes manifest, that according to the statutory provision, an application for grant of a mining lease shall be deemed to have been refused only if the application is not disposed of within the period specified in sub-rule (1) of R. 24. The expression "the period specified in sub-rule (1)" is clear, specific, plain and unambiguous and admits of only one meaning, viz., the period laid down or contained in sub-rule (1). No period can be said to be specified in sub-rule (1) if it is not contained in sub-rule (1) or cannot be ascertained precisely by reference to the provisions of sub-rule (1) alone. As such the period of 100 days specified in the remand order of the Central Govt. cannot be said to be period specified in R. 24 (1). Therefore, it follows that the failure to dispose of the application for grant of the mining lease within such period cannot be regarded as failure to dispose of the application within the period "specified in respect thereof in these rules" within the meaning of the expression as contained in the Explanation to R. 54. And, therefore, the application cannot, on the expiry of the aforesaid period be deemed to have been refused by the State Government, by virtue of either the Explanation to R. 54 or R. 24 (3). (Paras 6, 7)

It cannot be said that the expression "the period specified in these rules" used in R. 54, Explanation includes a period specified in an order passed in exercise of powers conferred by these rules as it would amount to reading into the Explanation words which are not there, which is not permissible when the expression can be given a meaningful interpretation even without adding any words thereto. Further R. 24 (3) and the Explanation to R. 54 are extraordinary provisions, which by creating a statutory fiction bring about the serious consequence of dismissal of the application for grant of a mining lease etc. even though the application has not actually been rejected. As such it is difficult to believe that the

rule-making authority would lay down the consequence of rejection of an application for failure to dispose of the same within a period which was to be fixed by another authority subsequently and of the duration of which it had no idea. (Paras 8, 9)

Furthermore as the Central Government had not passed a specific order to the effect that if the State Government did not pass any final orders on merits of the application of the petitioner within the period fixed, the application of the petitioner shall stand dismissed or shall be deemed to have been rejected. The decision of the Central Government that the application for grant of mining lease of the petitioner which was remanded to the State Government for fresh decision must be deemed to have been rejected after the expiry of the period of 100 days specified in the order is, therefore, clearly erroneous in law. (Para 13)

Cases Referred: Chronological Paras

(1980) C. W. J. C. Nos. 592 of 1978 (R) and 393 of 1979 (R), D/- 23-1-1980 (Pat)	15
AIR 1976 SC 1433	10
1976 BBCJ (HC) 448	15
AIR 1973 SC 678	4
AIR 1967 Andh Pra 94	10
AIR 1966 Pat 144 (FB)	13
1910 AC 409: 103 LT 81: 26 TLR	526,
Thompson v. Goold & Co.	8

S. C. Banerjee, Devi Lal, Amareshwar Sahay and Miss Indrani Choudhary, for Petitioner; S. B. Gadodia, Standing Counsel and A. B. Kumar, Jr. Counsel to Standing Counsel (for Nos. 1 and 2) and R. N. Sahay Sinha, S. C. C. G. and B. S. Lal, Jr. Counsel to S. C. C. G. (for No. 3), for Respondents.

SHIVANUGRAH NARAIN, J.:— This is an application for quashing the order dated 3-8-1977 of the Central Government, copy whereof is Annexure '11' to this writ application, by which the Central Government has dismissed the revision application filed by the petitioner under S. 30 of the Mines and Minerals (Regulation and Development) Act, 1957 read with S. 54 of the Mineral Concession Rules, 1960 (hereinafter called 'the Rules') against the order of the Government of Bihar (hereinafter called 'the State Government') rejecting the application of the petitioner for grant of mining lease in respect of certain lands.

2. The relevant facts are these: On 9-5-1969 the petitioner, M/s. Harish Tara Refractories (P.) Ltd., a company incorporated under the Companies Act, 1956, which carries on mining business, filed an application for grant of mining lease for winning fireclay

with respect to 250 acres of land in villages Balu Datum and Kuriam Kala within the jurisdiction of Balu Nath Police Station in the district of Palamau. That application was rejected by the State Government. The petitioner filed revision application against the said order and upon the application of the petitioner, the Central Government set aside the aforesaid order of the State Government, and remanded the case to the State Government for a fresh decision. The application of the petitioner, however, was again rejected by the State Government and the petitioner filed another revision application against the second order of rejection passed by the State Government. By its order dated 25-10-1975 communicated by letter of that date issued under the signature of the Under Secretary, Government of India in the Ministry of Steel and Mines, copy whereof is Annexure '1' to this writ application, the Central Government allowed the aforesaid revision application, set aside the order of the State Government and directed the State Government to pass appropriate and final order on merits of the application of the petitioner for grant of mining lease within 100 days. Though the direction of the Central Government was that the final orders on the application be passed within 100 days, admittedly no orders were passed by the State Government within the period of 100 days. For the purpose of this case, it is not necessary to set out the circumstances in which no orders were passed by the State Government within the period specified by the Central Government. Ultimately, by a letter dated 17-8-1976, a copy of which was forwarded to the petitioner under memo No. 1244 N dated 13-18-1976, addressed by the Additional Secretary to the State Government to the Deputy Commissioner, Palamau, the State Government intimated that as orders on the application of the petitioner could not be passed within the period fixed by the Central Government, the application stood automatically dismissed. In that letter some further objections to the grant of the lease to the petitioner were also set out. A copy of the aforesaid letter is Annexure '8' to this writ application. According to the averments in the petition, which are not controverted, though a counter-affidavit was filed on behalf of respondents Nos. 1 and 2, and therefore, must be accepted, the aforesaid copy of the order was received by the petitioner on 16-10-1976. Thereafter, the petitioner filed a fresh revision application under R. 54 of the Rules to the Central Government against the order of the State Government communicated to

it under the memo dated 13-10-1976 aforesaid. It appears that the said revision application was dated 10-1-1977 but it was received in the office of the Central Government on 14-1-1977. Thereafter, by a letter dated 7-2-1977, copy whereof is Annexure '9' to the writ application, the Central Government called upon the petitioner to show cause why the revision application be not rejected as time-barred by one day as the revision was directed against the order of the State Government dated 13-10-1976 and should have been filed before 13-1-1977 but was received on 14-1-1977 and, therefore, was time-barred by one day. The petitioner filed a petition showing cause stating that the revision application filed was within time as the order of the State Government was communicated to it on 16-10-1976 and revision application was despatched on 10-1-1977 and was received by the office of the Central Government on 14-1-1977 within the period of three months. Thereafter, the Central Government by the impugned order dated 3-8-1977, as already stated, dismissed the revision application filed by the petitioner.

3. By the aforesaid order, the Central Government held that as the State Government did not pass orders on the revision application "within the statutory period of 100 days, i.e., by 1-2-1976", the orders passed by the State Government on 13-10-1976 were without jurisdiction and a nullity and it set aside the aforesaid order of the State Government. Thereafter, it passed the following order:—

"As the application was deemed to be rejected on 2-2-76, and no revision application had been filed against the deemed rejection, the application was no longer alive at the time of the order by the State Government. No fresh orders of the State Government on the application are therefore necessary."

There can be no doubt that this order is tantamount to an order dismissing the revision application filed before the Central Government by the petitioner. As I have already stated, the present application is directed against the aforesaid order of dismissal.

4. It is clear from the impugned order, the relevant portion of which I have quoted, that the Central Government has refused to consider the revision application filed before it by the petitioner on merits and has in effect declined to entertain it. The reason why it has refused to entertain the revision application are not expressly stated in the impugned order. The fact that the application for grant of the mining lease was no

longer alive may justify the conclusion that no fresh orders of the State Government on the application were necessary. But it will not, by itself, justify the action of the Central Government in refusing to deal with the application in exercise of its revisional jurisdiction duly invoked by the petitioner. As pointed out by the Supreme Court in State of Assam v. Om Prakash Mehta (AIR 1973 SC 678) the fact that the application for grant of mining lease must be deemed to have been refused under R. 24 (3) of the Rules "does not prohibit the Central Government from passing any order it may deem just and proper". It may, however, be assumed that the Central Government refused to entertain the revision application filed by the petitioner on the ground that the only order of rejection in the eye of law was the deemed order of rejection which must be deemed to have been made on 2-2-1976 after the expiry of the period fixed by it and no revision application had been filed by the petitioner, at least within the prescribed period of limitation, against that order. But then the impugned order refusing to entertain the revision application can be sustained only if the finding that the application for grant of a mining lease filed by the petitioner was not alive as the application must be deemed to have been rejected on 2-2-1976 is correct in law. Sri S. C. Banerjee, Advocate, appearing on behalf of the petitioner contends that it is not. In my opinion, this contention is sound and must be accepted. It is true that the period of 100 days had expired before the State Government passed the order, copy whereof is Annexure '8' to the writ application and which communicated to the petitioner by the memo dated 13-10-1976. The Central Government, however, was clearly in error in treating that period of 100 days as the 'statutory period'. The aforesaid period of 100 days was not fixed by any statutory provision. It was fixed by the order of the Central Government passed upon a revision application filed before it under S. 30 of the Mines and Minerals (Regulation and Development) Act, 1957 (hereinafter called the Act) read with R. 54 of the Mineral Concession Rules, 1960 framed thereunder. A reference to Rr. 24 and 54 of the Rules which are the only relevant statutory provisions makes this crystal clear.

5. Chapter IV of the Rules lays down the procedure for grant of mining leases etc. Under R. 22, the person desirous of obtaining mining lease etc. in respect of land in which minerals vest in the Government is required to file an application for the same

on the prescribed form to the State Government. Rule 23 provides that the receipt of the application shall be acknowledged. Rule 24, so far as is relevant, runs thus :—

"24. Disposal of application for mining lease.— (1) An application for the grant of a mining lease shall be disposed of within twelve months from the date of its receipt.

(2) xx xx xx

(3) If any application is not disposed of within the period specified in sub-rule (1) it shall be deemed to have been refused Section 30 of the Act confers power on the Central Government to revise any order made by a State Government or other authority in exercise of powers conferred on it by or under this Act, either on its own motion or on application made within the prescribed time. The time is prescribed by Rule 54 of the Rules, which so far as is relevant, runs thus :—

"54. Application for revision.— (1) Any person aggrieved by any order made by the State Government or other authority in exercise of the powers conferred on it by the Act or these rules may, within three months of the date of communication of the order to him, apply to the Central Government in triplicate in Form N for revision of the order

Provided that any such application may be entertained after the said period of three months, if the applicant satisfies the Central Government that he had sufficient cause for not making the application within time....." There is an Explanation to R. 54 which reads as follows :

"Explanation— For the purposes of this rule, where a State Government has failed to dispose of an application for the grant or renewal of a prospecting licence or a mining lease within the period specified in respect thereof in these rules, the State Government shall be deemed to have made an order refusing the grant or renewal of such licence or lease on the date on which such period expires."

6. It will thus be seen that under sub-rule (3) of R. 24 an application for the grant of mining lease shall be deemed to have been refused only if the application is not disposed of "within the period specified in sub-rule (1)", that is to say, "within 12 months from the date of its receipt" The Explanation to R. 54 does not in terms specify the period during which if the State Government fails to dispose of the application for grant of the mining lease etc., it shall be deemed to have made an order refusing the grant etc. of the mining lease on

the date on which such period expires. The period is indicated by the expression "the period specified in respect of the disposal of an application for grant of a mining lease etc. The only period specified in the rules for disposal of an application for the grant of a mining lease is the period specified by Rule 24 (1). If, therefore, R. 24 and the Explanation to R. 54 are read together, it is manifest, that according to the statutory provision, i.e., the Rules, an application for grant of a mining lease "shall be deemed to have been refused" or the State Government "shall be deemed to have made an order refusing the grant thereof" only if the application is not disposed of "within the period specified in sub-rule (1)" of R. 24. Can it be said that the period specified in the order (Annexure '1') of the Central Government for disposal of the application by the State Government on remand is the period specified in sub-rule (1) of R. 24 of the Rules. In my opinion, there can be no doubt that it is not. The expression 'the period specified in sub-rule (1)' is as clear, specific, plain and unambiguous and admits of only one meaning, viz., the period laid down or contained in sub-rule (1). The use of the word 'specified' only reinforces the conclusion. No period can be said to be specified in sub-rule (1) if it is not contained in sub-rule (1) or cannot be ascertained precisely by reference of the provisions of sub-rule (1) alone. The only period for disposal of the application for grant of mining licence specified or contained in sub-rule (1) of R. 24 is the period of 12 months from the date of its receipt. It is, therefore, manifest that 'the period specified in sub-rule (1)' occurring in sub-rule (3) of R. 24 means 'the period of 12 months from the date of its receipt, i.e., the receipt of the application for the grant of the mining lease'. The period specified in the order (Annexure '1') of the Central Government is the period of 100 days and not 12 months and it has to be computed either from the date of the said order or the date of its receipt by the State Government. The period of 12 months from the date of the receipt of the application had expired much before 2-2-1976 the date of expiry of the period of 100 days and indeed even before 25-10-1975 when the order contained in Annexure '1' was passed by the Central Government. "The expression 'date of its receipt' construed according to its plain meaning and with reference to the context means the date on which the application for grant of the mining lease is first received by the State Government from the applicant." It must be remember-

ed that the expression "the date of its receipt" occurs in R. 24 which follows Rr. 22 and 23 which provide for an application for grant of mining lease etc. and for acknowledgment of its receipt after such an application is received from the applicant.

7. Even if the view is taken that the expression 'date of its receipt' includes the date or dates on which an application for grant of mining lease is received by the State Government after the case is remanded to it by the Central Government after setting aside the previous order of the State Government passed on the application for grant of a mining lease, the period of 100 days expiring on 1-2-1976 the period prescribed by the aforesaid order cannot be regarded as the period of the Central Government is 100 days while the period specified in sub-rule (1) of R. 24 is twelve months. On either interpretation of the expression 'date of its receipt' in R. 24 (1) the period of 100 days expiring on 1-2-1976 specified in the order of the Central Government as contained in Annexure '1' to the writ application, cannot be regarded as the period specified in sub-rule (1) to R. 24. And, therefore, the application of the petitioner for grant of a mining lease cannot be deemed to have been refused by virtue of sub-rule (3) to R. 24 on the expiry of the period specified in the order of the Central Government. As I have pointed out, sub-rule (1) of R. 24 is the only provision specifying a period for disposal of the application for grant of a mining lease. Therefore, it follows that if the period specified in the order of the Central Government for disposal of the application for grant of a mining lease is not the period specified in sub-rule (1) to R. 24, the failure to dispose of the application for grant of the mining lease within that period cannot be regarded as failure to dispose of an application for the grant of mining lease within the period "specified in respect thereof in these rules" within the meaning of the expression as contained in the Explanation to R. 54. And, therefore, the application cannot, on the expiry of the aforesaid period be deemed to have been refused by the State Government, by virtue of the Explanation to R. 54.

8. Sri Ram Nandan Sahay Sinha, Standing Counsel for the Central Government appearing for respondent No. 3 and Sri Gadodia Standing Counsel for the State Government appearing for respondents Nos. 1 and 2 strenuously contend that the period fixed by the Central Government for disposal of the application for grant of mining lease by the State Government in exercise of its

revisional jurisdiction under S. 30 of the Act read with R. 54, must be regarded as 'the period specified in respect thereof (i.e. for disposal of an application for grant of mining lease etc.) in these rules' within the meaning of the expression as occurring in the Explanation to R. 54 because the period has been fixed by the Central Government in exercise of the powers conferred by the rules. I will assume that the period of 100 days specified in the order was specified by the Central Government in exercise of powers conferred by these rules and not by the Act, but still the contention must fail. The period 'specified in an order passed in exercise of powers conferred by these rules' cannot be equated with or be included within the ambit of the expression 'the period specified..... in these rules' used in the Explanation to R. 54. The period specified by an order passed in exercise of the powers conferred by these rules cannot be regarded as "the period specified in these rules" which as expression, as I have already stated, construed with reference to its context clearly and plainly means the period which is contained in these rules and can be ascertained by reference to the rules alone or is laid down by the rules themselves directly without the intervention of any other agency. To hold that the period specified in an order passed in exercise of powers conferred by these rules is included within the ambit of the expression 'the period specified in these rules, would amount to reading into the Explanation words like or the period specified in any order passed in exercise of the powers conferred by these rules', words which are not there. In *Thompson v. Gould and Co.* (1910 AC 409 at p. 420) Lord Mersey said "It is a strong thing to read into an Act of Parliament words which are not there and in the absence of a clear necessity it is a wrong thing to do". And those observations are opposite in connection with the interpretation of a rule like this rule framed in exercise of power conferred by a legislative enactment for the rules of interpretation for both are the same. I can see no clear necessity to read into the Explanation the words 'or by an order passed in exercise of the powers conferred by these rules' or some similar words. As R. 24 (1) specifies the period for disposal of the application for grant of mining lease etc., the expression 'the period specified in these rules' can be given a meaningful interpretation even without adding any words thereto. Further, it cannot be said that the object of the Explanation to R. 54 would not be effectuated, or effectuated very imperfectly,

if the words 'or by an order passed in exercise of the power conferred by these rules' are not read into the Explanation. The object of the statutory fiction of deemed rejection of the application for grant of mining lease etc. if the application is not disposed of by the State Government within the period specified by the Rules created by R. 24 (3) or the Explanation to R. 54 clearly is to facilitate the exercise of the right of the applicant to approach the Central Government for the grant of mining lease etc. in exercise of its revisional jurisdiction. Because of the statutory fiction of deemed rejection the right of the applicant for grant of a mining lease etc. to invoke the revisional jurisdiction of the Central Government cannot be unduly delayed and thus defeated either by the inaction of the State Government or by its design to prevent the applicant from approaching the Central Government by the simple expedient of refusing to pass final orders on his application. That object is completely achieved by interpreting 'the period specified in these rules' literally without adding any words thereto as meaning the period contained in these rules or the period which can be ascertained by reference merely to the rules. The rules specify the period of 12 months during which, if the application is not disposed of, it is deemed to be rejected and the right of the applicant to invoke the revision at once accrues. There is, therefore, nothing either in the context or the object of the Explanation which requires us to depart from the plain, literal meaning of the expression 'specified in these rules' and to add thereto the words 'or in any order passed in exercise of the power conferred by these rules' or any similar words.

9. On the contrary, it seems difficult to imagine that the rule-making authority intended that the aforesaid words be read into the Explanation. It must be remembered that sub-rule (3) to R. 24 and the Explanation to R. 54 are extraordinary provisions, which by creating a statutory fiction bring about the serious consequence of dismissal of the application for grant of a mining lease etc. even though the application has not actually been rejected. In the absence of statutory provision to that effect, an application is not deemed to be rejected or granted because of the expiry of any period from time of receipt of that application by the authority empowered to grant or refuse an application. The dismissal of the application being a serious matter, it is difficult to believe that the rule-making authority would lay down the consequence of rejection

of an application for failure to dispose of the same within a period which was to be fixed by another authority subsequently and of the duration of which it had no idea. It seems reasonable to conclude that the consequence of deemed rejection of the application on the expiry of a certain period without its disposal has been laid down only if the application is not disposed of within the period of which the rule-making authority was fully aware and which it had itself laid down in the rules. The plain literal meaning of the expression 'the period specified in respect thereof in these rules' without reading any further words the rule is, therefore, in accord with the object of the provision and also its context and there is absolutely no necessity for reading into the Explanation the words 'or in any order passed in exercise of the powers conferred by these rules' or any similar words. I am, therefore, clearly of the opinion that the expression 'specified in respect thereof in these rules' means, so far as it relates to an application for grant of mining lease, the period specified in respect of the disposal of the application for mining lease in R. 24 (1) i.e., the period of twelve months from the date of its receipt and does not include the period specified for fresh disposal of the application for grant of mining lease, in the order of the Central Government passed in exercise of its revisional jurisdiction.

10. The decisions of the Andhra Pradesh High Court in *Seshanna v. Union Government of India* (AIR 1967 Andh Pra 94) and of the Supreme Court in *Dharam Chand v. State of Bihar* (AIR 1976 SC 1433) relied upon by the learned Standing Counsel for the Central Government, in my opinion, have no bearing on the interpretation of the expression 'the period specified in respect thereof in these rules' in the Explanation to R. 54 or 'the period specified in sub-rule (1) occurring in sub-rule (3) of R. 24'. In the Supreme Court case, the State Government failed to pass any final orders on the application for grant of a mining lease and, thereupon, the Central Government in a revision application preferred before it directed the State Government to grant the mining lease and when the petitioner went up in revision before the Central Government, the Central Government rejected the revision application of the appellant before the Supreme Court by its order dated 17-2-1968. When the matter came up the Supreme Court on appeal, it set aside the order of the Central Government holding that the State Government was bound to implement the order

passed by the Central Government on the previous revision application and the Central Government could not revise its earlier order at least in the absence of some fresh grounds which warranted reconsideration of the earlier order. In the Andhra Pradesh Case (supra) the decision of the Central Government was challenged before the Andhra Pradesh High Court on the ground that the revision petition before the Central Government was filed far beyond the period of limitation inasmuch as the order of rejection of the application for grant of mining lease must be deemed to have been passed by the State Government on an earlier date and if the limitation was computed from that date and not from the date of the passing of the order by the State Government, the revision petition was beyond time. The argument was rejected by stating that the petitioner had filed a revision petition earlier asking the Central Government to direct the State Government to extend the period for disposal of his application. The Andhra Pradesh High Court held that the validity of the extension of time for disposal of the application by the Central Government could not be questioned. No question arose whether a period for disposal of the application for mining lease fixed by the Central Government in exercise of its revisional jurisdiction must be regarded as the period specified in these rules.

11. It, therefore, follows that the period of 100 days specified by the order of the Central Government dated 28-5-1975 for the disposal of the application by the State Government on remand cannot be regarded 'as the period specified in sub-rule (1) of R. 24 of the Rules' or 'the period specified in respect thereof in these rules' within the meaning of the expression as used in the Explanation to Rule 54 of the Rules, and the application of the petitioner for grant of a mining lease cannot be deemed to have been refused by virtue of either R. 24 (3) or the Explanation to R. 54 of the Rules. And there is no other statutory provision.

12. Can it be said that even apart from any statutory provision, by virtue of the order of the Central Government contained in Annexure '1' upon the failure of the State Government to dispose of the application within the period specified in the order the application of the petitioner must be deemed to have been rejected by the State Government. The answer is clearly in the negative. The operative portion of the order dated 25-10-1975 of the Central Government (Annexure '8') runs as follows:—

"The Central Govt., therefore, in exercise of their powers under R. 55 of MCR 1960 all other enabling powers in that behalf hereby set aside the impugned order of the State Government and direct the State Government to pass appropriate and final orders on merits on the M. L. application of the petitioner within 100 days."

13. It is clear that the Central Government had not passed a specific order to the effect that if the State Government did not pass any final orders on merits of the application of the petitioner within the period fixed, the application of the petitioner shall stand dismissed or shall be deemed to have been rejected. Nor can such an order be read into the aforesaid order of the Central Government on any legal principle. When a Court or Tribunal intends that a serious consequence like that of dismissal of an application shall follow automatically without further reference of the matter to it, it says so expressly and clearly. See the peremptory orders passed by this Court. It is the usual practice of Courts and Tribunals that if an order passed by them is not complied with, and the order is silent about the consequence of non-compliance with that order, the matter is again placed for orders before the Court or Tribunal unless the consequence of non-compliance is prescribed by a statutory provision. A serious consequence like dismissal of the application for non-compliance with it cannot be read into the order by implication. It must be remembered that the petitioners whose application was remitted to the State Government for disposal within the time prescribed had no control over the State Government and could not compel it to dispose of the application within the period prescribed and that the period of 100 days was a period prescribed for performance of a duty by the State Government viz. the duty of passing orders upon application duly filed before it. It would be highly unjust that the application of the petitioner which had been remitted to the State Government by the Central Government after setting aside its previous order of rejection should be dismissed without consideration of its merits and without any fault on the part of the petitioners, because the State Government did not comply with the direction of the superior Tribunal which had set aside its earlier order on the subject. In that event, the State Government would be vested with a power to have its order which had been set aside restored because by the simple expedient of not passing any orders on the application within the period

specified, it could have the application which it had rejected earlier, rejected once again. Such an intention, unless plainly and explicitly expressed may not be imputed to the Central Government. It seems reasonable to conclude that by prescribing a time limit for passing orders on the application which it had remitted to the State Government for fresh decision, the Central Government intended that the State Government shall pass orders on the petition expeditiously and not that the order passed by it beyond the time limited by the order would be null and void. At best it only intended that if it failed to do so, the State Government should seek its instruction on the matter whereupon the Central Government would either extend the time limit or withdraw the case to itself for disposal. I may mention that a statutory provision prescribing a time limit for performance of an official duty without indicating the consequence of non-performance of the duty within the time prescribed is generally regarded as directory only and not involving the nullification of the act done beyond the time prescribed. In Maxwell on Interpretation of Statutes, 11th Edition, Page 369 occurs this passage which was quoted with approval by a Full Bench of this Court in Shiveshwar v. District Magistrate (AIR 1966 Patna 144 at p. 146):—

“It has often been held, for instance, when an Act ordered a thing to be done by a public body or public officers and pointed out the specific time when it was to be done, that the Act was directory only and might be complied with after the prescribed time.” This is on the principle that “the provisions of a statute relate to the performance of a public duty and to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time not promote the main object of the Legislature”. It is, therefore, manifest that the direction that if the State Government fails to dispose of the application within the specified period, the application shall stand dismissed cannot be read into the order of the Central Government by necessary implication. The decision of the Central Government that the application for grant of mining lease of the petitioner which was remanded to the State Government for fresh decision must be deemed to have been rejected on 2-2-1976 after the expiry of the period of 100 days specified in the order is, therefore, clearly erroneous in law.

14. And if it is held that the application could not be deemed to have been rejected on 2-2-1976, it is manifest that the petitioner could not have filed a revision application immediately after 2-2-1976 and before the passing of the order communicated to it by memo dated 13-10-1976, copy whereof is Annexure ‘8’ to the writ application. Admittedly, the petitioner filed a revision application before the Central Government against that order and the Central Government has not considered that application on merits under the erroneous assumption that the application of the petitioner for grant of a mining lease must be deemed to have been rejected on 2-2-1976 and no revision application had been filed against the deemed rejection. I may state that it has not been contended before us that the revision application filed against the order dated 13-10-1976 of the State Government was not filed within the time allowed by law. Indeed, it could not have been so contended because the period of limitation prescribed is three months from the date of the communication of the order which event took place on 16-10-1976 and the revision application was received by the Central Government on 14-1-1977 within the aforesaid period of three months.

15. Upon these findings, the revision application must be allowed and it is not necessary to consider whether the revision application filed could also be deemed to be a revision application filed against the deemed rejection and was in time. I may only state that while it was argued on behalf of the respondents that the revision application against the deemed order of rejection filed on 14-1-1977 would be barred by limitation and reliance was placed in support of this argument on the decision of this Court in C. W. J. C. No. 592 of 1978 (P) and C. W. J. C. No. 393 of 1979 (R): (both disposed of on 23-1-1980), this argument was controverted on behalf of the petitioner with reference to the decision of this Court reported in 1976 BBCJ (HC) 448. It is not necessary to pronounce upon these rival contentions in view of the finding arrived at by me.

16. I would, accordingly, allow the application, set aside the order dated 3-8-1977 of the Central Government, copy whereof is Annexure ‘11’ to the writ application, and direct the Central Government to dispose of the revision application filed by the petitioner in accordance with law. The peti-

tioner will be entitled to his costs of this application. Hearing fee of Rs. 200/- only.

UMESH CHANDRA SHARMA, J.:— I agree.

Application allowed.

AIR 1982 PATNA 107

**HARI LAL AGRAWAL AND
NAZIR AHMAD, JJ.**

Ram Rup Mahton, Petitioner v. Kirpa Narain Mahton, Opposite Party.

Civil Revn. No. 1296 of 1977, D/- 10-12-1981.*

(A) Bihar Debt Relief Act (10 of 1977), S. 3 — Protection to "Small Farmer" — Person must be dependent upon agricultural land as farmer and he should not have any other substantial source of income or own property — Judgment-debtor alleged to have some more land — Granting of protection by Execution munsiff without a finding in that respect is illegal, 1980 BBCJ (HC) 166, Relied on. (Per Nazir Ahmad, J.) (Para 5)

(B) Bihar Debt Relief Act (10 of 1977), Ss. 2, 3 — Decree for debt — "Scheduled debtor" obtaining debt for agricultural purpose as well as for development of trade — Protection under S. 3 can be granted.

Per Agrawal, J.— The definition of 'debt' in sub-sec. (a) of S. 2 of the Act was so comprehensive as to include all kinds of debts, irrespective of the nature for which it was incurred and it is not necessary that it should be in regard to the purpose of agriculture or operations connected therewith only. Sec. 3 of the Act contemplates an unqualified discharge of all debts of 'scheduled debtors'.

(Para 11)

Cases Referred: Chronological Paras
1980 BBCJ (HC) 166; 1980 BLJR 118

5, 10

Guneshwar Prasad and Shyameshwar Dayal, for Petitioner.

NAZIR AHMAD, J.:— This is an application by the plaintiff-decree-holder for setting aside the order dated the 1st Sept., 1977 passed by the Execution Munsif, Patna, in Miscellaneous Case No. 57 of 1977, wherein she held that the opposite party-judgment-debtor is a resident of the State of Bihar and is a small farmer within the definition of the Bihar Debt Relief Act, 1976 (hereinafter called 'the said Act'), who owns land measuring not more than two acres of irrigated land and

can be called a "scheduled debtor" and that being a 'scheduled debtor' he is entitled to discharge of his debts under S. 3 of the said Act. She also held that the debts are not recoverable. Accordingly, she allowed the application.

2. Learned counsel for the petitioner has submitted that the hand-note (Ext. A) shows that opposite party Kirpa Narain Mahto borrowed a sum of Rs. 2,200/- and there was a recital therein to the effect that he carried on agriculture and trade and that the loan was needed for agricultural purpose and also for the development of trade. He has also referred to para 2 of his petition at page 11 where it has been pointed out that the defendant-opposite party accepted in the written statement that the plaintiff was a well-known money lender and that the defendant, who was in need of money for starting a business, went to him and requested him for a loan of Rs. 2,200/-. On the basis of these two documents the learned counsel for the petitioner has submitted that the opposite party was carrying on business.

3. I have perused the order dated 1-9-1977 of the learned Execution Munsif and I find that after discussing the evidence relating to it she has come to a finding that the opposite party Kirpa Narain Mahto was not primarily a cultivator. She has also not accepted the evidence on behalf of the petitioner that the opposite party was carrying on any business and that even if the intention was to carry on business, unless the opposite party carried on business at the time when execution petition was pending, it cannot be said that he had other source of income.

4. On a perusal of para 11 of the order of the learned Execution Munsif it appears that Ext. B/1, which was filed as a rejoinder to the petition of the plaintiff-decree-holder praying for attachment before judgment of the land of the defendant, was proved before her. That rejoinder dated 27-3-1974 was filed by the opposite party in the money suit in question before the Munsif 1st Court, Patna. In Ext. B/1 there was a mention that the judgment-debtor possessed other properties situated in Patna, within Patna Municipal Corporation area bearing holding No. 201/18 in Circle No. 223 within Malsalami Police Station. The petitioner asserted before the learned Munsif that the judgment-debtor-opposite party had more land than 1.35 acres. The learned Execution Munsif has held that Ext. B/1 does not show whether holding No. 201/18 in Patna City was an agricultural land or a house and what was its area. She took the view that there was no suggestion to the judgment-debtor that it was an agricultural

* Against order of Smt. Rajendra Kumari, Execution Munsif, Patna, D/- 1-9-1977.

land. On this basis she has held that Ext. B/1 does not bestow any benefit to the opposite party.

5. However, it has been held in *S. K. Ataur Rahman v. Budh Mall Agrawal*, 1980 BBCJ (HC) 166 that the object of the Act was to give protection to small, poor farmers who were not in a position to pay off their debts on account of their poverty and that for a person to be a 'small farmer' or a 'marginal farmer' within the Act it is necessary that he be dependent upon the agricultural land as farmer and he should not have any other substantial source of income nor should he own other substantial properties.

6. Under such circumstances it is necessary to find as to what is the area of holding No. 201/18 aforesaid and what is the nature of this property. If it is a house, then rental income will be there, besides agricultural income relating to 1.35 acres of land.

7. Mr. Guneshwar Prasad, learned counsel for the petitioner, is agreeable to produce necessary evidence before the learned Executing Court relating to holding No. 201/18 if the matter goes back to it.

8. I, therefore, set aside the order dated 1-9-1977 of the learned Execution Munsif with a direction that she will give an opportunity to the decree-holder to produce necessary evidence relating to holding No. 201/18 and she will decide the matter afresh according to law after giving opportunity to both the parties of hearing.

9. In the result, the application is allowed and the matter is sent back to the learned Execution Munsif. There will be no order as to costs.

HARI LAL AGRAWAL, J.: 10. While agreeing with my learned brother that the matter requires reconsideration as the Court below has not recorded any finding with respect to other property, admittedly owned and possessed by the debtor, which was very vital for applying the provisions of the Act in question, in view of the Bench decision of this Court referred to above by my learned brother, I would add a few words clarifying the position with respect to the nature of debt to which the Act applies, perhaps for which decision L. M. Sharma, J. has referred this case to a Division Bench, in spite of his decision with which I had agreed, in the aforesaid case of *Sk. Ataur Rahman* (1980 BBCJ (HC) 166).

11. Mr. Guneshwar Prasad's argument was that inasmuch as the debt in question was created for carrying on the business, the provision of the Act would have no application. It is not possible to accept this conten-

tion as the definition of 'debt' in sub-sec. (a) of S. 2 of the Act is wide and comprehensive enough to include within its fold "all liabilities to a money lender . . . including any transaction which is in substance a debt, and subsisting on the date of the commencement of this Act whether due or not due". The definition, therefore, was so comprehensive as to include all kinds of debts, irrespective of the nature for which it was incurred and it is not necessary that it should be in regard to the purpose of agriculture or operations connected therewith only. Section 3 of the Act contemplates an unqualified discharge of all debts of 'scheduled debtor'.

Application allowed.

AIR 1982 PATNA 108

R. P. SINHA, J.

(On difference of opinion between B. P. Jha and Choudhary Sia Saran Sinha, JJ.)

Narain Sharan Sharma, Petitioner v. Smt. Lalita Devi and others, Respondents.

Civil Writ Jurn. Case No. 5309 of 1978, D/- 18-2-1982.

Patna Municipal Corporation Act (13 of 1952), S. 242 (5) — Application under, before District Judge — Transfer of application to Additional District Judge by District Judge He is also competent to dispose it of. (Civil P. C. (1908), S. 24).

An Additional District Judge is also competent to decide matters in respect of which application under S. 242 (5) is filed before the District Judge. It cannot be said that the power of the District Judge for transferring such cases filed under S. 242 (5) has been restricted and that the District Judge and the District Judge alone, and not an Additional District Judge who is equally competent and has coextensive jurisdiction, can decide the matter. (Para 10)

The term 'District Judge of Patna' has been mentioned in the sections of the Act with a view to prescribe the jurisdiction for the purposes of filing application for injunction or election petition and not that only the District Judge of Patna alone can dispose of those applications. Under S. 503 it has been laid down that for the purposes of any appeal, inquiry or proceeding under the Act, the High Court and the District Judge, Patna may exercise all the powers conferred on them by the Code of Civil Procedure, 1908 and shall observe the procedure prescribed in the said enactment so far as it is not inconsistent with the provisions of the Act. The

DY/DY/B499/82/SMA

District Judge both under the provisions of Section 24 of the Code of Civil Procedure and also under sub-sec. (2) of S. 8 of the Bengal, Agra and Assam Civil Courts Act, 1887 can transfer such applications to Additional District Judges for disposal.

(Paras 7 and 8)

Cases Referred:	Chronological	Paras
AIR 1975 Pat 131		9
AIR 1960 Cal 565		9
AIR 1956 Pat 108		9
AIR 1954 Assam 161		9
AIR 1924 Pat 593		9

Indu Shekhar Prasad Sinha and Sachidanand Sharma, for Petitioner; K. P. Verma (Advocate General) and B. P. Gupta, for Respondents.

R. P. SINHA, J. (agreeing with Chaudhary Sia Saran Sinha, J.):— This writ application was at first heard by a Division Bench of this Court consisting of B. P. Jha and Chaudhary Sia Saran Sinha, JJ. Since the Hon'ble Judges differed on the only point on which the writ petition was to be decided, it has been referred to me.

2. The petitioner has made a prayer in the writ application to quash Annexures 3, 4 and 6 to the application. The petitioner had filed an application before the District Judge of Patna under S. 242 (5) of the Patna Municipal Corporation Act, 1951 (hereinafter referred to as 'the Act') and an order of ad interim injunction against respondents 1 to 3 was passed. Thereafter the District Judge, Patna, by his order (Annexure 4) transferred the case to the file of Additional District Judge, Patna. In pursuance of the order of the District Judge, order of transfer was issued by the Registrar of Civil Court, Patna which is Annexure 3. After the transfer of the case to the file of First Additional District Judge, Patna, the petitioner raised an objection before him that he was not competent to hear the case. By order (Annexure 6) the learned Additional District Judge has overruled the objection. Hence the petitioner has filed the present writ application here.

3. The contention of learned counsel for the petitioner has been that the Additional District Judge, Patna, is not competent to try the case as, according to him, it is the District Judge, Patna, alone who under the provision of S. 242 (5) of the Act has been empowered to try the case. The contention on behalf of the respondents, on the other hand, has been that the application filed under Section 242 (5) of the Act before the District Judge can be disposed of by the Additional District Judge on transfer made to him by the District Judge.

4. The only question to be decided in this writ application is whether the District Judge alone or an Additional District Judge also is competent to dispose of on transfer to him by the District Judge an application filed under S. 242 (5) of the Act. Choudhary Sia Saran Sinha, J., for the reasons stated in his judgment, has been of the view that the application filed by the petitioner challenging the competence of the Additional District Judge is without merit and should be dismissed, whereas B. P. Jha, J., on the contrary, is of the view that only the District Judge is vested with the power and jurisdiction to decide an application under S. 242 (5) of the Act and hence he has allowed the application and remanded the case.

5. Having gone through the judgments of my learned brethren and the authorities referred to in the judgments and after hearing learned counsel for the parties I am of the view that the provisions of Ss. 242 (5), 502, 503 and 504 (5) of the Act, S. 8 of the Bengal, Agra and Assam Civil Courts Act, 1887 and S. 24 of the Civil Procedure Code have to be considered carefully in order to ascertain as to whether the District Judge alone or the Additional District Judge also is competent to dispose of the application under S. 242 (5) of the Act. The term 'District Judge' has not been defined in the Act although the term 'the Magistrate' has been defined under Section 4 (ww) of the Act as follows:—

" 'the Magistrate' includes the District Magistrate of Patna, the Magistrate-in-charge of Patna City and sadar sub-divisions and any other Magistrate subordinate to the District Magistrate to whom the Dist. Magistrate has made over any of his duties under this Act." The term 'District Judge' has been defined in the General Clauses Act as follows:—

" 'District Judge' shall mean the Judge of a principal Civil Court of original jurisdiction"

6. I may point out that the Act with which we are concerned is Patna Municipal Corporation Act, 1951 (Bihar Act 13 of 1952). Section 1 (2) of the Act prescribes the territorial jurisdiction and lays down that it applies only to Patna. This Act was passed with a view to consolidate and amend the law relating to the municipal affairs of the town and suburbs of Patna including the areas administered by the Patna City Municipality and the Patna Administration Committee. So this Act applies only within the area stated above. Consequently under the heading 'Legal proceedings in general' Section 502 of the Act provides that the District

Judge of Patna shall exercise all the powers and jurisdiction expressly conferred on or vested by the provisions of this Act. Under Section 503 thereafter the procedure is laid down for inquiry before Civil Courts. Under this section for the purposes of any appeal, inquiry or proceeding under the Act, the High Court and the District Judge, Patna, are to exercise all powers conferred on them by the Code of Civil Procedure, 1908 and they have to observe the procedure prescribed in the said enactment so far as the same is not inconsistent with the provisions of this Act. Now we may pass on to Section 544 of the Act where provisions have been made for filing election petitions. There also the District Judge of Patna is the Prescribed Authority before whom an application challenging the election for the reasons stated in the section is to be filed. In sub-section (5) of S. 544 of the Act the term 'District Judge of Patna' has been extended to include any person for the time being exercising the powers of the District Judge of Patna.

7. In my opinion, the term 'District Judge of Patna' has been mentioned in the section of the Act with a view to prescribe the jurisdiction for the purposes of filing applications for injunction or election petition and not that only the District Judge of Patna alone can dispose of those applications. I may repeat again that under Section 503 of the Act it has been laid down that for the purposes of any appeal, inquiry or proceeding under the Act, the High Court and the District Judge, Patna may exercise all the powers conferred on them by the Code of Civil Procedure, 1908 and shall observe the procedure prescribed in the said enactment so far as it is not inconsistent with the provisions of the Act.

8. Now, the question is whether the Additional District Judge, who has undoubtedly co-extensive jurisdiction with that of the District Judge and both of them are equally competent to dispose of any matter except with this difference that the District Judge is the Judge of principal Civil Court of original jurisdiction where applications are to be filed, can dispose of such applications on transfer to him by the District Judge. Section 8 (1) and (2) of the Bengal, Agra and Assam Civil Courts Act, 1887 reads as follows :—

"8. Additional Judges.— (1) When the business pending before any District Judge requires the aid of Additional Judges for its speedy disposal, the State Government may, having consulted the High Court, appoint

such Additional Judges as may be requisite.

(2) Additional Judges so appointed shall discharge any of the functions of a District Judge which the District Judge may assign to them, and in the discharge of those functions, they shall exercise the same powers as the District Judge."

In my opinion, the District Judge both under the provisions of S. 24 of the Code of Civil Procedure and also under sub-sec. (2) of Section 8 of the Bengal, Agra and Assam Civil Courts Act, 1887 can transfer such applications to Additional District Judges for disposal.

9. A number of decisions have been referred to by learned counsel for the respondents in support of the fact that the Additional District Judge is competent to dispose of such matters which have been transferred to him by the District Judge. The decisions are (1) *Mt. Daho Kuer v. Mt. Tural Dei* (AIR 1924 Patna 593); (2) *Lila Mahton v. Sheo Govind Singh*, (AIR 1956 Patna 108); (3) *Bijan Kumar Bose v. Gouri Bose*, (AIR 1975 Patna 131); (4) *G. C. Bazfarua v. State of Assam*, (AIR 1954 Assam 161) and (5) *Ajit Kumar Bhunia v. Sm. Kanan Bala Devi*, (AIR 1960 Cal 565). These decisions have been referred to and fully discussed in the judgment of Chaudhary Sia Saran Sinha, J. which I need not repeat them over again and, in my opinion, he has rightly observed that although all those decisions relate to provisions of Acts other than the Patna Municipal Corporation Act, yet the principle of law enunciated therein can be taken for interpreting the term 'District Judge' in the instant case.

10. Having examined the provision of law and the decisions and arguments submitted by learned counsel for the parties, I am of the view that an Additional District Judge is also competent to decide matters in respect of which application under S. 242 (5) of the Act is filed before the District Judge, as I do not find anything in the Act from which it can be concluded that the power of the District Judge for transferring such cases filed under S. 242 (5) of the Act has been restricted or there is anything from which it can be said that the District Judge and the District Judge alone, and not an Additional District Judge who is equally competent and has co-extensive jurisdiction, can decide the matter. I, therefore, agree with the view taken by my learned brother Chaudhary Sia Saran Sinha, J. The writ application is accordingly dismissed, but without costs.

Petition dismissed.

AIR 1982 PATNA 111**S. K. CHOUDHURI AND****YADUNATH SHARAN SINGH, JJ.**

Smt. Bharti Singh, Petitioner v. State of Bihar and others, Respondents.

C. W. J. C. No. 3199 of 1980, D/- 12-2-1982.

Bihar Cinemas Regulations Act, 1954 (15 of 1954), S. 5 (2) — Cinema Licence — Issuance of — State Government cannot usurp power of licencing authority, which had exclusive jurisdiction to deal with original application for grant and/or renewal of licence.

Under the guise 'control of the State Government' as used in S. 5 (2) the State Government could not usurp the power of the licensing authority which had the exclusive jurisdiction to deal with the original application for grant and/or renewal of a cinema licence and dispose of the same in accordance with law. AIR 1966 SC 1081, Rel. on.

(Para 10)

Cases Referred :	Chronological	Paras
1968 Pat LJR 28 A (SC)		12
ILR (1967) 46 Pat 1043		12
AIR 1966 SC 1081		9

Basudeo Prasad, Anil Eumar and Rajib Kumar Verma, for Petitioner; C. K. Sinha, N. Haidar, Prabha Shankar Mishra, A. K. Singh, Chauhan and Anil Kumar Mukund, for Respondents.

S. K. CHOUDHURI, J.:— In this writ application filed under Arts. 226 and 227 of the Constitution of India, the petitioner prays for issue of a writ of certiorari quashing the order of the State Government (respondent No. 1) dated 28th of Nov., 1980, which is said to have been passed by the Minister of Local Self Government, Bihar, as contained in Annexure 1 by which a direction has been issued to issue the licence of Shri Krishna Talkies, Samastipur, in the name of Chandradeo Singh (respondent No. 4), and a writ of mandamus commanding on the respondents to renew the cinema licence of the aforesaid Shri Krishna Talkies, Samastipur in the name of the petitioner.

2. It may be stated here that the petitioner's husband Shri Surajdeo Singh started the aforesaid cinema business sometime in the year 1958 in a Hall (building) belonging to the Bengali Hindu Theatrical Club, Samastipur, which was taken on rent by him. It is not disputed that said Shri Surajdeo Singh was exhibiting the cinema in the said Hall under an appropriate licence granted by the licensing authority.

The petitioner, who is the wife of said Surajdeo Singh, as already stated above, claims the said cinema business with all its appliances on the basis of a document executed by her husband in favour of the petitioner. It is said that since the date of transfer, the petitioner is running the cinema business in her own right. The petitioner's further claim is that all the appliances, furnitures and projectors etc., were sold by the petitioner's husband on payment of price for which a stamped receipt was granted to the petitioner by her husband on 2-2-1978. A copy of the transfer deed and the receipt have been made Annexures 3 and 4 respectively of this writ application. According to the petitioner, after the aforesaid transfer of the cinema business by her husband in her favour, her husband informed several authorities in writing about the aforesaid transfer. She has claimed to have made payment of all taxes relating to the cinema business including the income-tax, sales tax and entertainment tax. In proof of these facts, the petitioner has annexed copies of various documents as annexures. A copy of the affidavit sworn by the petitioner's husband for presenting it before the Superintendent of Commercial Taxes, Samastipur, dated the 30th Dec., 1978 has been quoted in full in para 11 of the writ application. The purport of the said affidavit sworn by the petitioner's husband is that he has sold the Motion Pictures Exhibiting Old Projectors including all appliances, furniture etc., located in Shri Krishna Talkies, Samastipur to the petitioner for a sum of Rs. 10,000/-, and the said price was received by him in cash for which a receipt was granted on 2-2-1978. He has also admitted in that affidavit that he has already transferred his ownership in the aforesaid cinema business to his wife for all purposes with its all belongings. It has also been stated therein that the contents of the petition sent by the petitioner's husband to the Superintendent of Commercial Taxes for amendment of the registration (a copy of which is Annexure 5) are true to the best of the deponent's knowledge and belief. Annexure 6 dated 30th Dec., 1978 is a copy of the letter purported to be written by the petitioner's husband to the District Magistrate, Samastipur for substitution of the name of his wife in his place as licensee of the cinema business of M/s. Krishna Talkies, Samastipur and in it a prayer was made to renew the licence in her name. The petitioner has also claimed that in Jan., 1979, the cinema show was stopped as the dues of the District Board, Samastipur was not paid, and, accordingly, the petitioner arranged for pay-

ment of the dues of the District Board in instalments and made part payment of the dues by two cheques. Thereafter, according to the petitioner, the Magistrate in charge Cinema of Samastipur (respondent No. 3) allowed the petitioner to run the cinema from 3rd Feb., 1979. A true copy of the aforesaid letter has been annexed as Annexure 8 to the writ application. The petitioner also claims to have obtained clearance certificate from the Sales Tax Department in her name which was required for renewal of the cinema licence, a copy of which is Annexure 9. The petitioner also claims to have deposited renewal fee of the cinema licence for the year 1980 amounting to Rs. 1,400/- in the Treasury through Chalan in her own name and also made an application for renewal of the cinema licence. A copy of the treasury chalan is Annexure 10 and a copy of the application for renewal of the cinema licence is Annexure 11 to the writ application.

3. The matter was dealt with by the District Magistrate, Samastipur (respondent No. 2), who after examining and perusing all relevant papers was satisfied that the renewal of the cinema licence be made in favour of the petitioner. This is to be found in the recommendation of the District Magistrate as contained in Annexure-12 sent to the State Government dated 18th March, 1980. On receipt of the said recommendation, the State Government (in the Urban Development and Housing Department) wrote to the District Magistrate, Samastipur, that the renewal of the permanent licence from 1-1-1980 to 31-12-1982 (i.e. for three years) of Shrikrishna Talkies, Samastipur, is being granted on the condition that the licence for the year 1980 is being renewed whereas for the years 1981 and 1982 it would be done after examination of the relevant papers. A direction was also issued to the District Magistrate that he would examine all the relevant papers, take opinion of the Government Pleader and thereafter send the matter to the Government for consideration as to whether the licence will be issued in the name of the petitioner or not. A copy of the aforesaid Government letter dated 9th April, 1980 has been annexed as Annexure-13 to the writ application. After Annexure-13 was received by the District Magistrate, he examined the matter, took opinion of the Government Pleader, Samastipur and sent his recommendation to the Government (Urban Development and Housing Department) on the 16th June, 1980 recommending renewal of the licence in favour of the petitioner. Annexure-14 is

the true copy of the said letter and Annexure-15 is the true copy of the opinion of the Government Pleader, Samastipur. However, the State Government (Urban Development and Housing Department) did not choose to pass order in consonance with the District Magistrate's recommendation, but took opinion from the then Advocate General, Bihar and ultimately by order dated 28th Nov., 1980 directed renewal of the licence in the name of Chandradeo Singh (respondent No. 4), who is the son of Surajdeo Singh and step son of the petitioner. The petitioner has, therefore, moved this writ application for the aforesaid reliefs.

4. It will be relevant to state here that a counter-affidavit has been filed by respondent No. 4, who has, in it, stated his claim. It appears that he has claimed the cinema business under a registered deed of lease for five years purported to have been executed by Surajdeo Singh on 27th May, 1977. Respondent No. 4 has, in the counter-affidavit, denied the claim of the petitioner and has stated that the payment of dues and taxes by the petitioner and applications to various authorities and the action taken thereon were merely an effort on the part of the petitioner to create documents in her favour. Respondent No. 4 has, accordingly contested the claim of the petitioner.

5. A reply to the counter-affidavit has been filed in which the petitioner has reiterated her stand already taken in the main writ application and has also annexed with the reply various copies of papers showing payment of entertainment tax from time to time and purchase of adhesive stamps for the same. It will also not be out of place to mention that apart from denying the claim of the petitioner, respondent No. 4 has enclosed a copy of the deed of lease for five years as Annexure-A, and has not filed anything else in proof of his claim, that it was he who was running the cinema business since the date of the lease and that he was in possession of the said business and the Hall.

6. Mr. Basdeo Prasad learned counsel for the petitioner in the first instance contended that the order of the State Government as contained in Annexure-1 dated 28th Nov., 1980 is illegal and without jurisdiction as the licensing authority is the District Magistrate, Samastipur (Respondent No. 2) who only could grant licence to the petitioner. According to the learned counsel, the District Magistrate, Samastipur having found everything in favour of the petitioner ought to have granted the renewal of the

licence instead of sending the same to the State Government for its consideration and passing orders thereon.

7. Mr. Prabha Shankar Mishra appearing on behalf of respondent No. 4, on the other hand, tried to counter-act the argument of Mr. Prasad by contending that the licensing authority being under the control of the State Government, it cannot be said that the order of the State Government directing issue of licence in the name of respondent No. 4 is illegal and/or without jurisdiction.

8. In order to examine the respective arguments aforesaid, it is necessary to indicate the provisions of the Bihar Cinemas Regulation Act, 1954 (Bihar Act XV of 1954) (hereinafter referred to as 'the Act') consists of 11 sections. It is an Act to make provision for regulating exhibition by means of cinematographs in the State of Bihar. Section 2 contains the definition of some of the words. The heading of Section 3 is 'Cinematograph exhibition to be licensed'. The important provisions are Sections 4 and 5 which are required for consideration and therefore quoted below. Section 4 reads as follows:—

"4. Licensing Authority.— The authority having power to grant licences under this Act (hereinafter referred to as the Licensing Authority) shall be the District Magistrate:

Provided that the State Government may, by notification in the Official Gazette, constitute for the whole or any part of the State, such other authority as it may specify in the notification to be the Licensing Authority for the purposes of this Act."

Section 5 without sub-section (4) which is not relevant for the present purpose, is quoted below:—

"5. Restriction of powers of Licensing Authority.— (1) The Licensing Authority shall not grant a licence under this Act, unless it is satisfied that—

(a) the rules made under this Act have been substantially complied with; and

(b) adequate precautions have been taken in the place in respect of which the licence is to be given, to provide for the safety of persons attending exhibition therein.

(2) Subject to the foregoing provisions of this section and to the control of the State Government, the Licensing Authority may grant licences under this Act to such persons as that authority thinks fit and on such terms and conditions and subject to such restrictions as it may determine.

(3) Any person aggrieved by the decision of a Licensing Authority refusing to grant a licence under this Act may, within such time as may be prescribed appeal to the State Government or to such officer as the State Government may specify in this behalf, and the State Government or the officers, as the case may be, make such order in the case as it or he thinks fit."

Section 6 gives power to the State Government or the District Magistrate concerned to suspend exhibition of films for reasons recorded in that section. Section 7 imposes penalty for contravention of the provisions of the Act or of the rules made thereunder, or, for violation of the conditions and restrictions of the licence etc. Section 8 gives power to the Licensing Authority to revoke or suspend licence where the holder of a licence has been convicted for offences mentioned in that section. It also gives right to appeal from such revocation or suspension of licence to the State Government. Under Section 9 the State Government may by notification in the Official Gazette make rules for the purpose of carrying into effect the provisions of the Act, and such rules may provide for matters which are mentioned in clauses (a) to (f) of sub-section (2) of that section. Section 10 gives power to the State Government to exempt any cinematograph exhibition or class of cinematograph exhibition from any of the provisions of the Act or of any rules made thereunder. By Section 11 of the Act, Cinematograph Act 1918 in its application to the State of Bihar and in so far as it relates to matters other than the sanctioning of cinematograph films for exhibition, has been repealed. This is shortly, the framework of the Act. It is not necessary to indicate the contents of the Rules which is called the Bihar Cinemas (Regulation) Rules, 1974, except R. 8 as it was referred to at the time of hearing by Mr. Basdeo Prasad learned counsel appearing on behalf of the petitioner, and as such I think it appropriate to quote the said Rule:—

"8. Grant of Licence.— (i) On completion of permanent cinema house to his satisfaction, the Licensing Authority may grant a licence for permanent cinema after he has ensured that the applicant has complied with the provision of these rules and instructions issued from time to time by the State Government and has taken all precautions to provide for the safety of persons attending exhibition in the cinema house;

Provided that nothing contained in these rules shall apply to the case of a permanent cinema house which has already been constructed wholly or partly before the commencement of these rules, and in such cases, the Licensing Authority, may, on an application made to him in this behalf grant a licence for a permanent cinema even if these rules have not been complied with :

Provided further that the Licensing Authority may require the licensee of such cinema houses to make certain alterations or improvements in the building if in his opinion, the same is necessary for the safety of the cine-goers.

(ii) All such licences will be given subject to the approval of the State Government." I indicate here that this Rule has no application in the present case, as the first proviso to sub-rule (i) of the said Rules excludes its applicability to a permanent cinema hall which has already been constructed wholly or partly before the commencement of these Rules. As already indicated above the cinema business in the present permanent building is being run from the year 1958. Thus sub-rule (ii) of R. 8 has no application to the present case.

9. The main argument hinges upon sub-section (2) of S. 5 of the Act, already quoted above, wherein the words '..... the control of the State Government' are to be found. It cannot be disputed that Section 4 of the Act gives power to the District Magistrate as the authority to grant licences under the Act, and it is the District Magistrate who is the Licensing Authority under that section. However, under the proviso to that section, the State Government may by notification in the Official Gazette, constitute for the whole or any part of the State, such other authority to be the Licensing Authority for the purpose of this Act, but we are not concerned with this proviso. Section 5 gives power to the said authority to grant a licence on being satisfied with the conditions laid down under sub-section (1). Sub-section (2) gives power to the Licensing Authority to grant licences under this Act to such persons as that authority thinks fit and on such terms and conditions and subject to such restrictions as it may determine. However, this power is subject to the control of the State Government. It is contended by Mr. Prasad that this power of control by the State Government would be exercised only after an order is passed by the Licensing Authority in favour or against the person concerned. If it is against the person concerned, then

under sub-section (3) of S. 5 of the Act, he will have a right of appeal to the State Government, but if it is in favour of the person concerned, then there is no question of preferring an appeal under sub-sec. (3), but in a case where the State Government is of the opinion that the licence has been granted not in accordance with the provisions of the Act and the Rules and to a person not entitled to have the said licence, then the State Government in such a case can exercise its power of control and pass such orders as it thinks fit and in such a case exercise of power by the State Government would amount to exercising power in revisional jurisdiction. According to the learned Counsel that is the true import and meaning of the word 'the control of the State Government' used in sub-s. (2) of S. 5 of the Act. In support of the contention, learned Counsel referred to a decision of the Supreme Court in the case of *State of Punjab v. Hari Kishan Sharma* (AIR 1966 SC 1081). This decision shows that the provisions of the Punjab Cinemas (Regulation) Act 1952 are in pari materia with the provisions of the present Act, namely, the Bihar Cinemas (Regulation) Act, 1954, and it appears that there is no difference between Ss. 4, 5 and other sections of the Act with the aforesaid Punjab Act. As such, in my view after perusing the judgment of the Supreme Court, the principles laid down in that case will fully apply in the present case. The question before the Supreme Court was the construction of S. 5 (2) of the Punjab Cinemas (Regulation) Act. While considering that sub-section which uses inter alia the words 'control of the Government' and which is in pari materia with S. 5 (2) of the present Act, it has been held in para 14 of the report as follows :—

"The control of Government contemplated by S. 5 (2) may justify the issue of general instructions or directions which may be legitimate for the purpose of the Act, and these instructions and directions may necessarily guide the licensing authority in dealing with applications for licences. The said control may, therefore, take the form of the issuance of general directions and instructions which are legitimate and reasonable for the purpose of the Act. The said control may also involve the exercise of revisional power after an order has been passed by the licensing authority. It is true that S. 5 (2), in terms, does not refer to the revisional power of the Government; but having regard to the scheme of the section, it may not be unreasonable to hold that if the Government is satisfied that in a given case, licence

has been granted unreasonably, or contrary to the provisions of S. 5 (1), or contrary to the general instructions legitimately issued by it, it may suo motu exercise its power to correct the said order by exercising its power of control. In other words, in the context in which the control of the Government has been provided for by S. 5 (2), it would be permissible to hold that the said control can be exercised generally before applications for licences are granted, or particularly by correcting individual orders if they are found to be erroneous; but in any case, Government has to function either as an appellate authority or as a revisional authority, for that is the result of S. 5 (2) and (3). Government cannot assume for itself the powers of the licensing authority which have been specifically provided for by S. 5 (1) and (2) of the Act. To hold that the control of the Government contemplated by S. 5 (2) would justify their taking away the entire jurisdiction and authority from the licensing authority, is to permit the Government by means of its executive power to change the statutory provision in a substantial manner; and that position clearly is not sustainable."

In para 16 of the report it is said that "S. 5 clearly requires that such applications must be dealt with by the licensing authorities in their respective areas in the first instance, and if they are granted, they may be revised by Government under S. 5 (2); and if they are rejected, parties aggrieved by the said orders of rejection may prefer appeals under S. 5 (3) of the Act. The basic fact in the scheme of the Act is that it is the licensing authority which is solely given the power to deal with such applications in the first instance, and this basic position cannot be changed by Government by issuing any executive orders, or by making rules under S. 9 of the Act."

10. The arguments of Mr. Prasad is thus well founded and has to be accepted. The interpretation put in the judgment of the Supreme Court in S. 5 (2) of the aforesaid Punjab Act will fully apply to S. 5 (2) of the present Act, as there is no difference in the language used in the two Acts; rather it appears from the decision of the Supreme Court where the provisions of the Punjab Cinemas (Regulation) Act, 1952 have been briefly indicated that the provisions of the Bihar Cinemas Regulation Act, 1954 are also similar. Therefore, in my view under the guise 'control of the State Government' as used in sub-sec. (2) of S. 5 of the Act, the State Government could not usurp the power of the licensing authority which had the ex-

clusive jurisdiction to deal with the original application for grant and/or renewal of a cinema licence and dispose of the same in accordance with law. I may state here that other points were canvassed at the Bar, but in my opinion, it is neither necessary nor appropriate to refer and discuss other points raised at the Bar as the licensing authority has yet to apply its mind and dispose of the original application of the petitioner for renewal of the licence in her name. In the circumstances it would be open to the parties to raise such points as may be available to them before the licensing authority. I do not wish to prejudice the licensing authority by referring and answering those points at this stage.

11. An argument was advanced by Mr. Mishra that the order and/or note under Annexure 1 is not an instruction of the Government and as such it was not necessary to be communicated to the petitioner. That may be so, but it is certainly a direction issued to the District Magistrate the licensing authority to issue licence in the name of respondent No. 4, and no discretion in any manner is left to the District Magistrate to be exercised in the matter of grant and/or renewal of the licence in question. Though the petitioner may not be entitled to communication of Annexure 1 but, in fact, the petitioner has been affected and prejudiced by the said issuance of Annexure 1 by the licensing authority and is, therefore, entitled to challenge in this writ application any interference by the State Government in the decision of the question at issue. Therefore, the order and/or note as contained in Annexure 1 should be considered to be non est.

12. Mr. Mishra during the course of arguments referred to the decisions in the case of *Arya Pratinidhi Sabha v. The State of Bihar* an unreported decision of the High Court in C. W. J. C. No. 1120 of 1966 disposed of on 13th April, 1967* which went to the Supreme Court on special leave being granted. This decision of the Supreme Court is reported in 1968 Pat LJR 28 A and was cited before us. The report shows that before the Supreme Court two points were raised; one was that the District Magistrate the licensing authority did not consult the Cinema Advisory Committee set up under the direction of the State Government, but consulted a body comprising of different persons. This point has been negated by the Supreme Court wherein it has been held that a properly constituted advisory committee had met on 16th June, 1961, and it recommend-

* Since reported in ILR (1967) 46 Pat 1043.

ed the grant of licence subject to certain conditions being imposed. The other point that was raised before the Supreme Court was that the State Government interposed its authority contrary to law because the District Magistrate alone was entitled to grant a licence. The Hon'ble Judges of the Supreme Court declined to consider on the ground that this point was never raised at any time before, and the settled practice of the Supreme Court is that no new point shall be allowed to be taken unless specially permitted. This decision, therefore, does not help any of the parties.

13. In the result, the writ application is allowed. Let a direction issue to the licensing authority to dispose of the application of the petitioner in accordance with law uninfluenced by any order and/or note of the State Government as contained in Annexure 1, which may be taken to be non est. In the circumstances of the case, there will be no order as to costs.

YADUNATH SHARAN SINGH, J.:—
I agree.

Application allowed.

AIR 1982 PATNA 116

**NAGENDRA PRASAD SINGH AND
P. S. SAHAY, JJ.**

Bhaiyalal and others, Petitioners v.
State of Bihar and others, Respondents.

Civil Writ Jurn. Case No. 3540 of 1981,
D/- 5-11-1981.

(A) Bihar Cycle-Rickshaw (Regulation of Licence) Act (6 of 1979), Ss. 3, 5, 6 — Directions by State Government for transfer of cycle-rickshaws from the owners thereof to the pullers thereof — Notice by Executive Officer Municipality pursuant thereto directing owners of rickshaws to be present before him on a day for such transfer — Held, directions and notice are without any authority in law, hence, liable to be quashed. (Constitution of India, Art. 226).

In the instant case, directions were issued by the State Government to all District Magistrates requesting them to issue necessary direction to the Executive Officers of Municipalities for transfer of cycle-rickshaws from the owners thereof to the persons who are actually plying those rickshaws. The Executive Officer of the Municipality in view of the aforesaid direction of the State Government issued notices to the owners of rickshaws direct-

ing them to be present before him on a certain day along with their cycle-rickshaws and the persons who are plying them. The notice further stated that on that day the owners of rickshaws will have to transfer their rickshaws to such persons who actually ply them for which reasonable compensation shall be paid to the owners of rickshaws. The notice also warned the owners that if they did not comply with the aforesaid order, their cycle-rickshaws shall be forfeited and other legal proceeding shall be initiated against them.

Held that in the absence of any provision in the Act under which the owners of cycle rickshaws could be compelled to part with their cycle-rickshaws, such directions by the State Government and the notice by Executive Officer of Municipality pursuant thereto, amounted to exercise of power without any authority in law and hence were liable to be quashed. (Paras 1, 7)

Further, no power has been vested in the State Government or in any other executive authority by the Act to forfeit or seize the rickshaws for purpose of transfer to the persons who are plying them. The provision regarding forfeiture as contained in S. 6 comes into operation only when a person charged for an offence under S. 5, is convicted and court declares the cycle-rickshaw in question to be forfeited to the State Government.

(Para 4)

(B) Bihar Cycle-Rickshaw (Regulation of Licence) Act (6 of 1979), Pre. — Constitutionality — Act not ultra vires of Art. 19 (1) (g) of Constitution. AIR 1977 Patna 114, Foll. (Constitution of India, Art. 19 (1) (g).) (Para 9)

Cases Referred: Chronological Paras
AIR 1977 Patna 114: 1977 Pat LJ 194 9

Shyama Prasad Mukherjee, Arvind Kumar Singh and Shanti Pratap, for Petitioners; R. B. Mahto, Addl. Advocate General and C. K. Sinha, Govt. Pleader No. 4, for Respondents.

ORDER:— The petitioners, who are the owners of cycle-rickshaws, have questioned the validity of the directions issued by the State Government and the Executive Officer, Sasaram Municipality in purported exercise of the powers conferred on them by the Bihar Cycle-Rickshaw (Regulation of Licence) Act, 1979 (Bihar Act VI of 1979), hereinafter to be referred to as 'the Act'. By the impugned communications and notices steps have been taken for transfer of the cycle-

rickshaws from the owners thereof to the pullers thereof, pursuant to coming into force of the aforesaid Act and the Rickshaw Pullers Welfare Scheme framed by the State Government. A letter dated 6-9-1981 was issued by the Director, Department of Urban Development addressed to all District Magistrates requesting them to issue necessary direction to the Executive Officers for transfer of cycle-rickshaws from the owners thereof to the persons who are actually plying those rickshaws. A copy of this letter is Annexure 1 to the writ application. The Executive Officer, Sasaram Municipality, perhaps, in view of the aforesaid direction of the State Government issued notices to the petitioners on 20-9-1981 directing them to be present before him on 29-9-1981 along with their cycle-rickshaws and the persons who are plying them. The said notice further states that on that day the petitioners will have to transfer their rickshaws to such persons who actually ply them for which reasonable compensation shall be paid to the petitioners. The notice warns the petitioners that if they did not comply with the aforesaid order, their cycle-rickshaws shall be forfeited and other legal proceeding shall be initiated against them. A copy of this notice is Annexure 3 to the writ application. According to the petitioners, the direction of the State Government as well as the notice issued by the Executive Officer of the respondent-Municipality is without any authority in law and not sanctioned by the provisions of the aforesaid Act.

2. Learned Additional Advocate General appeared on behalf of the respondents at the stage of admission itself and both parties were heard at length and by the consent of the parties this writ application is being disposed of at the time of admission itself.

3. Initially the Bihar Cycle-Rickshaw (Regulation of Licence) Ordinance, 1976 was promulgated which was ultimately replaced by the Act aforesaid. The preamble of the Act says that it is to regulate the issue of licences to the owners and drivers of Cycle-Rickshaws plying in any Municipal area in the State of Bihar for their better management. The provisions of the Ordinance and the Act are virtually identical. S. 3 of the Act is as follows:

"(i) Notwithstanding anything contained to the contrary in the Bihar and Orissa Municipal Act, 1922 or the Patna Municipal Corporation Act, 1951 or any

rule or order or bye-laws made thereunder or any other laws for the time being in force, no owner of a cycle-rickshaw shall be granted any certificate of registration nor his certificate shall be renewed by any municipal authority after the commencement of this Act unless the rickshaw is to be plied by such owner by himself.

(ii) A certificate of registration granted or renewed prior to the commencement of this Act shall stand revoked if it does not conform to the provisions of this Act."

In view of this section no owner of cycle-rickshaw shall be granted certificate of registration unless such rickshaw is to be plied by such owner himself and any certificate already granted shall stand revoked if he does not ply it himself. S. 4 prescribes some exemption in respect of a widow or a disable person from the restrictions contained under S. 3. S. 5 is the penal provision which is as follows:—

"(i) Any person who is found to be in possession of a cycle-rickshaw without a certificate of registration conforming to the provisions of this Act or plies or causes it to be plied by a person without a valid driver's licence issued under any law for the time being in force or plies or causes to be plied a rickshaw not meant to be plied for hire without painting the body thereof in yellow shall be punishable with imprisonment which may extend to three months.

(ii) Notwithstanding anything contained to the contrary in the Code of Criminal Procedure, 1973 (Act II of 1974), the offences under this Act shall be cognizable."

In view of S. 5, a person found to be in possession of a cycle rickshaw without a certificate of registration is liable to be punished with imprisonment which may extend to three months. This section also makes the offence in question a cognizable one. S. 6 is the provision regarding forfeiture of the rickshaw, which is as follows:—

"(i) If any person is convicted of an offence in respect of a cycle-rickshaw the court shall declare such cycle-rickshaw to be forfeited to the State Government.

(ii) If the owner of a cycle-rickshaw cannot be traced, the court before whom the cycle-rickshaw is produced shall declare it to be forfeited to the State Government.

(iii) The State Government may hand over any cycle-rickshaw forfeited under sub-section (i) or sub-section (ii) to the municipal authority within whose area the offence was committed."

On a plain reading it is clear that only after conviction for an offence under Section 5, court can declare such cycle-rickshaw to be forfeited to the State Government. The remaining Ss. 7 and 8 deal with powers to make rules and conditions and provisions regarding repeal and saving.

4. From the aforesaid provisions of the Act it appears that after coming into force of the Act no owner of a cycle-rickshaw is to get certificate of registration unless he plies the cycle-rickshaw himself, and any such certificate of registration already granted shall stand revoked unless the case in question is covered by the exemptions. After revocation or in absence of a certificate of registration, if some person is found to be getting a cycle-rickshaw driven by some other person, he is liable to be prosecuted for an offence under S. 5. No power has been vested in the State Government or in any other executive authority by the said Act to forfeit or seize the rickshaws for purpose of transfer to the persons who are plying them. We have already pointed out that the provision regarding forfeiture as contained in S. 6 comes into operation only when a person charged for an offence under S. 5, is convicted and court declares the cycle-rickshaw in question to be forfeited to the State Government.

5. Learned Additional Advocate-General appearing on behalf of the respondent-State submitted that offence under S. 5 being a cognizable one, cycle-rickshaws which are being plied in contravention of the provisions of Ss. 3 and 5 of the Act can be seized in accordance with the provisions of the Code of Criminal Procedure. Under the Code of Criminal Procedure power has been vested in the Police to seize certain articles during investigation which have to be produced before the court and courts are vested with powers to pass any appropriate order in respect of custody of such articles during the trial or after the conclusion of the trial. If the Police in connection with an offence under S. 5 of the Act had seized the cycle-rickshaws of the petitioners, perhaps, the petitioners could not have made any grievance as the matter would have been different. But, in the instant case admittedly no case has been

lodged against the petitioners but the petitioners have been directed to surrender their cycle-rickshaws before the Executive Officer of the respondent-Municipality so that they may be transferred to persons who are plying them. In our view, such directions are not permissible under the provisions of the Act.

6. Learned Additional Advocate-General further pointed out that the owners of such cycle-rickshaws are to get some reasonable compensation for the transfer of their cycle-rickshaws. If some of the owners willingly accept compensation and transfer their rickshaws to the persons who actually ply them, the matter will be different, but there is no provision under the Act under which they can be compelled to part with their cycle-rickshaws, although they themselves in view of Ss. 3 and 5 of the Act neither possess such cycle-rickshaws without a certificate of registration nor allow them to be driven by others.

7. No doubt, the actions of the respondents may be laudable and in good-faith, but once they are challenged and tested in the light of the provisions made in respect thereof, this Court has got no option but to hold that the directions as contained in Annexure 1 and the notice issued by the Executive Officer of the respondent-Municipality, as contained in Annexure 3, amount to exercise of power without any authority in law, and they have to be quashed.

8. Accordingly, this writ application is allowed and the impugned communication and notices aforesaid (Annexures 1 and 3) are quashed. In the circumstances, there will be no order as to costs.

9. Before we part with the judgment we consider it proper to mention that the petitioners have also challenged the vires of the Act itself saying that the provisions thereof amount to unreasonable restrictions on the freedom of trade and business as guaranteed under Art. 19 of the Constitution. A Bench of this Court in the case of Devendra Prasad v. State of Bihar (1977 Pat LJR 194): (AIR 1977 Pat 114) has considered identical provisions of the Ordinance which was then in force prior to the Act, and has held that the provisions of the Ordinance were not ultra vires. It was pointed out in the aforesaid judgment that provisions have been made in order to remedy and reduce, if not to eliminate, the problem of the rickshaw drivers who have to work under great strain; as such, the provisions were in public interest and cannot

be held to be unreasonable restrictions on the right of the owners of cycle-rickshaws. We are in respectable agreement with the aforesaid view and we do not consider it necessary to refer this case to a larger Bench for reconsideration of the questions raised in respect of the validity of the Act itself.

Application allowed.

AIR 1982 PATNA 119

K. B. N. SINGH, C. J. AND

M. P. SINGH, J.

Shiv Lochan Jha, Petitioner v. State of Bihar and others, Respondents.

Civil Writ Jurn. Case No. 1577 of 1981, D/- 22-12-1981.

Constitution of India, Arts. 226, 162 — Who can apply — Settlement of fishery rights of tanks — For 1980-81 in auction held by local authorities, petitioner was highest bidder — He also deposited half the bid amount — Subsequently settlement made by State Government in favour of another person (not a bidder) for three years in violation of its own circulars and instructions — Petitioner could challenge the illegal order — High Court could cancel the illegal settlement in its writ jurisdiction. AIR 1979 SC 1628, Foll. (Paras 11, 12, 14)

Cases Referred: Chronological Paras
AIR 1979 SC 1628 12

Prabha Shanker Mishra and Ramanand Kumar, for Petitioner; S. N. Jha (Standing Counsel), Arun Kumar Jha, K. P. Singh and Awadesh Prasad Singh, for Respondents.

ORDER:— In this writ application, the petitioner, Shiv Lochan Jha, has prayed for quashing an order contained in the letter of the Joint Secretary to the Government of Bihar in the Revenue and Land Reforms Department dated the 20th Jan., 1981, directing that the settlement of the Makhana-cum-fishery rights of the tanks of Manigachi Anchal, for the years 1980-81 and 1981-82, be settled in favour of respondent No. 7, for an annual Zama of Rs. 7,000 each year (commencing from the 1st Oct. and ending on the 30th Sept. every year). The petitioner has also challenged the order of the Commissioner of Darbhanga Division, dated the 17th March, 1981 (Annexure 3), by which he refused to interfere with the said order of the Government and observed that the Court of the Commissioner was not

the forum where the petitioner should have gone for the cancellation of the impugned order.

2. The petitioner's case is that for the year 1980-81 (1st Oct. 1980 to the 30th Sept. 1981), an open bid was held by the Block Development Officer cum Anchal Adhikari, for settlement of the Makhana cum fishery rights in five tanks of Manigachi Anchal, on the 10th Sept. 1980, at which the petitioner was the highest bidder, having offered Rs. 6,000 per year.

The petitioner deposited a sum of Rupees 3,000 being half of the bid amount, as directed by the Anchal Adhikari, on the same day and the Anchal Adhikari referred the matter to the Deputy Collector Land Reforms, Darbhanga, for approval. On the 16th Sept., 1980, respondent No. 7 filed a petition before the Deputy Collector, Land Reforms, Darbhanga, stating that he was prepared to offer Rs. 7,000 per year, and that either the said rights be settled with him or a fresh bid should be held. On this the Deputy Collector, Land Reforms (respondent No. 5), directed by an order dated the 20th Sept., 1980, that if respondent No. 7 had offered Rs. 9,000, i.e. 50 per cent more than the bid amount, as required by the Government instructions, then he could have considered the question of directing a fresh bid. Respondent No. 7 was informed accordingly. In spite of notice, when respondent No. 7 did not comply with the aforesaid order, on the 6/7th Oct., 1980 the Deputy Collector, Land Reforms referred the matter to the Additional Collector for approval, as the amount of the bid was more than Rs. 5,000.

3. It seems, in the meantime, respondent No. 7 moved the State Government in the Revenue Department, and on the 7th Oct. 1980, obtained an order for settlement of the Shairat in question in his favour for three years, i. e., 1979-80, 1980-81 and 1981-82, at an annual Zama of Rs. 5,100/- only. When the file was placed before the Collector of Darbhanga, by a letter dated the 28th Nov. 1980, he pointed out to the State Government that Respondent No. 7 had himself offered Rs. 7,000/- per year and that, if the settlement could be made at Rs. 5,100/- only, as directed, there would be a loss of Rs. 1,900/- per year. On receipt of the aforesaid letter of the Collector, it seems that the State Government, by the impugned order, contained in the letter of the Joint Secretary, dated the 20th Jan. 1981 (Annexure '5'), cancelled its previous order dated the 7th

Oct. 1980, and directed that the settlement should be made with Respondent No. 7 for the years 1980-81 and 1981-82 at the annual Zama of Rs. 7,000/- only, perhaps, on the footing that the year 1979-80 had already expired on the 30th Sept. 1980.

4. The petitioner thereafter moved the Commissioner of the Darbhanga Division in Case No. 186 of 1980-81, and he was asked to deposit a sum of Rs. 10,500/-, i.e., fifty per cent more than the amount offered by Respondent No. 7, which he deposited before the Additional Collector, as directed, but, in view of the Government order, the Commissioner dismissed the application of the petitioner on the 17th March, 1981 (Annexure '6'), observing that the Commissioner was not the proper forum to revise the order of the State Government. It is thereafter that the petitioner has moved this Court on the 8th May, 1981, and this application was admitted on the 15th May, 1981, and operation of the orders impugned (Annexures '5' and '6') was stayed.

5. A counter-affidavit has been filed on behalf of Respondents Nos. 1 to 6 and Respondent No. 7 has also filed a petition in opposition, to which the petitioner has filed a reply and they would be referred to only so far as they are relevant.

6. It will be necessary to refer to certain facts alleged by Respondent No. 7 in his petition. It is alleged that previously the Jalkars in question used to be settled at very low Zama, and when an open bid was held for settlement for the year 1979-80, Respondent No. 7 offered the highest bid of Rs. 5,100/-. It is alleged that as the offer of Respondent No. 7 was much in excess of all previous bids, the District authorities recommended for settlement of the aforesaid Jalkars with Respondent No. 7 for a period of three years, as it would be advantageous, on which the State Government passed an order dated the 7th Oct. 1980, which, on objection by the Collector, as already stated, was recalled by the State Government and the impugned order dated the 20th Jan. 1981 (Annexure '5') was passed. It is the Respondent's case that an agreement was executed and a Parwana was also issued in his favour for three years, and that he has invested money in cleaning etc. of the Jalkar. It is asserted that no writ application is maintainable at the instance of the petitioner.

7. Mr. Prabha Shanker Mishra, learned counsel appearing on behalf of the

writ petitioner, has urged that the auction for settlement of the Shairat in question for the year 1980-81 was held on the 10th Sept. 1980, in which Respondent No. 7 not having participated, there was no occasion for the State Government or any authority in the Government to direct the settlement of the Shairat in question to be made in favour of Respondent No. 7 for the year 1980-81, and that the order contained in Annexure 5 is wholly without jurisdiction. Mr. Mishra has also urged that the State Government having delegated the authority to settle the Shairat in question and laid down procedure for its settlement after approval by the competent authority, which, in the instant case, would be the Additional Collector, the State Government's action in interfering with the settlement would be discriminatory and hit by Art. 14 of the Constitution of India. The further contention on behalf of the petitioner is that in the bid for the year 1980-81, the petitioner was the highest bidder and there was a recommendation for acceptance of his bid, and, even if that bid was annulled, it could be annulled only with a proper notice to the petitioner. This having not been done, there has been a violation of the principles of natural justice.

8. Mr. Kanhaiya Prasad Singh, learned counsel appearing on behalf of Respondent No. 7, has submitted that the said respondent having offered a sum of Rs. 5,100/- annual for three years and his bid having been accepted by the State Government and agreement etc, having been executed in his favour, the writ petition of the petitioner was not at all maintainable, and this Court could not cancel the settlement made in favour of Respondent No. 7 in exercise of the writ jurisdiction.

9. Learned Standing Counsel has supported the State Government's orders in pursuance of which the settlement has been made in favour of Respondent No. 7.

10. The first question to be answered is about the locus standi of the petitioner to maintain this writ application. To answer this question two things have to be clearly borne in mind, firstly, that initially there was a bid for the settlement for the year 1979-80, at which Respondent No. 7 was a bidder, and secondly the notice for auction was admittedly for settlement for one year and the matter was dragged on on account of confusion created by the local officers,

especially the Collector in proposing for settlement for the three years in favour of Respondent No. 7 instead of one year, as advertised for. Learned counsel for Respondent No. 7 could not bring to our notice any Government Circular authorising settlement for more years than what had been advertised for. As against this, learned counsel for the petitioner has brought to our notice Government Letter No. 2526/R, dated the 12th Sept. 1978, in relation to settlement of Shairat. This letter seems to have been issued by the State Government in connection with the requests made by Bihar State Fishermen's Co-operative Federation and other Societies, for settlement of perennial and non-perennial Jalkars for longer periods, and while rejecting the Co-operative Societies Federation's request the letter reiterates some of the salient features of the Government policy in regard to the settlement of Jalkars. Relevant for our purpose are Paragraphs Nos. 2, 4, 5 and 6. A reference to these paragraphs makes it abundantly clear that the Government, confirmed its earlier directions for settlement of Makhana-cum-Jalkars for only one year at a time. Relevant portions from the said letter may usefully be quoted:—

11. It is the settled law that the State Government is bound by its own Circular or Instructions, although a citizen is not. In view of the clear circular and direction of the State Government, the settlement in favour of Respondent No. 7 could be only for one year, for which he was a bidder at the auction, i.e., for the year 1979-80, and the local authorities were fully justified in holding the bid for the next year, that is, 1980-81, on the 10th Sept. 1980, in which the petitioner not only participated, but was the highest bidder. There cannot be any doubt that so far as the settlement of the fishery for the year 1980-81 is concerned, he has a vital interest. He was not only an intending bidder, but a bidder at such an auction, where he had deposited half of the bid amount, i.e., Rs. 3,000/- and that there was recommendation for the approval of his bid by the Deputy Collector Land Reforms and Sub-Divisional Officer and the matter was pending before the Additional Collector, when the State Government's order came in. The petitioner, therefore, was undoubtedly a person who had locus standi to challenge any illegal order interfering with a fair consideration of his case for settlement

of the Shairat in question for the year 1980-81. We would, therefore, reject the contention of Mr. Singh that the petitioner has no locus standi to challenge the settlement in favour of Respondent No. 7.

12. From the facts stated and the Circular referred to above, it is also abundantly clear that the State Government had no power to order settlement for three years, where initially the advertisement was for settlement for only one year. This will amount to a settlement by private treaty, when different Government Circulars laid down that settlement of such Shairats can be made only by public auction. The State Government, as already held, was bound by its own circulars and instructions, unless the State Government withdrew such circulars and instructions and assumed all powers in itself, which is not the case in the instant case. The State Government's order, therefore, is contrary to the decision of the Supreme Court in the case of *Ramanna Dayaram Shetty v. International Airport Authority of India* (AIR 1979 SC 1628), where all previous decisions on the point have been considered and which has been followed by the Supreme Court in latter cases, wherein it has been laid down that once the terms and conditions for settlement have been laid down by the appropriate authority, even that authority was not competent to go back from the said terms and conditions, as it may result in undue favour to a particular person, without affording equal opportunity to others, to take their chance after relaxation was made in the terms and conditions of the settlement. Thus, there is no escape from the conclusion that the Government order contained in Annexure '5' is not a legal order at all and has to be quashed.

13. Coming to the question, whether in view of the fact that an agreement has been executed between Respondent No. 7 and the State, and that may stand in our way in cancelling the settlement made in favour of Respondent No. 7, it brings us to a sad state of affairs prevailing in the office of the Anchal Adhikari, Manigachi. It should be remembered that on the 15th May, 1981, we stayed the operation of the State Government's order contained in Annexure '5', meaning thereby that no settlement should be finalised during the pendency of the writ application, after the 15th May, 1981. From the order of the Anchal Adhikari dated the 6th April, 1981, it appears that Respondent No. 7 had not deposited Ru-

pees 3,500/-, i.e., the other half of the annual Jama fixed by the State Government for settlement, i.e., Rs. 7,000/-, for the year 1980-81, and in that regard it was directed as follows:—*

It is urged by Mr. Mishra that the last line in the said order (which we have underlined) is an interpolation, as it is wholly inconsistent with what precedes the same. When the order stated that the sum of Rs. 3,500/- due in respect of the settlement to be made for the year 1980-81 was not deposited till the 6th April, 1981, and a direction was made to deposit the same within a month from that date, failing which the settlement, as directed, would be cancelled, the question of the Ekrarnama being accepted on that date and the direction for the issue of the Parwana are wholly inconsistent. On a reference to the original order-sheet of the Anchal Adhikari it is apparent that it is a subsequent addition. Besides, it is in direct conflict with the earlier part of the order, and appears to have been subsequently interpolated to get over the stay order passed by this Court on the 15th May, 1981, as urged by Mr. Mishra. Mr. Mishra has also pointed out that there is an interpolation in column No. 1 of the next order dated "2-5-1981", which would be "8-5-1981", but has been later interpolated to read as "2-5-1981". There is no doubt some overwriting in the digit of the date, which now appears to be '2'. The said order reads as follows:—*

Mr. Mishra has further pointed out that in the next order also, which appears to be dated "8-6-1981", there is some overwriting with regard to the digit of the month and even the Anchal Adhikari has cut out the date below his initial and has rewritten it as "8-6-1981".

14. From the order-sheet it does not appear that the amount of Rs. 3,500/- was deposited even up to the 8th June, 1981. It is, therefore, surprising, how an agreement could be executed for such a settlement, as noted in the order dated the 6th April, 1981, and a direction made for issue of the Parwana, when that order itself recites that according to the Government directions, six months before the close of the year of settlement, the entire amount of settlement has to be deposited (relevant portion we have underlined in the order quoted above). The year of settlement would expire in the month of Sept. 1981, and, six months prior to that would have been in the

month of March, 1981. In spite of our repeated asking, the respondents could not produce anything to show that the balance amount of Rs. 3,500/- was deposited before the 6th April, 1981, or even till the 8th June, 1981. Such a shady agreement, even if made, obviously cannot stand in the way of this Court in cancelling an illegal settlement in exercise of its writ jurisdiction.

15. So far as the period 1979-80 is concerned, Respondent No. 7 alone seems to be in the field. So far as 1980-81 is concerned, it is already over. What is left now is the settlement for the year 1981-82. After quashing the State Government's order contained in Annexure '5', we direct that the settlement for the year 1981-82 be made afresh by public auction after proper advertisement at an early date. As the settlement in respect of the earlier two years, namely, 1979-80 and 1980-81 is already over, we are not expressing any opinion as to what would be the equity between the State Government and Respondent No. 7, nor it is necessary for us to express any opinion on that question.

16. This writ application is accordingly allowed and the order contained in Annexure '5', is quashed. To be on the safe side, the order of the Commissioner, which has only refused to interfere with the order, is also quashed. In the circumstances of the case, we make no order as to costs.

17. Before we part, we leave the matter open to the Collector of Darbhanga (Respondent No. 3) to look into the matter regarding the functioning of the office of the Anchal Adhikari, Manigachi, about which serious allegations have been made before us with reference to the order sheet, as already mentioned.

Petition allowed.

AIR 1982 PATNA 122

S. K. JHA AND

YADUNATH SHARAN SINGH, JJ.

Amresh Kumar, Petitioner v. Principal, Bhagalpur Medical College, Bhagalpur and another, Respondents.

Civil Writ Journ. Case No. 1609 of 1979, D/- 4-2-1982.

Constitution of India, Art. 226 — Writ against University — Petitioner, admitted to Medical College in 1975 — Cancellation of his admission in 1979 when

DZ/EZ/B501/82/SSG

*Matter in Hindi omitted—Ed

he was in final M.B.B.S. — Not proper — Principle of equitable estoppel attracted. (Evidence Act (1872), S. 115).

Petitioner, a Dhobi belonging to Scheduled Caste was admitted to M. B. B. S. course by Principal of a Medical College. He had produced a caste certificate from Block Development Officer and later on after admission, he produced requisite certificate from District Welfare Officer. Petitioner passed Part I of M.B.B.S. course in 1977. When he was in final M.B.B.S., on 7-5-1979 his admission to Medical College was cancelled on ground that he was actually not a Dhobi and belonged to upper class. Enquiry by District Magistrate as to whether he belonged to Scheduled Caste was made behind the back of the petitioner and without any knowledge to him. During the pendency of writ petition against the cancellation of his admission, the petitioner was allowed to prosecute his studies and he passed his final M. B. B. S. examination. It was not the case of the Principal that the caste certificates produced by petitioner were not genuine.

Held (1) that there being acquiescence on the part of the authorities concerned and no forgery alleged or fraud committed by the petitioner, it was too late on 7-5-1979, when the petitioner was finishing his final year M. B. B. S. course, to have cancelled his admission to the 1st year M.B.B.S. course as far back as in the year 1975. AIR 1976 SC 376, Foll.

(Para 4)

(2) that the cancellation of his admission to the College after four years by the authorities was barred by the principle of estoppel. Although in strict terms the principle of S. 115 of the Evidence Act might not be said to have been attracted, the principle of quasi-estoppel or equitable estoppel would apply to such a case. If the impugned order was allowed to stand, it would lead to a ridiculous situation, too harsh and against the petitioner not commensurate with the fault, if any, committed by him before his admission. Thus, the impugned order of cancellation must be quashed. AIR 1981 Raj 8, Foll. AIR 1979 SC 621, Expld.

(Paras 5 to 7)

Cases Referred : Chronological Paras

AIR 1981 Raj 8	5
AIR 1979 SC 621 : 1979 All LJ 368	6
AIR 1976 SC 376	3

Shyama Prasad Mukherjee, Arvind Kumar Singh and Shanti Pratap, for Petitioner; S. Hoda, Standing Counsel

No. 3, Mihir Kumar Jha, Jr. Counsel to Standing Counsel No. 3 and Ramesh Chandra Sinha, for Respondents.

ORDER:— In this application under Arts. 226 and 227 of the Constitution of India, the petitioner has prayed for issuance of an appropriate writ quashing the order of the Principal, Bhagalpur Medical College (Respondent No. 1) contained in Memo No. 1167 dated 7-5-1979, as contained in Annexure-12 to the writ petition. By that order contained in the memo the petitioner's admission to the Medical College in the year 1975 has been cancelled and rescinded. There are other incidental and consequential prayers made which we need not dilate upon because the main question to be decided is the legality and validity of the impugned order as contained in Annexure-12.

2. The relevant facts for the disposal of this application are short and simple. They may be narrated thus. After having been selected at the test for admission into the MBBS degree course, the petitioner was interviewed by the selection Board on 24-11-1975 and selected for admission. The letter dated 23rd Sept. 1975 issued to the petitioner regarding his provisional selection for interview for admission in the 1st year M.B.B.S./Dental Course 1975 of State Medical/Dental College of Bihar, on the basis of the results of the Pre-medical and Pre-dental Test, 1975, has been marked Annexure-1 to the writ application. Paragraph 8 (a) of that letter regarding provisional selection for interview for admission reads thus :

"Caste certificate from the District Magistrate or Civil S. D. O. or District Welfare Officer of the area concerned, if the candidate belongs to Scheduled Caste/ Scheduled Tribe/Backward Classes (Annexures I and II). Caste and category should be specifically mentioned."

The petitioner at the time of his Pre-medical and Pre-dental Test, 1975, had produced a caste certificate from the Block Development Officer, Sadar, Patna, showing that he was a 'Dhobi' by caste and belongs to the category of a scheduled caste. The petitioner was thereafter interviewed by the interviewing Board and selected for admission on 24-11-1975. On 5-12-1975, he was admitted into the First Year M. B. B. S. course by the Principal, Bhagalpur Medical College (Respondent No. 1). Although it is not so stated either in the petition or in the counter affidavit, learned counsel for all the parties including the State

have admitted that in the year 1977 the petitioner passed Part-I of his M.B.B.S. course. Thereafter he was prosecuting his studies for the final completion of the M.B.B.S. course and in the year 1979 the petitioner was in the final year of the M.B.B.S. class bearing Roll No. 36.

At this stage by the impugned order of Respondent No. 1 dated 7-5-1979 his (petitioner's) admission to the First Year M.B.B.S. course was cancelled on the ground that as a result of a report by the District Welfare Officer, Bhagalpur, in which it was found that he was actually not a 'Dhobi' by caste but belongs to an upper caste. It may also be pertinent to mention here that some time in the year 1976 even after the petitioner's admission when the petitioner was called upon to submit a caste certificate from the District Welfare Officer, he did so produce a certificate from the District Welfare Officer, Patna. Subsequent thereto the petitioner was asked to produce a caste certificate from the District Magistrate which was not at all warranted under the terms of Annexure-1. The certificate of the District Welfare Officer was deemed to be a valid certificate under paragraph 8 (a) of Annexure-1. It has been rather vaguely stated in the counter affidavit filed on behalf of respondents that on a complaint having been received by the Principal (Respondent No. 1) that the petitioner did not belong to a scheduled caste an enquiry was set afoot and it was consequent thereupon that the petitioner was asked to furnish the District Magistrate's certificate. This the petitioner was unable to do.

As has already been stated above, on some sort of enquiry having been made by the District Welfare Officer, Bhagalpur, who had not granted caste certificate to the petitioner (which has been granted by the District Welfare Officer, Patna), the report being dated 17-1-1979, a copy of which has been marked Annexure-A to the counter-affidavit, the petitioner's admission to the First Year M.B.B.S. course in 1975 was cancelled on 7-5-1979 when he was completing his final year M.B.B.S. course. It may also be mentioned here that admittedly the so-called enquiry made by the District Welfare Officer, Bhagalpur, was made behind the back of the petitioner and without any knowledge to him as the petitioner was on the verge of completing his M.B.B.S. course at the time when the impugned order was passed. He had

to rush up to this Court for an appropriate relief as the cancellation order of 7th May, 1979 rescinded his admission in the First Year M.B.B.S. course 1975 relegating him to the position of merely an Intermediate Science passed candidate.

When a rule nisi was issued in this case, an interim order was passed that the petitioner shall be entitled to prosecute his studies and attend lectures and sit at the examinations subject to the final result of this application. During the pendency of this writ application in July, 1980, the petitioner successfully completed his M.B.B.S. course and was declared to have been passed. The case of the respondents is that what was required by the petitioner to submit was a caste certificate from either the District Magistrate or the Civil S.D.O. or the District Welfare Officer of the area concerned and since the petitioner had not furnished any such certificate before his admission his admission was illegal. The further case of the respondents is that in any event in spite of the caste certificate granted to the petitioner before his admission by the Block Development Officer, Sadar, Patna, and after his admission, by the District Welfare Officer, Patna, such reports were found to have been granted on misrepresentation of facts made by the petitioner. The petitioner's admission to the 1st year M.B.B.S. course in the year 1975 was itself illegal and therefore was liable to be cancelled. These are the only relevant facts upon which the fate of this case hinges.

3. The petitioner must succeed on a very short and simple ground. In the year 1975, when he was admitted to the 1st year M.B.B.S. course, there was already from before the competent authorities the caste certificate granted by the Block Development Officer, Sadar, Patna, and with their open eyes and ignoring the provisions in paragraph 8(a) of Annexure-1 that the caste certificate should be granted by the District Magistrate or by the Civil S.D.O. or by the District Welfare Officer of the area concerned they admitted the petitioner to the course. Even subsequently when the petitioner was called upon to furnish a certificate from the District Welfare Officer he did so furnish a certificate of the District Welfare Officer, Patna. It is not alleged that any of these certificates was forged. The only contention of the respondents is that those certificates had been obtained by the

petitioner on a misrepresentation of facts before those authorities. The report of the District Welfare Officer, Bhagalpur, against the petitioner is based on an enquiry having been initiated at the instance of respondent No. 1 admittedly on the basis of a complaint made by some busy body or the other challenging the caste of the petitioner. And, this enquiry was admittedly made behind the back of the petitioner in violation of the principles of natural justice.

The petitioner's case is fully covered by the decision of the Supreme Court in the case of *Shri Krishan v. Kurukshetra University, Kurukshetra* (AIR 1976 SC 376). In the case of *Shri Krishan* (supra) the candidate in question was allowed to take the examination in Part-II law Examination and then it was discovered that some suppression of facts has been made by the petitioner at the time of the issuance of his admit card which amounted to fraud. It was held by the Supreme Court that once the candidate is allowed to take the examination rightly or wrongly then the Statute which empowers the University to withdraw the candidature of the applicant had worked itself out and the candidate could not be refused admission subsequently for any infirmity which should have been looked into before giving the candidate permission to appear. It has further been held in that case that if the University authorities acquiesced in the infirmities which the admission form contained and allowed the candidate to appear in the examination, then by force of the University Statute the University had no power to withdraw the candidature of the candidate. Moreover, it was also held that where a person on whom fraud is committed is in a position to discover the truth by due diligence which is not done then fraud is not proved. Because it would neither be a case of *suggestio falsi*, or *suppressio veri*.

In the instant case the competent authorities had before them a genuine caste certificate granted by the Block Development Officer, Sadar, Patna, to the petitioner and they were fully aware of the condition laid down in paragraph 8 (a) of the letter of selection dated 23rd Sept. 1975 (Annexure-1) that the Block Development Officer was not a competent authority to grant a caste certificate for the purpose of admission. And, yet they did not insist upon the petitioner producing any caste certificate from either the District Magistrate or the Sub-divisional

Officer or the District Welfare Officer and admitted the petitioner to the 1st year M.B.B.S. course. Even after the petitioner was admitted when he was called upon to produce a caste certificate from the District Welfare Officer, he did so produce a genuine caste certificate from the District Welfare Officer, Patna.

It was thereafter that it was insisted upon the petitioner producing a caste certificate from the District Magistrate in the year 1977, by the time he had already passed his Part-I M.B.B.S. course. If it would have been a case of forgery in obtaining any of those two certificates produced by the petitioner the matter may have been different. But it is not the case of the respondents that those certificates were not genuine. Their only case is that they had been obtained by the petitioner on mis-representation of facts. Having admitted the petitioner to the 1st year M.B.B.S. course in the year 1975, and having permitted him to prosecute his studies up to the final year in the year 1979, the respondents could not be permitted in law to cancel the admission of the petitioner (made in the year 1975) in the year 1979, by the impugned order Annexure-12. No fraud can be said to have been committed by the petitioner. It is manifest from the facts stated above, that the respondents acquiesced in the infirmities which the selection letter (paragraph 8 (a)) contained and allowed the petitioner his admission. No fraud can be said to have been committed by the petitioner in the circumstances.

4. There being acquiescence on the part of the authorities concerned and no forgery alleged or fraud committed by the petitioner, it was too late on 7th May, 1979, when the petitioner was finishing his final year M.B.B.S. course to have cancelled his admission to the 1st year M.B.B.S. course as far back as in the year 1975. The petitioner must succeed on this ground alone.

5. Learned counsel for the petitioner rightly pressed into service a decision of the Rajasthan High Court in the case of *Harphool Singh v. State of Rajasthan* (AIR 1981 Raj 8). In that case a student had secured admission in medical college on reservation quota by giving a false declaration. It was held that the cancellation of his admission to the College after 3-4 years by the authorities was barred by the principle of estoppel. Although in strict terms the principle of S. 115 of the Evidence Act may not be said to have been attracted, the principle

of quasi estoppel or equitable estoppel would apply to such a case. We were in full agreement with the learned Judge in Harphool Singh's case (supra) that (at p. 10) "even if the admission of this boy is cancelled, it would not be possible to undo the mischief done earlier of depriving a boy of Scheduled Tribe because what could have been done in 1973 for admission cannot be done now". In the instant case, if the impugned order is allowed to stand, it will lead to a ridiculous situation, too harsh and against the petitioner not commensurate with the fault, if any, committed by him before his admission. For he having passed his M.B.B.S. course successfully will now be deemed to have been relegated to the position of a candidate merely having passed an intermediate science course.

6. Learned counsel for the respondents invited our attention to a decision of the Supreme Court in the case of Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh (AIR 1979 SC 621). We do not see how this decision in any way adversely affects the petitioner's case. In so far as the question of quasi estoppel is concerned, this decision rather supports the petitioner's case, and there is no question of waiver involved.

7. On the facts and in the circumstances mentioned above the petitioner must succeed. The application is accordingly allowed and the impugned order of respondent No. 1 contained in the memo dated 7-5-1979 (Annexure-12) is quashed. We, however, make no order as to cost.

Petition allowed.

AIR 1982 PATNA 126
SARWAR ALI, Ag. C. J.
AND U. C. SHARMA, J.

Deepak and others, Petitioners v. State of Bihar and others, Respondents.

Civil Writ Jur. Case No. 286 of 1982,
D/- 1-4-1982.

(A) Constitution of India, Arts. 15 (4), 46 — Prospectus for year 1980-81 for admission to Post-Graduate Courses in Medical Colleges — Bihar Inter-University Board Ordinance (1981), S. 5 (1) (d) — Regulations under — Prospectus for admission to Post-Graduate Course not providing for reservation for Scheduled Castes and Scheduled Tribes candidates — Reservation introduced after examination for selection — It is not invalid —

EZ/EZ/C143/82/SNV

Principle of promissory estoppel, not attracted. (Evidence Act (1872), S. 115). AIR 1981 Patna 164 Held per incuriam in view of AIR 1973 SC 2641.

Where after examination for admission to post-graduate course in Medical Colleges under the prospectus which did not provide for reservation for Scheduled Castes and Scheduled Tribes, the Govt. introduced reservation for candidates belonging to the Scheduled Castes and Scheduled Tribes by a Govt. notification, it could not be said that the notification was invalid and the Govt. was bound by the principle of promissory estoppel to maintain the method of selection on basis of merit as contained in the prospectus. AIR 1981 Patna 164 Held per incuriam in view of AIR 1973 SC 2641. (Para 13)

Even if it be assumed that the issue of prospectus amounted to a representation and promise that the admission would be purely on the basis of merit, it would be inequitable to hold the Government to the alleged promise made in the prospectus as it would be interfering with the constitutional mandate in Art. 46 of the Constitution which is fundamental in the governance of the country (Article 37 of the Constitution) and would unduly interfere with the accepted policy of the State and Union Governments to provide for real opportunity of advancement of the interest of the Scheduled Castes and Scheduled Tribes. Taking into consideration the constitutional provisions contained in Arts. 46 and 15 (4) of the Constitution, equity does not require that the Government should be held bound by the alleged promise made by it. Further, the power of the State Government to make reservation in conformity with Art. 15 (4) of the Constitution can neither be affected nor negated by the mere fact that a statutory regulation made by it for admission into the Medical Colleges does not provide for reservation.

(Paras 13, 14)

(B) Constitution of India, Art. 136 — Special leave granted against decision of High Court declaring introduction of reservation for Scheduled Tribes and Scheduled Castes candidates after holding of examination for selection to Post-graduate Medical Courses invalid and admission of candidates belonging to Scheduled Castes and Scheduled Tribes allowed — High Court can still consider the issue of validity of introduction of reservation — Grant of special leave did not amount to overruling of High Court decision under challenge. (Para 8)

(C) Constitution of India, Art. 141 — Earlier Bench of High Court not noticing Supreme Court decision on point in issue — Latter Bench can follow the law laid down by Supreme Court. (Para 13)

Cases Referred: Chronological Paras

AIR 1981 SC 2045	6, 13
AIR 1981 Patna 164	4, 5, 7, 10, 12
AIR 1980 SC 1285	6, 8
AIR 1979 SC 621: 1979 All LJ 368	8
AIR 1973 SC 2641: 1973 Lab IC 1593	8
AIR 1971 SC 1762	12
AIR 1969 Orissa 80	5

Prabha Shankar Misra and Sunil Kumar Singh, for Petitioners; Y. V. Giri and Pawan Kumar, for Intervenor; K. P. Verma, Advocate General, and Subodh Kumar Sinha, Jr. Counsel to Advocate General, for the State; Shyama Prasad Mukherji, Arvind Kumar Singh, Shanti Pratap, Ashok Kumar Jha and Bhola Lal Das, for Intervenor.

SARWAR ALI, Ag. C. J.:— In this writ application the petitioners pray for quashing of the impugned annexure, being Annexure '1' to the writ application. By this annexure reservation of 14 per cent and 9 per cent seats for Scheduled Caste and Scheduled Tribe candidates has been made for admission into the Post-Graduate Medical Course in the Medical College of the State for 1981-82.

2. It is not in dispute that the original prospectus that was issued for admission to the aforesaid course by the Additional Director of Health Services (Medical Education) and Chairman, Board of Post-Graduate Medical Examination Test, did not contain any provision for reservation for Scheduled Caste or Scheduled Tribe candidates. Examination was held on the basis of the aforesaid prospectus. After the written test the result of successful candidates was notified on the Notice Board of Patna Medical College, and was also published in the local journals including the daily "Indian Nation". A copy of the said result as published in the Indian Nation is annexed as Annexure "3" to the writ application. After the publication of the result, the aforesaid Annexure '1' has been issued making the reservation as indicated above. It is averred in the petition that as a result of this reservation the petitioners would not be able to take their admission in the post-graduate degree courses. It is because of this that the petitioners are challenging the impugned annexure making reservation.

3. An application has been filed on behalf of the persons mentioned therein

for being permitted to be added as intervenor respondents and for permission to make submissions in conformity with Chapter XXIC of the Patna High Court Rules. We have heard learned counsel for these applicants. We have also heard the learned Advocate General on behalf of the State.

4. The challenge to the impugned annexure is on two grounds. It is contended that the State is prevented, on the principle of promissory estoppel from bringing about any change in the prospectus and thereby creating reservation for the members of the scheduled caste and scheduled tribe. Reliance in this connection is placed on a Bench decision of this Court in Dr. Anand Kumar Mishra v. State of Bihar (AIR 1981 Patna 164). It is next contended that regulations have been framed for admission to combined competitive examination for post graduate course in Government Medical Colleges of Bihar. These regulations have been framed under S. 5 (1) (d) of the Bihar Inter-University Board Ordinance, 1981. The regulations are thus statutory in character. They do not provide for any reservation. It was, therefore, not open to make reservation under Annexure "1", which is an executive instruction issued by the State Government.

5. The sheet anchor of the argument on behalf of the petitioners is the decision of this Court in Dr. Anand Kumar Mishra's case. There also the reservation made in Medical Colleges for Scheduled Castes and Scheduled Tribes in the year 1980 was under challenge. That challenge succeeded. This is how the contention regarding applicability of the principle of promissory estoppel was dealt with by this Court (at p. 168):

"The order contained in Annexure 4 was passed on 17th of October, 1980, after all formalities were over and only the final list had to be published and the students admitted. The petitioners, respondents Nos. 4 to 8 and all others had applied for admission on the basis of the representation contained in the notice and the prospectus (Annexure 5) that selection of candidates will be done by the Selection Board on the basis of merit determined by the marks obtained by them at the competitive test. No reservation had been made for the Scheduled Castes, Scheduled Tribes at that time. When the final selection was to be made, the Government by the order contained in Annexure 4 purported to change the basis of selection. This was not permis-

sible as it violated Arts. 14 and 15 (1) of the Constitution. The claim of the petitioners is founded upon equity which arose in their favour as a result of the representation made in the notice and the prospectus as also the action taken by the petitioners acting upon the said representations under the belief that the authorities would carry out the representations made by them or on their behalf. In almost a similar situation, a Bench of the Orissa High Court in *Abodha Kumar Mohapatra v. State of Orissa*, AIR 1969 Orissa 80 held that the principles of legal or equitable estoppel was applicable in the circumstances of the case and the authorities concerned were estopped from issuing such orders. The Government is not exempt from the liability to carry out the representations in the notice and the prospectus as to the basis of merit on the marks obtained at the competitive test for selection. The impugned Government order contained in Annexure 4 to the extent it makes reservation for the Scheduled Castes and Scheduled Tribes for admission to all the Post-Graduate Degree and Diploma Courses, must, therefore, be held to be invalid as it violates the provisions of the Constitution and is otherwise illegal."

6. Mr. Shyama Prasad Mukherji arguing for the intervenors tried to distinguish this case on facts. He as also the learned Advocate General contended that this decision could not be said to be good law in view of the decision of the Supreme Court in *Jit Ram Sheo Kumar v. State of Haryana* (AIR 1980 SC 1285) and *State of Madhya Pradesh v. Kumari Nivedita Jain* (AIR 1981 SC 2045). It was also contended that the Bench decision of this Court could not stand in the way of this Court taking a contrary view in view of the fact that special leave has been granted against the judgment of this Court and interim order has been passed in the following terms:

"Issue notice for 27-7-1981. We direct that as an interim arrangement the State of Bihar may create additional seats and the petitioner may be given tentative admission pending notice. Other persons belonging to Scheduled Castes and Scheduled Tribes may also be admitted if they move the Government for this purpose."

This order, it was contended, virtually amounts to overruling the decision of this Court. I must state that I cannot agree with this submission of the respondents. Nothing has yet been finally determined

by the Supreme Court. I would, therefore, proceed to consider whether the present case is distinguishable with the previous decision of this Court and whether the said decision could be said to be contrary to any earlier or later decision of the Supreme Court.

7. I find it difficult to distinguish the case on facts. It will, therefore, have to be examined whether the earlier Bench decision, being per incuriam or for other reasons is not binding. It is to be observed that Dr. Anand Kumar Mishra's case (AIR 1981 Patna 164) does not notice several decisions of the Supreme Court and only noticed one decision of the Orissa High Court. It would therefore, be necessary to examine the relevant Supreme Court decisions.

8. I would first consider the decision of the Supreme Court in *N. Ramanatha Pillai v. State of Kerala* (AIR 1973 SC 2641). Dealing with the general principle of estoppel in relation to State, it was observed as follows (at p. 2649):

"In American Jurisprudence 2nd at page 783 paragraph 123 it is stated 'Generally, a State is not subject to an estoppel to the same extent as is an individual or a private corporation. Otherwise, it might be rendered helpless to assert its powers in Government'. Therefore as a general rule the doctrine of estoppel will not be applied against the State in its governmental, public or sovereign capacity. An exception however arises in the application of estoppel to the State where it is necessary to prevent fraud or manifest injustice. The estoppel alleged by the appellant Ramanatha Pillai was on the ground that he entered into an agreement and thereby changed his position to his detriment. The High Court rightly held that the courts exclude the operation of the doctrine of estoppel, when it is found that the authority against whom estoppel is pleaded has owned a duty to the public against whom the estoppel cannot fairly operate."

This decision has been interpreted in the case of *Jit Ram Sheo Kumar* (AIR 1980 SC 1285) by a Division Bench of the Supreme Court as laying down that the principle of estoppel is not available against the Government in exercise of legislative, sovereign or executive power (paragraphs 12 and 39). Even if it be held that none of these decisions stand as a complete bar to the applicability of the rule of promissory estoppel in relation to governmental action as aforementioned, it has to be recognised that even *M. P.*

Sugar Mills v. State of U. P. (AIR 1979 SC 621), on which strong reliance was placed by learned counsel for the petitioners, carves out an area where the rule of promissory estoppel does not apply in relation to governmental action. I would, therefore, quote the relevant passage from the said decision (at p. 644):

"But it is necessary to point out that since the doctrine of promissory estoppel is an equitable doctrine it must yield when the equity so requires. If it can be shown by the Government that having regard to the facts as they have subsequently transpired, it would be inequitable to hold the Government to the promise made by it, the Court would not raise an equity in favour of the promisee and enforce the promise against the Government. The doctrine of promissory estoppel would be displaced in such a case because, on the facts, equity would not require that the Government should be held bound by the promise made by it."

9. The earlier Bench decision did not consider whether the case was such where on the principles laid down by the Supreme Court, the doctrine of promissory estoppel was excluded. It is, therefore, open to examine this question.

10. The position in this case is that in 1980 the Government attended to make reservation. This was held to be unconstitutional. It is obvious that had this decision been not there the prospectus for 1981 would have contemplated reservation. But in view of the Bench decision of this Court in *Dr. Anand Kumar Mishra's case* (AIR 1981 Patna 164) it was only reasonable that the Government would not rush in to make reservation without giving further thought to the matter. Some of the respondents of that case moved the Supreme Court and got an order dated 6-5-81 which could legitimately induce the Government to think that the Supreme Court may take a different view of the matter. It was in this situation the policy of reservation, which was formulated earlier was again sought to be enforced. It sufficiently explains as to why the reservation was not introduced in the prospectus and was notified by a separate order.

11. Learned counsel for the petitioner contended that Annexure '2' was issued after the order of the Supreme Court aforesaid. I do not find any date given in Annexure 2. Assuming, however, that it

was issued after the Supreme Court's order, as the last date of submission of applications was 22-8-81, I do not think that the contention of the learned Advocate General that it was after appreciating the impact of the interim order of the Supreme Court that the order of reservation was issued can be rejected. What is, however, more important is to examine whether even on the enunciation of law, as quoted above, the governmental action is justified and whether the doctrine of promissory estoppel would be applicable.

12. It is well known that Scheduled Castes and Scheduled Tribes for various reasons, which have been discussed in numerous decisions of the Supreme Court, lag far behind many other sections of the community. Reservation is the method evolved in the Constitution for bringing about real equality as against theoretical or formal equality. Thus the interest of the society is advanced as a whole by looking after its weaker section (*D. N. Chanchala v. State of Mysore* (AIR 1971 SC 1762 at p. 1770)). Realising that even in the sphere of higher education members of Scheduled Castes and Scheduled Tribes require a special fillip, the policy of the State Government in relation to admission to Post-Graduate classes in medical education was evolved. I am, therefore, of the opinion that even if it be assumed that the issue of prospectus amounted to a representation and promise that the admission would be purely on the basis of merit (a matter about which I am not expressing any concluded opinion), I am of the view that it would be inequitable to hold the Government to the alleged promise made in the prospectus as it would be interfering with the constitutional mandate in Art. 46 of the Constitution which is fundamental in the governance of the country (Article 37 of the Constitution) and would unduly interfere with the accepted policy of the State and Union Governments to provide for real opportunity of advancement of the interest of the Scheduled Castes and Scheduled Tribes. Taking into consideration the constitutional provisions contained in Arts. 46 and 15 (4) of the Constitution, I am of the view that equity does not require that the Government should be held bound by the alleged promise made by it. I am further of the view that the principles enunciated in the Supreme Court decision which have been mentioned earlier have not been con-

sidered in Dr. A. K. Mishra's case (AIR 1981 Patna 164) and as such this Bench is not prevented from taking a view contrary to the view expressed in the said case. Had these Supreme Court decisions been considered and interpreted earlier by a Bench of this Court, we would have been bound by that interpretation, and it would not have been open to us to give a different interpretation. Since, however, as already stated, the Supreme Court pronouncements, which are law of the land under Article 141 of the Constitution, have not been noticed in the earlier decision, the latter Bench is entitled to follow the law as laid down by the Supreme Court and to apply them to the facts of the case under consideration.

13. Reliance was placed on the decision of the Supreme Court in Nivedita Jain's case (AIR 1981 SC 2045) (supra) by the learned counsel for the respondents. But this case does not specifically deal with the question of promissory estoppel (which could very well have been raised in the case). I do not think that the petitioners are shut out from raising the question of promissory estoppel in the present case because of the aforesaid decision.

14. The second contention, as already noticed, is that under an executive instruction there could not be any amendment in the prospectus. Without going into the question whether the regulations are statutory in character or not, I am of the view that the power of the State Government to make reservation in conformity with Art. 15 (4) of the Constitution can neither be affected nor negated by the mere fact that a statutory regulation made by it for admission into the Medical Colleges does not provide for reservation. The power to make reservation is derived under Art. 15 (4) of the Constitution. The exercise of that power cannot be prevented merely because some statutory instruments had not earlier provided for reservation. The second contention raised on behalf of the petitioners is, therefore, also unacceptable.

15. In the result, I do not find any merit in this application and it is accordingly dismissed but without costs.

U. C. SHARMA, J.:— I agree.

Petition dismissed.

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FULL BENCH

SHIVESHWAR PRASAD SINHA,
HARI LAL AGRAWAL AND
B. S. SINHA, JJ.

Tata Iron & Steel Co. Ltd., Appellant
v. Bir Singh and another, Respondents.

A. F. A. D. Nos. 401 and 402 of 1967,
D/- 16-11-1979.*

(A) Industrial Disputes Act (14 of 1947), Sch. 3 Item 5 — Gratuity — It is a gratuitous payment at discretion of employer.

'Gratuity', as the very word connotes, is a gratuitous payment, a sort of present made to an employee when the employer felt pleased with the employee's work. Such a thing cannot be claimed as of right nor could any one else, much less a court of law, compel the employer to pay a gratuity to its employee.

(Para 9)

(B) Employees' Provident Funds and Miscellaneous Provisions Act (19 of 1952), S. 2 (h) — Fund — Under the rules of a scheme of a Company, certain percentage of bonus payable to each member retained to be paid to Trustees to be credited to the Fund in account — Composition of Fund including contribution of such a contingency nature — Retained profit sharing bonus was part of provident fund account. (Industrial Disputes Act (1947), Sch. 3 Item 5). (Para 13)

(C) Employees' Provident Funds and Miscellaneous Provisions Act (19 of 1952), Ss. 17, 10, 6 — Scheme prepared by a Company on getting exemption under S. 17 — Scheme approved by appropriate authority — Scheme has same statutory force as one under Act — Protection under S. 10 against attachment — Applicable to such scheme. (Civil P. C. (1908), S. 60).

A scheme prepared by a company, on getting exemption under S. 17 of the Act, which scheme had also been approved by the appropriate authority, has the same statutory force as a scheme under the Act. Therefore the protection against attachment as laid under S. 10 of the Act, applies to such a scheme also. Such protection extends to all the components which go to make up the fund established under the scheme. Hence the retention profit sharing bonus being a part of the

*From order of M. M. Moosa, Addl. Sub. J., Jamshedpur, D/- 26-11-1964.

provident fund account of the judgment debtor employee, could not be attached in satisfaction of the decree for money against the employee of that Company and, therefore, the appellant-company could not be directed to deposit the same in court. Decisions in M. A. No. 336 of 1965, D/- 3-7-1968 (Pat) and that in M.A. No. 163 of 1967, D/- 15-1-1969 (Pat), Approved. (Paras 15 to 17)

The purpose of the exemptions under S. 17 is only to ensure a scheme better than the one under S. 6 of the Act and better than one offered by an establishment of similar nature. Section 17 is thus only an extension of the scheme under the Act, whereby, in order to avoid duplication, if the appropriate Government is satisfied that the scheme framed by the concerned establishment, in regard to the rules of its provident fund regarding the rates of contribution etc. are not less favourable than those specified in S. 3 of the Act or as available in any other establishment of like nature, authorises the establishment to substitute its own scheme in place of a scheme framed by the appropriate Government. Both the schemes are, however, schemes under the Act. Notwithstanding the exemption granted under S. 17 of the Act, the appropriate Government does not lose its hold over the scheme framed by the establishment. There are built-in safeguards in S. 17 itself to protect the interest of the member. (Para 15)

Cases Referred : Chronological
 AIR 1969 Pat 53 : 1969 Lab IC 180 8
 (1969) Misc. Appeal No. 163 of 1967, D/-
 15-1-1969 (Pat), Jainarain v. Controller
 of Accounts, Tata Iron & Steel Co. Ltd. 1, 16
 AIR 1968 Pat 297 8
 (1968) Misc. Appeal No. 336 of 1965, D/-
 3-7-1968 (Pat), Prabhunath Prasad v.
 Tata Iron & Steel Co. Ltd. 1, 16
 AIR 1964 SC 980 14

L. K. Choudhary and Amla Kant Choudhary, for Appellant.

S. P. SINHA, J.:— These two second appeals have been referred to Full Bench, but the point on which the reference is really made, arises only in Second Appeal No. 402 of 1967. This matter has been referred to Full Bench for testing the correctness of two decisions of this Court; one by a Division Bench in the case of Prabhunath Prasad v. M/s. Tata Iron & Steel Co. Ltd. (Miscellaneous Appeal No. 336 of 1965 decided on 3rd July, 1968) and the other by a learned single Judge in the case of Jainarain v. The Controller of Accounts, Tata Iron & Steel

Co. Ltd. (Miscellaneous Appeal No. 163 of 1967 decided on 15th Jan. 1969).

In both these decisions, the protection under S. 10 of the Employees' Provident Funds Act, 1952 (Act 19 of 1952) (hereinafter referred to as the Act) has been extended to the fund created by the concerned establishment under its own scheme.

2. The questions as framed by the learned single Judge, who first referred the matter to a Division Bench, were:—

"1. Whether in the absence of any provision in the Act to that effect the protection granted by S. 10 of the Act extends to a fund created under a scheme framed by an establishment exempted under S. 17 of the Act from the operation of any scheme framed under the Act?

2. If so, whether in the absence of any specific provision the protection extends to such part of the fund established by such an exempted establishment as are monies representing things other than basic wages, dearness allowance and retaining allowance which alone under Sec. 6 of the Act are said to be constituents of provident fund?"

These questions have been reframed by the Division Bench in the following words:—

"The question is as to what is the status in law of such a scheme or rules framed by a company in respect of the provident fund of an employee. Whether rules of the company will have the same status in law as a scheme framed by the Central Government under the Act?"

3. The Employees' Provident Funds Act provides for the institution of provident funds for employees in factories and other establishments. The extent of its application is laid under S. 1 of the Act. Section 2 of the Act, inter alia, defines "fund" as the "provident funds establishment under a scheme". Member means "a member of the fund". "Scheme" means "a scheme framed under this Act". Sec. 6 of the Act lays down how much out of what earnings of a member could be contributed towards the fund of the scheme under the Act. Section 10 provides a protection against attachment of the amount standing to the credit of any member in the fund under any decree or order of any court in respect of any debt or liability incurred by the member. Section 17 in so far as is relevant for the purpose of this case reads as under:—

"Power to exempt— (1) The appropriate Government may, by notification in

the Official Gazette, and subject to such conditions as may be specified in the notification, exempt from the operation of all or any of the provisions of any scheme—

(a) any establishment to which this Act applies if, in the opinion of the appropriate Government, the rules of its provident fund with respect to the rates of contribution are not less favourable than those specified in S. 6 and the employees are also in enjoyment of other provident fund benefits which on the whole are not less favourable to the employees than the benefits provided under this Act or any scheme in relation to the employees in any other establishment of a similar character; or

(b) any establishment if the employees of such establishment are in enjoyment of benefits in the nature of provident fund, pension or gratuity and the appropriate Government is of opinion that such benefits, separately or jointly, are on the whole not less favourable to such employees than the benefits provided under this Act or any scheme in relation to employees in any other establishment of a similar character."

By this section an establishment to which this Act applies is exempted from the operation of all or any of the provisions of the scheme under the Act, if its scheme is not less favourable than those specified in S. 6 of the Act or under any scheme in relation to employees in any other establishment of a similar character. Admittedly, the exemption under S. 17 had been granted to the employer company, namely, the appellant. The appellant framed its own provident fund rules (hereinafter referred to as the Rules) which rules were also approved by the Regional Provident Fund Commissioner, Bihar in the year 1955. Rule 5 of the Rules describes the "Fund" as consisting of—

(a) Contributions by the members out of their salaries or wages,

(b) Contributions by the Company :

(i) General contributions under Rr. 9 and 10 hereof.

(ii) Contributions of a contingent nature under the profit sharing scheme as provided for in R. 11 hereof,

(c) Contributions by members under R. 12,

(d) sums forfeited to the fund under these rules,

(e) The interest and dividends which

the investment of money forming the fund from time to time may produce,

(f) Transferred balances from other provident funds where such transfers are permitted by these rules,

and

(g) Such other sums as may accrue to the fund from any source whatever.

Rules 9, 10, 11 and 12, which are referred to in Rule 5 respectively relate to company's contributions, special contributions, Company's contributions of a contingent nature which may be 33½% of the bonus payable to each member, which is required to be retained by the company to be credited to the fund in a separately marked account, and lastly, members' voluntary contributions. Admittedly the 'fund' in terms of R. 5 of the Rules consists of certain items which are not provided under S. 6 of the Act. Whereas according to S. 6 of the Act, contributions to the 'fund' could be only out of basic wages, dearness allowance and retention allowances; according to Rule 5 of the Rules, the sources of contribution to the 'fund' were not only those, but many others.

It is, therefore, that the aforesaid questions have been raised for consideration by this Bench. In substance, the primary question is, whether the protection under S. 10 of the Act would at all be available to a scheme other than a scheme under the Act; and the subsidiary question is whether such protection would be available to contributions made to the fund out of earnings other than basic salary, dearness allowance and retention allowance.

4. The facts may now be stated: Second respondent, A. N. Chatterjee (judgment-debtor) was an employee of the appellant-company. The first respondent filed a suit for money, being Money Suit No. 573 of 1960 of the court of Munsif, Jamshedpur against the second respondent and obtained a decree. An application for attachment before judgment had been filed by the first respondent (plaintiff) to attach the gratuity money amounting to Rs. 1400 and retention profit sharing bonus amounting to Rs. 1200 payable to the second respondent (judgment-debtor). An order of attachment before judgment was passed and the same was communicated to the appellant-company (Garnishee) on 17th Sept. 1960. After passing of the decree in the money suit, Execution Case No. 378 of 1961 was initiated and the Controller of Accounts of the Garnishee Company was called upon to deposit the attached amounts in court.

The Garnishee company raised objections stating that the judgment-debtor, namely, the second respondent, was not entitled to any gratuity money or to the profit sharing bonus, but was entitled only to an ad hoc bonus for the years 1959 to 1961, which amount was remitted to the court. The Executing Court, partially accepting the Garnishee company's objection, held that since no gratuity money was payable to the second respondent on the date on which the order of attachment before judgment was served on the Garnishee company, the latter could not be called upon to deposit the same in court. With regard to the profit sharing bonus, however, the Executing Court held that it represented an amount already earned by the second respondent and retained for the purpose of being deposited in his provident fund account under the rules of the company and the same having been attached before judgment must be deposited in the court.

5. The Garnishee company as also the decree-holder, both felt aggrieved by the order of the Executing Court and both of them appealed against it. The decree-holder was aggrieved against the order refusing to call upon the Garnishee company to deposit the gratuity money in court. The appeal filed by him was numbered as Miscellaneous Appeal No. 23/12 of 1964.

The Garnishee company was aggrieved by the order calling upon it to deposit the profit sharing bonus in court. The appeal filed by it was numbered as Miscellaneous Appeal No. 25/19 of 1964. The Additional Subordinate Judge, Jamshedpur, who heard the two appeals, dismissed the appeal filed by the company and partly allowed the appeal filed by the decree-holder by directing the Garnishee company to deposit a sum of Rs. 750 out of the gratuity money payable to the second respondent. Second Appeal No. 401 of 1967 arises out of M. A. No. 23/12 of 1964 and Second Appeal No. 402 of 1967 arises out of M. A. 25/19 of 1964. The question which arises in Second Appeal No. 401 of 1967, is whether the Garnishee company could at all be asked to pay out any sum as an amount of gratuity payable to the judgment-debtor.

6. I would like to dispose of this appeal first.

Second Appeal No. 401 of 1967:

7. It has been urged by Mr. L. K. Choudhary, appearing on behalf of the appellant that the payment of gratuity was discretionary and, therefore, until an

employees gets a right to receive the gratuity and the same is credited to the employees account, it does not become the property of the employee. No court has, therefore, the authority to call upon the employer company to grant an entitlement to an employee to receive gratuity. In the instant case, it was submitted that although the appellate court was fully conscious of the rules governing the payment of gratuity as framed by the appellant-company, yet it observed "... It must be presumed that in due course the form of application had been drawn up and submitted. It has also to be presumed that the necessary authority had accorded sanction for the gratuity amount because in the absence of any other evidence it will be presumed that the Officers of the company are efficient and carrying on duties assigned to them....."

Reference was also made to that portion of the appellate court's judgment wherein was observed that—

".....I quite agree that in the year 1960 when attachment before judgment was served the amount of gratuity may not have been sanctioned as it was too early. I, however, find from the record of the Execution case that a fresh attachment was issued on 30-1-1961 for attaching Rs. 750/- out of the gratuity money and unpaid wages of A. N. Chatterjee....."

It was, therefore, submitted that the order calling upon the appellant-company to pay a sum of Rs. 750/- out of gratuity amount of the judgment debtor was wholly illegal and without any basis.

8. The argument made on behalf of the appellant-company is sound and must be accepted. Rule 10 of the Retiring Gratuity Rules, 1937 framed by the appellant-company is to the following effect:—

"All retiring gratuity granted under these rules other than special gratuity to be paid under the provisions of Rule 22 hereof shall be at the absolute discretion of the company irrespective of whether an employee has or has not performed all or any of the conditions hereinafter stated, and no employee howsoever otherwise eligible shall be deemed to be entitled as of right to any payment under these rules".

Clearly the payment of gratuity to an employee was entirely at the discretion of the company and when the company categorically stated before the court that its employee A. N. Chatterjee (judgment-

debtor) was not entitled to payment of any gratuity, the Appellate Court could not presume facts and make an order like the one in question, on such presumption of facts.

The Retiring Gratuity Rules of the appellant-company came up for consideration in the case of Tata Iron & Steel Co. Ltd. v. Sudhir Chandra Sarkar (AIR 1969 Pat 53). After due consideration of the provisions thereof, Untwalia, J. as he then was, observed that (para 16):—

".....until and unless the Company has decided to pay the gratuity money, in accordance with Rule 7 or otherwise the mere fact of the employee becoming eligible to get it under Rule 6 does not create any right for the payment of gratuity under the Rules by enforcement of such a claim in a Civil Court. The matter of payment of gratuity is at the absolute discretion of the Company and the employee, however unfortunate the position may be under the modern stage of the society, is not entitled to claim it as a matter of right even though payment of gratuity under the Rules is an implied condition of service, yet the condition is further conditioned by the provisions made in the rules and is subject to them." In another decision in which again the appellant was the appellant, in the case of Tata Iron & Steel Co. Ltd. v. Sultan Khan Kabuli (AIR 1968 Pat 297), a learned single Judge had expressed the view that a gratuity until it is paid out to the employee, could not be treated as a property of the employee. Payment of gratuity could not be equated with salary or wages.

9. In my opinion, the view expressed in the above decisions are legal and valid. 'Gratuity', as the very word connotes, is a gratuitous payment, a sort of present made to an employee when the employer felt pleased with the employee's work. Such a thing cannot be claimed as of right nor could any one else, much less a court of law, compel the employer to pay a gratuity to its employee.

10. In the instant case, admittedly, when attachment before judgment was served in the year 1960, the judgment-debtor did not have any gratuity amount to its credit and when a fresh attachment was issued on 30-1-1961, the employer categorically stated that its employee Mr. A. N. Chatterjee was not entitled to the payment of any gratuity. The court below, therefore, erred in presuming the existence of gratuity money to the credit of the judgment-debtor and calling upon

the appellant to pay up that money in court.

11. Second Appeal No. 401 of 1967 is, therefore, allowed and the order passed in Miscellaneous Appeal No. 23/12 of 1964 by the Additional Subordinate Judge, Jamshedpur is set aside. The parties will bear their own costs throughout.

Second Appeal No. 402 of 1967

12. I now come to Second Appeal No. 402 of 1967. I have already stated the facts which led the case to be referred to a Full Bench.

13. I may, however, further state that both, the Execution Court as also the lower Appellate Court have held that the retention profit sharing bonus amounting to Rs. 1440 and odd was not a part of the employees' provident funds and on that ground alone they have held that the Garnishee company was liable to pay the said amount towards satisfaction of the decree.

Having regard, however, to the specific provisions contained in Rule 11, it is difficult to accept that reason as a valid one for the order. Sub-clause (b) of R. 11 clearly states that—"33 1/3 per cent of the bonus payable to each member of the Fund in accordance with the above Scheme shall be retained by the Company and shall be paid to the Trustees to be credited to the Fund in an account.....". R. 5 describes the composition of the Fund and clearly includes contribution of such a contingent nature, as the one laid under Rule 11, in it. It cannot, therefore, be argued with any logical justification that notwithstanding the said unambiguous rules, the retained profit sharing bonus was not a part of the provident fund account.

14. I now turn to a consideration of the question raised relating to the status of the rules and as to whether the protection granted under S. 10 of the Act would extend to the provident fund created under the Rules.

I have not been able to find any direct authority on the question and I think, it is a question of first impression. I have, however, been able to get some light from a decision of the Supreme Court in the case of *Mohmedali v. Union of India* (AIR 1964 SC 980), wherein the vires of S. 17 of the Act was under challenge. In that context their Lordships observed (at p. 983):—

"..... The Act has given sufficient indication of the policy underlying its provisions, namely, that it shall apply to all

factories engaged in any kind of industry and to all other establishments employing 20 or more persons. This Court has repeatedly laid it down that where the discretion to apply the provisions of a particular statute is left with Government, it will be presumed that the discretion so vested in such a high authority will not be abused. The Government is in a position to have all the relevant and necessary information in relation to each kind of establishment enabling it to determine which of such establishments can bear the additional burden of making contribution by way of provident fund for the benefit of its employees. The power to exempt given to the appropriate Government under S. 17 is not uncanalised because both cls. (a) and (b) of that section postulate that the exemption would be granted on ground that the employees of those establishments are already in the enjoyment of benefits in the nature of provident fund, pension or gratuity not less favourable to them than under the Act....."

Their Lordships have further observed (at p. 983):—

"..... The general rule as to the application of the Act has been laid down in that sub-section. By way of exception to that general rule, the appropriate Government has been authorised by S. 17 to exempt from the operation of all or any of the provisions of any scheme framed under the Act....."

Their Lordships, while dealing with the scope of S. 17 of the Act, observed at p. 984):—

"..... The exemptions are to be granted by the appropriate Government only if in its opinion the exempted establishment has provisions made for provident fund, in forms at least equal to, if not more favourable to its employee. In other words, the exemption is with as view to avoiding duplication and permitting the employees concerned the benefit of the pre-existing scheme, which presumably has been working satisfactorily, so that the exemption is not meant to deprive the employees concerned of the benefit of a provident fund but to ensure to them the continuance of the benefit which at least is not in terms less favourable to them. As the whole scheme of provident fund is intended for the benefit of employees S. 17 only saves pre-existing schemes of provident fund pertaining to particular establishments....."

The observations quoted above indicate three things:—

(1) The exemption under S. 17 is incorporated in the Act for getting better benefits for the employees of an establishment;

(2) The exemption is granted with a view to avoiding duplication, that is to say, for framing a scheme by the appropriate Government on the line as framed by the establishment itself; and

(3) that the exemption is not meant to deprive the employees concerned of the benefit of a provident fund, but to ensure to them the continuance of the benefit.

15. Bearing these in mind when I look at S. 17 of the Act, its purpose is the same as that of a scheme under the Act. The Scheme under the Act is that an employee and the employer, both will contribute to the fund standing to the credit of a member, which is meant specifically for the benefit of the member. The further benefit which the Act provides to the fund under the scheme is laid under S. 10 of the Act which makes the amount standing to the credit of any member in the fund immune from attachment under any decree or any order of any court in respect of any debt or liability incurred by the member. Sec. 17 also has the same purpose, but with this difference that whereas under the Act, the appropriate Government has framed the scheme itself, but now the scheme is permitted to be framed by the concerned establishment. The appropriate Government thereafter, only tests as to whether it is more beneficial to a member than what he would have got under the scheme of S. 6 of the Act, or what he would have got in an establishment of a like nature. If the appropriate authority is satisfied that the scheme is one such which fulfils these requirements, a stamp of approval is put on the scheme. Thus, the purpose of the exemptions under S. 17 is only to ensure a scheme better than the one under S. 6 of the Act and better than one offered by an establishment of of similar nature. The further purpose is labour saving; that is to say, the labour of framing the scheme is cast on the establishment, the appropriate Government reserving to itself the right of approval of the scheme. S. 17 is thus only an extension of the scheme under the Act, whereby, in order to avoid duplication, if the appropriate Government is satisfied that the scheme framed by the concerned establishment, in regard to the rules of its provident fund regarding the rates of contribution etc. are not less favourable than those specified in S. 6 of

the Act or as available in any other establishment of like nature, authorises the establishment to substitute its own scheme in place of a scheme framed by the appropriate Government. Both the schemes are, however, schemes under the Act.

It must be borne in mind that notwithstanding the exemption granted under S. 17 of the Act, the appropriate Government does not lose its hold over the scheme framed by the establishment. There are built in safeguards in S. 17 itself to protect the interest of the member. These built-in safeguards also lend support to the conclusion that a scheme prepared and enforced by an establishment, which has been granted the exemption in terms of S. 17 of the Act, is only an extension of the scheme under the Act and thereby being a scheme under the Act.

In my opinion, therefore, notwithstanding the fact that the scheme has been prepared by an establishment concerning its employees, it is very much a scheme under the Act. It would then logically follow that the benefits which the Act confers on the members of the fund under the scheme drawn up by the appropriate Government will also be available to the members under the scheme framed by an establishment which has been exempted under S. 17 of the Act and which scheme has been approved by the appropriate authority. May be that under the scheme framed by the establishment, the sources of contribution to the fund do not remain limited to the salary, the dearness allowance and retaining allowance, as laid under S. 6 of the Act, but all the same, if the appropriate Government is satisfied that the scheme laid by the establishment, in regard to the provident fund of the concerned employees, was not less favourable than those specified under S. 6 of the Act or those available to an employee in an establishment of like nature, it would be deemed to be a scheme under the Act. I, therefore, think that the scheme prepared by the appellant company, on getting exemption under S. 17 of the Act, which scheme had also been approved by the appropriate authority, has the same statutory force as a scheme under the Act. It, therefore, further follows that the protection against attachment as laid under S. 10 of the Act, applies to such scheme also.

16. I will accordingly answer the question raised, in the following manner:—

(1) the protection granted by S. 10 of the Act extends to a fund created under a scheme framed by an establishment exempted under S. 17 of the Act;

(2) such protection extends to all the components which go to make up the fund established under the scheme; and

(3) the decisions in the cases of Prabunath Prasad v. M/s. Tata Iron & Steel Co. Ltd. (M. A. 336 of 1965 decided on 3rd July, 1968) and in the case of Jainarain v. The Controller of Accounts, Tata Iron and Steel Co. Ltd. (M. A. No. 163 of 1967 decided on 15-1-1969) are correct and legal.

17. In view of the conclusions to which I have arrived, I hold that the retention profit sharing bonus being a part of the provident fund account of the judgment-debtor employee, could not be attached in satisfaction of the decree for money against him, the employee of that company and, therefore, the appellant-company could not be directed to deposit the same in court. The orders of the courts below are set aside. Second Appeal No. 402 of 1967 is allowed. The parties will, however, bear their own costs.

HARI LAL AGRAWAL, J.:— I agree.

B. S. SINHA, J.:— I agree.

Appeals allowed.

AIR 1982 PATNA 136

B. P. JHA, J.

Hansdeo Singh, Petitioner v. Ghura Singh and another, Respondents.

Civil Revn. No. 1379 of 1981, D/- 31-3-1982.*

(A) Civil P. C. (1908), S. 115 Provisos (a) and (b) — Revision — Interference — Acceptance of written statement at end of trial — Not question of jurisdictional error — High Court while exercising its jurisdiction under S. 115 cannot interfere.

Acceptance of the written statement by the court below at the end of the trial itself is not question of jurisdictional error and, hence, the same cannot be interfered with in exercise of revisional powers under S. 115. The action of the Court may be improper but the question of propriety cannot be looked into by the High Court while exercising the civil revisional jurisdiction under S. 115. The High Court while exercising civil revisional jurisdiction can decide the ques-

*Against order of B. N. Shahi, Munsif, Sasaram, D/- 20-7-1981.

tion if the Court below has acted without jurisdiction. AIR 1966 SC 153. Rel. on.

(Paras 2, 3)

Further, as the Court below had not finally disposed of the suit the High Court would not interfere with the order in question. S. 115 Proviso (a) would bar the jurisdiction of the High Court.

(Para 3)

Furthermore, S. 115 Proviso (b) would not apply to such case as by allowing defendant to file the written statement it would cause no irreparable injury to the plaintiff nor there would be any occasion of failure of justice. The plaintiff would be entitled to file a fresh amended plaint and lead evidence to rebut the allegations mentioned in the written statement.

(Para 3)

(B) Civil P. C. (1908), O. 8, R. 1; S. 115 — Acceptance of written statement at the end of trial after granting extension several times to defendant to file written statement — Not without jurisdiction — Court is entitled to accept the written statement at the end of trial to check abuse of process of Court and in the interest of justice— No interference under S. 115.

(Para 6)

Cases Referred: Chronological Paras
AIR 1966 SC 153 2

Devendra Prasad and Chittaranjan Sinha, No. 1, for Petitioner; Murli Manohar Prasad and Mrs. Kusumlala Sinha (for No. 1) and Yugal Kishore (for No. 2), for Respondents.

ORDER:— This petition arises out of an order dated 20-7-198..

2. By this order, the court below allowed defendant No. 1 to file the written statement at the end of the trial. I must say in the beginning that the court below ought not to have extended the time for filing written statement. However, in this case the only point which arises for determination is: whether the court has acted without jurisdiction? I must answer this question in the negative. The Court has jurisdiction to allow defendant No. 1 to file the written statement at the end of the trial. As such it is not a question of jurisdictional error. The Supreme Court has consistently held that the error of the fact or law, however, gross may be unless such errors have relation to the jurisdiction of the Court to try the dispute itself, cannot be corrected (see Pandurang Dhondi Chougule v. Maruti Hari Jadhav, AIR 1966 SC 153). The Supreme Court has also held in Pandurang Dhondi Chougule v. Maruti Hari Jadhav (AIR 1966 SC 153) that the High Court

cannot interfere while exercising its jurisdiction under S. 115, correct errors of fact, however, gross they may be, or even errors of law. The Supreme Court further held that it can only do so when the said errors have relation to the jurisdiction of the Court to try the dispute itself. Relying on this decision of the Supreme Court I hold that merely because the court allowed acceptance of the written statement at the end of the trial this fact itself is not a question of jurisdictional error. The action of the court below may be improper but the question of propriety cannot be looked into while exercising the civil revisional jurisdiction.

3. The High Court while exercising civil revisional jurisdiction can decide the question if the court below has acted without jurisdiction. In my opinion, the civil revision itself is not maintainable under the proviso (a) to S. 115 of the Civil Procedure Code. In my opinion, by this order the court below has not finally disposed of the suit or other proceeding and in such a case the High Court shall not interfere with the order in question. I, therefore, hold that proviso (a) of Section 115 bars the jurisdiction of the High Court. Proviso (b) of S. 115 does not apply to this case as by allowing defendant No. 1 to file the written statement it will cause no irreparable injury to the plaintiff nor there will be any occasion of failure of justice. The plaintiff is entitled to file a fresh amended plaint at this stage and lead evidence to rebut the allegations mentioned in the written statement of defendant No. 1.

4. Defendant No. 1 is the main defendant in the case. If he is not allowed to file the written statement then there will be no decision in accordance with law.

5. This petition is also not maintainable under S. 115 (1) of the Code of Civil Procedure as the subordinate court has not decided any case. By this order the Court has only directed defendant No. 1 to file written statement at a late stage.

6. Learned counsel for the petitioner contends that the court below after having granted (extension?) several times to defendant No. 1 to file written statement cannot after the case having been taken up and the plaintiff having closed his case and almost all the witnesses of defendant No. 2 having been examined, accept the written statement at this stage. I am unable to accept the contention of the learned counsel for the petitioner. Under O. 8, R. 1 of the Civil P. C. the Court has been empowered to extend time for filing writ-

ten statement and the court can accept the written statement even at the end of the trial. The Court is entitled to accept the written statement at the end of trial to check abuse of process of the court and in the interest of justice. Therefore, in my opinion, there is no illegality in exercising the jurisdiction vested in the court below. The Court acted within its jurisdiction in passing this order. I am, therefore, unable to interfere with the order in question.

7. In these circumstances the civil revision petition itself is not maintainable and as such I dismiss the petition filed by the petitioner.

8. In the result the civil revision petition is dismissed. The parties shall bear their own costs. The court below is, however, directed to dispose of the suit as early as possible.

Petition dismissed.

AIR 1982 PATNA 138

B. P. JHA, J.

Badri Narain Prasad Sah and others,
Petitioners v. Bansidhar Prasad and
others, Respondents.

Civil Revn. No. 183 of 1975, D/- 15-3-1982.*

Civil P. C. (1908), O. 22, Rr. 3, 4 — Abatement of suit — Limitation — Some of heirs of deceased already on record — Question of limitation does not arise in bringing other remaining heirs on record — Held, question of abatement would not arise. AIR 1971 SC 742 and AIR 1975 SC 733, Rel. on. (Para 2)

Cases Referred: Chronological Paras

AIR 1975 SC 733 2

AIR 1971 SC 742 2

Kailash Roy and Mukteshwar Singh, for Petitioners; Shreenath Singh, K. N. Choubey, Ripudaman Pd. Sinha and S. C. Dubey (for Nos. 1 to 4) and Upendra Prasad (for Nos 7 & 11 to 14), for Respondents.

ORDER:— This Civil Revision has been filed by the defendants against an order dated 6-12-1974.

2. This matter arises out of an abatement matter. Defendant No. 3 Kedar Prasad Sah died on 9-2-1970 and his three sons, defendants 10 to 12 were already on the record of the suit. It is stated that his

widow and daughters were not brought on the record within the period of limitation. In this connection the Supreme Court held in Mahabir Prasad v. Jage Ram (AIR 1971 SC 742) that the question of abatement does not arise in a case where some of the heirs of the deceased are already on the record. It is necessary to quote paragraph 6 of the judgment of the Supreme Court which runs as follows:

"Even on the alternative ground that Mahabir Prasad being one of the heirs of Saroj Devi there can be no abatement merely because no formal application for showing Mahabir Prasad as an heir and legal representative of Saroj Devi was made. Where in a proceeding a party dies and one of the legal representatives is already on the record in another capacity, it is only necessary that he should be described by an appropriate application made in that behalf that he is also on the record, as an heir and legal representative. Even if there are other heirs and legal representatives and no application for impleading them is made within the period of limitation prescribed by the Limitation Act the proceeding will not abate. On that ground also the order passed by the High Court cannot be sustained."

In a case of this type the appellants will file an application to that effect that the heirs of the deceased are already on the record. In the present case such application was filed before the trial Judge. It is a settled law that if some of the heirs of the deceased are already on the record then the question of limitation does not arise in bringing the other remaining heirs on the record. The view of the Supreme Court was also upheld in Harihar Prasad Singh v. Balmiki Prasad Singh (AIR 1975 SC 733). (See the last portion of paragraph 34 of the judgment). Relying on the two decisions, I hold that the question of abatement does not arise in the present case and the order passed by the court below is a correct one.

3. I must say that the learned Subordinate Judge, Janki Prasad Sinha, has written a very good order in a short compass in an intelligent manner.

4. In the result, the petition is dismissed but without costs.

Petition dismissed.

*Against order of J. P. Sinha, Sub. Judge, Buxer, D/- 6-12-1974.

AIR 1982 PATNA 139**BIRENDRA PRASAD SINHA, J.**

Maya Devi and others, Appellants v. Bhishma Sharma and others, Respondents.

A.F.A.O. No. 92 of 1981, D/- 15-3-1982.*

Civil P. C. (1908), S. 100, O. 41, Rr. 27, 28 — Second appeal — Case sent back to first Appellate Court for decision in light of observation made in judgment — First Appellate Court cannot remand case to trial Court for decision after taking additional evidence.

Where on second appeal the judgment and decree passed by the lower Appellate Court was set aside and the case was sent back for a decision in accordance with law and in the light of the observations made in the judgment, the first Appellate Court could not after hearing the parties set aside the judgment and decree, passed by the trial Court and remand the case for a fresh decision by the trial Court after taking additional evidence. The first Appellate Court can after recording additional evidence consider the evidence on the record and come to any finding but for the purpose of admitting additional evidence he cannot set aside judgment and decree of the trial Court. It is open to him to follow the procedure laid down in O. 41, R. 28 directing the trial Court to take such evidence and send it back to him. (Para 3)

Kailash Roy and Binod Kumar Ray, for Appellants; Guru Sharan Sharma, for Respondents.

JUDGMENT:— Plaintiff's Title Suit No. 548/71 of 1968/70 was dismissed by Additional Munsif Motihari on 28th July, 1973. He filed an appeal, which was disposed of by the 1st Additional District Judge, Motihari on 28-3-1981. The appeal was also dismissed and the plaintiff preferred a Second Appeal in this court, which was registered and numbered as Second Appeal No. 348 of 1975. The second appeal was allowed by this court on 9th Feb., 1979 and the judgment and decree passed by the lower Appellate Court was set aside. The case was sent back for a decision in accordance with law and in the light of the observations made in the judgment. When the matter went back to the learned Additional District Judge he heard the parties and by his judgment dated 28th of March, 1981.

*From decision of B. K. Dubey, Addl. Dist. J., East Champaran, Motihari, D/- 28-3-1981.

set aside the judgment and decree, passed by the trial Court and remanded the case for a fresh decision by the trial Court after taking additional evidence. The defendants Nos. 1 and 2 (defendants first party) have filed this Miscellaneous Appeal against this order, passed by the learned Additional District Judge.

2. The question is as to whether the learned Additional District Judge could set aside the judgment and decree of the trial Court and remand the case to the trial Court for a fresh decision after taking additional evidence in the case. The answer must be in the negative. It has been contended by Mr. Kailash Roy, learned counsel appearing on behalf of the appellant that the lower Appellate Court, to whom the case was remanded by the High Court for a fresh decision in accordance with law, cannot pass an order like this and set aside the judgment and decree of the trial Court for the purpose of taking additional evidence in the case.

3. It appears that an application under O. 41, R. 27 had been filed before the learned Additional District Judge on behalf of the plaintiff praying that the plaintiff may be allowed to adduce some additional evidence. The prayer was allowed on 4-7-1980. When the appeal was taken up for final hearing it was submitted on behalf of the plaintiff that some fresh important materials were also to be taken in evidence by way of documentary evidence. The learned Additional District Judge thought that it was better that the trial Court gave a fresh judgment instead of recording additional evidence and sending the records to the court of the Additional District Judge. In these circumstances, the learned Additional District Judge set aside the judgment and decree passed in the suit and remanded the case to the trial Court for a fresh decision after recording additional evidence. The reason, which has been given by the learned Additional District Judge for setting aside the judgment and decree of the trial Court and remanding the case for a fresh decision is, in my opinion, wholly inappropriate. Order 41, R. 27 provides that the parties to an appeal shall not be entitled to produce additional evidence in the appellate Court, but if the trial Court has refused to admit any evidence, which ought to have been admitted or the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not

within his knowledge or could not be produced by him after exercise of due diligence at the time when the decree was passed or the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, the appellate Court may allow such evidence or document to be produced or witness to be examined. This Court, while remanding the case had made certain observations and had directed the learned Additional District Judge to decide the case in accordance with law. It may be open to the learned Additional District Judge to take additional evidence in the case, which he had rightly allowed by his order dated 14-7-1980 for the purpose of giving a fresh decision, but to set aside the judgment and decree of the trial Court for the purpose of admitting additional evidence is an unknown procedure which has been followed by the learned Additional District Judge. The learned Additional District Judge, after recording additional evidence may consider the evidence on the record and come to any finding. But for the purpose of admitting additional evidence he cannot set aside judgment and decree of the trial Court. It was open to him to follow the procedure laid down in O. 41, R. 28 of C.P.C. directing the trial Court to take such evidence and send it back to him.

4. That being the position, this appeal has to be allowed and the judgment under appeal is set aside. The learned Additional District Judge shall proceed to decide the appeal in accordance with law. There shall be no order as to costs. Let the records be sent down immediately.

Appeal allowed.

AIR 1982 PATNA 140

(RANCHI BENCH)

LALIT MOHAN SHARMA AND

SATYESHWAR ROY, JJ.

M/s. Barakar Engineering & Foundry Works Ltd., Appellant v. Union of India, Respondent.

A. F. O. D. No. 1187 of 1971, D/- 18-2-1982.*

Railways Act (1890), Section 80 (b) (as amended by Act 39 of 1961) — Suit for damages against Railway for non-delivery of consigned goods — Suit filed against Railway administration on which

*From decision of H. D. Banerjee, Sub. J., Dhanbad, D/- 3-6-1971.

EZ/EZ/B903/82/AGM/SNV

destination station lay — Railway administration on which consignment was booked not included as party — Suit is maintainable. AIR 1973 Madh Pra 145, Rel. on. (Civil P. C. (1908), O. 1, R. 9).

(Para 6)

Cases Referred : Chronological Paras
AIR 1973 Madh Pra 145 6

S. K. Mazumdar, for Appellant; D. K. Sarkar, for Respondent.

JUDGMENT :— The appellant filed a suit for a decree for Rs. 16,900/- besides interest and costs against the Union of India representing North-East Frontier Railway on the allegation that a part of the goods booked by it for carriage by railways was not delivered.

2. According to the plaintiff's case, certain steel goods were booked in two wagons from Khusri Pandra Branch siding on the Eastern Railway to Dimapur Manipur Road on the North-East Frontier Railway. Goods of one of the wagons were duly delivered but those in Wagon No. NRDC 65129 Invoice No. 12, never reached the destination and the total goods in that wagon remained undelivered. The plaintiff lodged his claim on 9-8-1965 before the CCS, N. F. Railway, Pandu and the Garrison Engineer, Dimapur who was the consignee also made a claim. Since the railway authorities did not respond, the suit had to be brought after service of notice under Sec. 80 of the Civil P. C. The amount claimed represented the price of 13 M. Tonnes of fabricated steel structures which were not delivered.

3. The Union of India filed a written statement indicating that it was appearing for self and on behalf of North-East Frontier Railway and denied the liability. Both sides led evidence and the learned Subordinate Judge decided the merits of the claim in favour of the plaintiff. This finding has not been challenged as erroneous before us by the learned counsel for the respondent.

4. Further the court below held that as the plaintiff failed to prove that the loss occurred on the North-East Frontier Railway, the suit has to be dismissed in absence of the Eastern Railway as a party to the suit on which the consignment was booked. The plaintiff has now appealed.

5. Mr. S. K. Mazumdar appearing for the appellant has contended that the learned Subordinate Judge committed a serious error in not taking into account the amended provisions of S. 80 of the

Railways Act as amended by Act 39 of 1961 and in relying upon the decisions given earlier on the basis of the old section. The argument appears to be well founded.

6. Before 1961 amendment, the section provided for institution of a suit against the railway administration where either the consignment was booked or the loss actually occurred. After the amendment, the plaintiff had been allowed to file his suit, apart from the administrations contemplated by the old section against the railway administration on whose railway the destination station lies. The language of cl. (b) of S. 80 as it now stands is clear in this regard and no other condition for the maintainability of suit has been prescribed. The decisions given earlier before the section was amended have no application now. Our view is supported by the decision in *Firm Kaluram Ram Narayar, Bilaspur v. Union of India*, (AIR 1975 Madh Pra 145). The present suit was filed in 1968. The decision of the court below without examining the amended section is wholly illegal and has to be set aside and it has to be held that the suit filed against the North-East Frontier Railway on which the destination station lies is maintainable.

7. In the result, this appeal is allowed, the decision of the court below is set aside and the suit is decreed with pendente lite and future interest and costs of both courts.

Appeal allowed.

AIR 1982 PATNA 141

LALIT MOHAN SHARMA AND

P. S. SAHAY, JJ.

Shiv Shankar Prasad Singh and others, Petitioners v. State of Bihar and others, Respondents.

Civil Writ Jurn. Case No. 3845 of 1981, D/- 12-3-1982.

Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act (12 of 1962), S. 45B — Reopening of proceedings under — Collector not having any material before him — He did not indicate as to whose age he wanted to examine — Fresh enquiry unwarranted. Case law discussed. (Para 5)

Cases Referred : Chronological Paras
(1981) CWJC No. 384 of 1981, D/- 16-4-1981 (Pat), *Thakur Ram Jankiji v. State of Bihar*

ILR (1979) 58 Pat 989

5

Kamal Nayan Chaubey and R. P. Sinha, for Petitioners; Surendra Narain Jha, Standing Counsel No. 2 and Rajendra Jha, Jr. Counsel to Standing Counsel No. 2, for the State.

ORDER:— By this writ application, the petitioners have challenged the order contained in Annexure '7' passed by the Collector (Respondent No. 2) under Section 45B of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (hereinafter referred to as 'the Act').

2. A proceeding under the provisions of the Act in regard to the land belonging to the petitioners was started several years back and the Anchal Adhikari, Ramgarhwa and Anchal Adhikari, Raxaul (Respondents 4 and 5) had appended genealogical tables as in Annexures 1 and 1/A to their verification reports giving the names of the land holders. After the matter was examined by the respondent No. 3, the Additional Sub-divisional Officer, Motihari, the order in Annexure-4 was passed wherein he granted six units for Shiv Shankar Prasad Singh and his four sons Bishwanath Singh, Chandra Kishore Singh, Purushottam Singh and Umesh Singh, and his grandson Ajay Singh son of Bishwanath Singh. A perusal of Annexure-4 indicates that he rejected the claim of Abhoy Kumar Singh, Digvijay Kumar Singh and Sanjay Kumar Singh sons of Chandra Kishore Singh to separate units on the ground that they were minors on due date. In this way, the petitioners were allowed to keep 150 acres of land. Since the total area of the land was more, the balance area was declared surplus. This proceeding thus concluded in 1976. There was no appeal or revision filed against this order. In 1981, the matter was attempted to be reopened for re-examination under the amended provisions of Sec. 45B of the Act and a show cause notice was served on the landholders. Thereafter, the petitioner No. 1 appeared in the proceeding. According to the petitioner, notice was served only on him. The matter was heard and by the impugned order in Annexure-7, the Collector has decided to reopen the proceeding. The petitioners have challenged the order as illegal.

3. Mr. Kamal Nayan Chaubey has contended that there was no fresh material available before the authority on the basis of which he could have considered the availability (advisability) of reopen-

ing the proceeding. The learned counsel has further said that perusal of the earlier order passed in the proceeding indicates that the question of age was pointedly considered before passing final orders concluding the proceedings. In these circumstances, the proceeding cannot be reopened. Mr. Chaubey has also relied on the statements in a rejoinder petition filed by the petitioners to which the certificates of the Bihar Secondary School Examination in regard to six adult members of the family have been attached. The said rejoinder petition appears to have been misplaced and is not available now, but the learned State counsel affirms that a copy of the said petition was served on him. Mr. Chaubey has produced before us photostat copies of the aforesaid certificates which indicate that even the youngest adult member of the family who has been allowed a unit was born on 7-4-1950, which means that he was correctly allowed a separate unit. In these circumstances, it is contended that the impugned order should be quashed.

4. Mr. Brajendra Jha, junior counsel to S. C. II, appearing on behalf of the respondents, has relied on the statements in the counter-affidavit filed on behalf of the respondents 1 to 6 and has attempted to support the order.

5. We have gone through the impugned order in extenso. It appears that the Collector did not have before him any material calling for reopening of the proceeding. He has, therefore, not been able to indicate as to whose age he wants to re-examine. It is futile to suggest that Sheo Shankar Prasad Singh grandfather of Ajay Singh or some of his sons could not be entitled to separate units as it is absurd to assume that they also were not major on the due date. Since the Collector has not indicated as to whose age he is doubting, the impugned order indicates an attempt to start a fishy enquiry which cannot be permitted under the section. The object and scope of the section has been examined by this court in several decisions, including those in CWJC No. 1925 of 1979. S. N. Ghose v. The State, disposed of on 24-10-1979 (reported in ILR (1979) 58 Pat 989) and CWJC No. 384 of 1981 Thakur Ram Janakiji v. State of Bihar, disposed of on 16-4-1981. The power under the section has to be exercised sparingly and for adequate reasons and the proceeding concluded earlier cannot be reopened merely for verifying whether the orders were

correctly passed. There should be some reason present before the authority in the shape of some material justifying an action. This is completely lacking in the present case. Further, the aforesaid certificates indicate that the earlier orders must have been passed correctly.

6. For all these reasons the impugned order in Annexure-7 is quashed and the writ application is accordingly allowed, but without costs.

Petition allowed.

AIR 1982 PATNA 142

LALIT MOHAN SHARMA AND
RAMCHANDRA PRASAD SINHA, JJ.

Sudhindra Chandra Mallik, Petitioner
v. State of Bihar and others, Respondents.

Civil Writ Jurn. Case No. 1216 of 1981
(R), D/- 26-3-1982.

(A) Constitution of India, Art. 226 — Writ petition — Interested party — Petition for declaration of a school sought to be nationalised, as 'minority' school — Teacher in school is interested party in dispute — If the school is held to be a nationalised one, the terms and conditions of his service including his right of pension will be as those of rest of the teachers in the State working in the nationalised schools. (Para 5)

(B) Constitution of India, Art. 226 — Writ petition — Addition of party — Authority to do so is included in Art. 226 — S. 141 of C. P. C. cannot be a bar in doing so. (Civil P. C. (1908), S. 141). (Para 5)

(C) Constitution of India, Art. 226 — Writ petition — Impleadment of parties — Petition for declaration of a school as 'minority' school — Every person who may be somehow interested in the result thereof, cannot be impleaded as a party specially where the case is like the instant one in which an unknown large number of people are bound to be interested in the question to be determined. (Para 7)

(D) Constitution of India, Art. 166 — Order by or on behalf of the State — What is not.

Where the materials on record indicated that the draft order although expressed in the name of the Governor of Bihar and signed by the Deputy Secretary, was not issued so as to be an effective order and remained in the records without be-

ing communicated to any person interested in the matter it could not be said to be an order by or on behalf of the State. AIR 1963 SC 395, AIR 1961 SC 493 and 1969 Pat LJR 177, Foll. (Para 9)

(E) Constitution of India, Art. 30 — Party claiming institution to be minority institution — Burden of — Nature of.

For the application of Article 30 it is necessary that an institution is proved to have been "established" as well as "administered" by minority. The two terms have been used in the Article conjunctively and the burden lies on the party asserting the institution to be a minority institution to prove both the facts. (Para 14)

(F) Constitution of India, Art. 30 — The right under Art. 30 can be lost and it is also possible to surrender the same. (Para 15)

(G) Bihar Private Secondary Schools (Taking Over of Administration and Control) Ordinance (1980), S. 3 — Order negating claim as to school being minority school set aside and matter remanded for fresh decision by Govt. — Management of school as nationalised school till decision is not rendered illegal as all schools except minority schools stand automatically nationalised without any notification. (Para 21)

Cases Referred : Chronological Paras

(1982) CWJC No. 1288 of 1981 (R), D/- 4-2-1982 (Pat), Ananta Narayan Mukhopadhyay v. Union of India	7
(1980) CWJC No. 534 of 1980 (R), D/- 10-10-1980 (Pat)	3, 8, 11
AIR 1979 SC 193 : 1979 Serv LJ 332 : (1979) 1 Serv LR 1 : 1978 Lab IC 1672	11
AIR 1977 SC 629 : (1976) 3 SCC 242 : 1977 Lab IC 281	10
AIR 1977 Pat 12	16
(1976) CWJC No. 23 of 1976 (R), D/- 14-9-1976 (Pat)	3, 8
AIR 1974 SC 1389	15
AIR 1974 SC 1755 : 1974 Serv LJ 576 : 1974 Lab IC 587	7
1974 Serv LJ 515 : 1973 WLN 892 (Raj)	11
AIR 1973 Pat 101	15
AIR 1971 SC 1737	16
AIR 1970 SC 2079	16
AIR 1969 SC 465	16
AIR 1969 Ker 191	15
1969 Pat LJR 177 : 1969 BLJR 482	9
AIR 1968 SC 662	14, 15
AIR 1964 SC 72	10
AIR 1963 SC 395	9

AIR 1962 Pat 101 (FB)	16
AIR 1961 SC 493	9
AIR 1961 SC 1402	15

B. C. Ghose, S. B. Sinha, M. K. Laik, V. S. Prasad and T. Sen, for Petitioner; Shreenath Singh, K. K. Sahay, S. N. Singh, T. Bodra, Govt. Pleader No. 2 and B. S. Lal, Jr. Counsel to Govt. Pleader No. 2, for Respondents.

LALIT MOHAN SHARMA, J.:— The question raised in this case is whether the Dhanbad High School is a minority school based on language. The petitioner, who claims to be the President of its Managing Committee, claimed it to be so and in the writ application, as originally filed, prayed for a writ of mandamus directing the State and certain authorities, impleaded as respondents, to publish the order passed in August, 1978, as contained in Annexure '9', and to declare the school as a linguistic minority school in accordance with Sec. 69 of the Bihar Secondary Education Board Act, 1976 (hereinafter referred to as the 1976 Act). The petitioner also challenged the notification dated 27-7-1981, Annexure '14', purporting to take over the school under the provisions of S. 3 of the Bihar Private Secondary Schools (Taking Over of Administration and Control) Ordinance, 1980 (hereinafter referred to as 'the 1980 Ordinance'). The case was placed for admission on 5-8-1981 when three persons appeared and wanted to oppose the writ application. The case was admitted under the orders of a learned single Judge on the same day, but the prayer for stay was rejected. The interveners were granted permission to be heard at the time of final hearing of the case. They will be referred to hereafter as the interveners. The petitioner went to the Supreme Court against this Court's order rejecting his prayer for stay and it is his case that while a counter affidavit was filed on behalf of the State there, he learnt about an order dated 23-6-1981 passed by the Education Commissioner, on the basis of a report by the Special Secretary, respondent No. 8, as contained in Annexure '16', holding that the petitioner's claim is not correct. He, therefore, filed a petition in the present case for amendment of the writ application by adding a relief for declaring Annexure '16' as without jurisdiction and for quashing the same and for restraining the respondents from interfering with the management of the school. The Supreme Court dismissed the petitioner's application, but observed that the case

should be taken up for final hearing before 17-1-1982. Accordingly, the case was taken up for hearing by my learned brother Mr. Justice R. C. P. Sinha singly on 15-1-1982. The application for amendment of the writ petition, referred to above, was filed at that stage. Mr. Justice Sinha, after hearing the case for some time, referred it to a Division Bench. Steps for preparing the case for hearing before a Division Bench were, thereafter, taken expeditiously and it was directed to be heard on 4-2-1982. One Hargouri Prasad Singh filed a petition in person for being added as a party respondent to the case. His application as also the petitioner's application for amendment of the writ petition were directed to be placed for orders along with the final hearing. Several counter affidavits and further affidavits were also filed by the parties. The case was taken up for hearing on 4-2-1982 and it was concluded on 12-2-1982. Since the deputation of my learned brother at Ranchi was only till that date, learned counsel for the parties stated that the judgment could be delivered at Patna when I went back.

2. The petitioner's case, as made out in the writ application, is that the Bengali residents of Gobindpur, which was earlier the sub-divisional headquarters, established the school as a middle school under the leadership of Sri J. C. Mallick, the grandfather of the petitioner. The sub-divisional headquarters were shifted to Dhanbad in or about 1919 and the school was also shifted to Dhanbad. Sri Mallick was the founder Secretary of the school and continued as the Secretary of the Managing Committee till his death. In or about 1912 the middle school was upgraded up to the high school standard. After the death of Sri J. C. Mallick, in or about 1939 his son Sri H. C. Mallick was appointed as the Secretary and he continued as such till his death in 1949. His son, the present petitioner, has been holding the post of Member/President of the Managing Committee of the school since 1974. It has been asserted that the control of the school has always been in the hands of the Bengali speaking minority and a number of annexures have been relied upon as the proof thereof.

3. The petitioner further referred to S. 69 of the Bihar Secondary Education Board Ordinance, 1975 which saved the religious or linguistic minority schools from its operation. Sub-sec. (2) of S. 69 of the Ordinance directed the Secondary Board, established under S. 3 of the Or-

dinance, to decide the questions relating to the minority nature of the school in accordance with the provisions of Articles 29 and 30 of the Constitution of India. It was also provided that the State Government could be moved against the decision of the Board, and the State's decision in that regard would be final. The aforesaid S. 69 of the Ordinance was retained in the 1976 Act which followed. As the provisions of the Act were illegally attempted to be applied to the school in question, the Secretary of its Managing Committee Sri B. N. Singh Choudhury requested the Board to hold the school as a minority one and on failure thereof moved this Court in CWJC No. 23 of 1976 (R) in April, 1976. This Court by an order dated 14-9-1976, as contained in Annexure 3, directed the Secondary Education Board to dispose of the petitioner's application before it under S. 69 of the said Ordinance. In para 47 of the writ application it has been mentioned that the petitioner came to learn that the Education Minister Janab Ghulam Sarwar passed an order, on the basis of certain recommendations made by some State officer, to declare the school in question as a linguistic minority institution and an order in the name of the Governor of Bihar was passed in Aug. 1978, as contained in Annexure '9'. A direction was also given for its publication in the official gazette, but the same was not complied with and the petitioner filed another writ application in this Court which was registered as CWJC No. 534 of 1980 (R) and was disposed of on 10-10-1980 on the terms as mentioned in Annexure '12'. The Board of Secondary Education had been abolished by then, and all the schools had been nationalised. The State Government was directed to dispose of the petitioner's application filed earlier, claiming minority nature of the school, within six months thereof. The interveners, who have appeared before this Court, were allowed to take part in the enquiry. Accordingly, respondent No. 9 Sri V. S. Dubey, Director, Public Instruction and Special Secretary, Education Department, Government of Bihar (hereinafter referred to as 'the Director') heard the petitioner and the interveners in Jan. 1981, but no orders were passed for several months and later the impugned notification as contained in Annexure '14' was issued. In these circumstances, the petitioner had to come to this Court again by the present writ application.

4. In his amendment petition, the petitioner stated as to how he learnt about the enquiry report of the Director as mentioned in Annexure '16' and that he had been advised to further pray for quashing Annexure '16'.

5. In his application for addition as a respondent in the case, Hargouri Prasad Singh has stated that he is a teacher in the school, and since he is bound to be affected by the decisions in this case, he is a necessary party. Sri Shreenath Singh besides appearing for the intervenors has also appeared for him and contended that all these persons as also seven other intervenors, who had been heard by Sri Dubey before passing Annexure 16, are necessary parties and the writ application is liable to be dismissed in their absence. According to the learned counsel, even after adding Hargouri Prasad Singh as a party and hearing the other three intervenors, the defect is not cured as the other seven intervenors are not before this Court. With respect to the interest of Hargouri Prasad Singh, it has been urged, and it appears to me rightly, that he as a teacher of the school is certainly interested in the dispute as to who is his employer. If the school is held to be a nationalised one, the terms and conditions of his service including his right of pension will be as those of rest of the teachers in the State working in the nationalised schools. I, therefore, hold that he is a proper party fit to be added as a respondent. Sri B. C. Ghose opposed the application on the ground that the provisions of O. 1, R. 10 of the Civil P. C. (hereinafter referred to as 'the Code') are not applicable to writ petitions as expressly declared in S. 141 (Explanation) of the Code. Sri Singh may not be right in pressing his application for addition under O. 1, R. 10 of the Code, but it is not correct to suggest that a party cannot be added to a proceeding for writ. Authority to do so as also to pass other necessary orders for the disposal of the proceeding in accordance with law including the power of substitution, calling for the records from any inferior tribunal etc. are all necessarily included in Art. 226 of the Constitution itself. In the circumstances, I add Hargouri Prasad Singh as the 10th respondent.

6. During the hearing of the case, it was made clear to the parties that they must address their arguments on the assumption that the prayer for amendment

of the writ application as also the application for addition of Hargouri Prasad Singh had been allowed. Sri S. B. Sinha, learned counsel for the petitioner, Sri Shreenath Singh for the intervenors and the learned State Counsel for the respondents, had all indicated their agreement to this course as the parties, according to them, had already filed their affidavits on such an assumption and did not require further opportunity after the amendments were allowed. I would, therefore, now proceed to consider the other arguments addressed before us.

7. In reply to the argument that seven left out intervenors are necessary parties, Sri S. B. Sinha argued that everybody, who may be indirectly and remotely interested in a question raised in a case, cannot be held to be a necessary party. He relied on the observations in paragraph 4 of the judgment of this Court in *Ananta Narayan Mukhopadhyay v. Union of India* (CWJC No. 1288 of 1981-R disposed of on 4-2-1982) and *General Manager S. C. Railway v. A. V. R. Siddhanti* (1974 Serv LJ 576) : (AIR 1974 SC 1755). Sri Sinha is right. It is difficult, rather impossible, to implead every person as a party to the case, who may be somehow interested in the result thereof, specially where the case is like the present one in which an unknown large number of people are bound to be interested in the question to be determined. Even in a regular suit, where public right is involved, R. 8 of O. I of the Code has evolved a theory of representation. I, therefore, overrule the objection of Sri Shreenath Singh in this regard. So far three of the intervenors are concerned, namely, Brajendra Kishore Prasad (Municipal Commissioner), Badri Prasad Gupta (Secretary Jan Kalyan Sangh) and Rabindra Chandra Sinha (Advocate) they along with Hargouri Prasad Singh have opposed the application through Sri Shreenath Singh and cannot have any grievance on that score.

8. The case on behalf of the petitioner was opened by Sri B. C. Ghose, who was followed by Sri S. B. Sinha. It was contended that the order in Annexure '9' determined the issue in favour of the petitioner finally and the State Government does not have any jurisdiction to ignore it or to take a contrary decision later. Annexures '14' and '16' are, therefore, ultra vires. Comparing the provisions of S. 69 (2) of the 1976 Act and S. 18 (2) of the 1980 Ordinance, it was

pointed out that a decision declaring the school as a minority institution was not required to be notified in the Bihar Gazette before it could be operative. The order in Annexure '9' issued in the name of the Governor of Bihar and duly authenticated as required by Art. 166 of the Constitution became operative and binding on the State and could not be later given a go-by. Sri Shreenath Singh argued that no order has finally been passed at all and Annexure '9' was merely a draft of a proposed order intended to be passed. He emphasised the fact that neither the date nor the memorandum number was given in Annexure '9' which is at page 104 of the record. The petitioner in his writ application also has, therefore, given only the month and the year of Annexure '9' and not the date. At the bottom of the order a direction had been given for its publication in the Bihar Gazette, but this was also a tentative draft without the date and the memo number, and admittedly it was never published. The number mentioned at the top of Annexure '9' refers to the file and the blank space provided for the memo number thereafter is unfilled. Correctly appreciating the inchoate nature of Annexure '9', the petitioner, in the present application prayed for a direction to the respondents to publish or notify the order therein and for a writ "directing the respondents to declare the said Dhanbad High School as a linguistic minority school in accordance with the provisions of the said Act". The petitioner had, on 15-3-1980, sent a letter to Sri N. D. J. Rao, Advisor to the Governor of Bihar, a copy whereof is Annexure '10/A' (pages 109 to 112), and in regard to Annexure '9' he had stated in the penultimate paragraph that "the order has not so far been published and put into implementation, the whole matter is still hanging in uncertainty" (emphasis added). In his memorandum to the Chief Minister (Annexure '10/D' at pages 116 to 118) he reiterated this stand by stating :

"May your honour, in the circumstances, be pleased to direct the release of the order forthwith and restore the confidence of the minority". (emphasis added)

The High Court, while disposing of CWJC No. 23 of 1976 (R) ordered that :

"In this (sic) circumstances, I direct the Bihar Secondary Education Board to decide the application filed by the petitioner on 11-11-1975 (Annexure 5) for declaring the Dhanbad High School as a

minority school". (Vide Annexure '8' at page 103).

This again indicates that the issue was not closed in favour of the petitioner by Annexure '9'. The petitioner correctly understood the position as is further clear by his letter to the Minister Janab Ghulam Sarwar Saheb (Annexure '10/F') wherein he reiterated that :

"This order of the Hon'ble High Court has been passed as early as on 14-9-1976. In view of the specific directions given by the High Court this exorbitant delay in deciding the application may expose the Bihar Secondary Board to the risk of violating the orders of the High Court". (page 122)

At the end of his letter, the petitioner made the following request :

"On behalf of the Bengali residents of Dhanbad, I humbly pray to you that order declaring Dhanbad High School as a minority school be issued without further loss of time."

Apart from the relief in the present application, mentioned above, which is not consistent with the stand taken by the petitioner's counsel at the hearing, it has been stated in paragraph 57 of the writ application as follows :

"Your petitioner states that in spite of pendency of the aforesaid representation filed on behalf of the said school and/or the petitioner, the State Government was not passing any order intentionally and deliberately in spite of clear directions made by this Hon'ble High Court in the aforesaid C.W.J.C. No. 23 of 1976 (R) dated 14-9-1976 as contained in Annexure '8' hereto."

The reliefs prayed for by the petitioner in C.W.J.C. No. 534 of 1980 (R), quoted in paragraph 53 of the writ application, also lead to the same conclusion, specially the relief (b). It is not necessary to further multiply such statements on the records indicating that the petitioner's own case, earlier as well as in the present writ petition, has been consistently contrary to what his counsel argued at the time of hearing. It has been urged on behalf of the respondents that since the argument, as addressed on behalf of the petitioner, was not to be found in the writ application, there was no question of its denial, still the State in paragraph 23 of its counter affidavit, while dealing with the other allegations said :

"It is stated that the school in question has never been declared by the State of Bihar to be a minority institution", (page 168)

The report of Sri Dubey in Annexure '16' indicates that a similar argument had been attempted on behalf of the petitioner before him, which he rejected on proper grounds. The circumstances in which the earlier order was passed by the Minister, which was later on not implemented, have been detailed, and Sri B. C. Ghose relied on the same in support of his argument. Sri Dubey has said "that the then Minister for Education ordered on 10-8-1978 on page 14/M of the file to notify the school as a minority institution, but before this could be done, the Minister happened to go to Dhanbad where he was faced with angry protest and demonstration against his order dated 10-8-1978 which was yet to issue". On his way back to Patna he asked the office by his note on page 15/N of the file not to issue his order and desired that the matter be enquired into afresh. Accordingly, the Government notification was withheld and a fresh report was called for. It was argued by Sri Ghose that these facts indicate that a final decision had actually been taken and it was wholly illegal on the part of the Minister to have reviewed it on the protest of the demonstrators and rioters. The course adopted by him indicates negation of rule of law and victory of mobocracy. This should not be permitted.

9. In reply, Sri Shreenath Singh contended that it is wrong to equate the order by a Minister with an order by and on behalf of the State. Assuming that the Minister had, at one point of time, decided to concede the minority nature of the school, this could not close the issue until an order on behalf of the State was duly passed and notified. Annexure '9' cannot be treated to be such an order. Reliance was placed on the observations in paragraph 42 of the judgment in *State of Punjab v. Sodhi Sukhdev Singh* (AIR 1961 SC 493), in paragraph 10 of the judgment in *Bachhitter Singh v. State of Punjab* (AIR 1963 SC 395) and in *State of Bihar v. Ganesh Prasad Dubey* (1969 Pat LJ 177). The argument is well founded. The materials on record indicate that the draft order in Annexure '9', although expressed in the name of the Governor of Bihar and signed by the Deputy Secretary, was not issued so as to be an effective order. It remained in the records without being communicated to any person interested in the matter. Although it was intended that a copy thereof should be sent to the printing press for being included in the Bihar Gazette and to the Director as also to the District

Education Officer etc., no such copies were sent. The State counsel said, during the argument, that the entire connected file is in the court room and the State has no objection if the Court decided to examine the same or permit the petitioner's counsel to do so with a view to ascertain these facts. Since it was not claimed on behalf of the petitioner that the order in Annexure '9' had been communicated and the allegations in the writ application were themselves contrary to such a stand, we did not consider it necessary to examine the State's records. Annexure '9' was clearly intended to be operative only after the date and memo number were supplied and after it was duly issued for being given effect to.

10. There was some discussion at the Bar as to what is meant by "communication" of an order. Mr. Sinha relied on *State of Punjab v. Balbir Singh* (1976-3 SCC 242): (AIR 1977 SC 629). There the Supreme Court following an earlier decision in *Partap Singh v. State of Punjab* (AIR 1964 SC 72) observed that once an order is sent out and it goes out of the control of the authority issuing it, so that there would be no chance whatsoever of its changing the mind and modifying it, the order must be held to have been communicated, no matter when the Government servant against whom it has been issued actually receives it. This proposition does not help the petitioner at all in view of the finding recorded above.

11. Mr. Singh also relied on the principles of *res judicata* for negating the petitioner's point, mentioned above, on the basis of the judgment in *C.W.J.C. No. 534 of 1980 (R)* by M. P. Singh, J. The case was disposed of at the admission stage itself, but only after hearing the parties including the intervenors and the order is contained in Annexure '12' from pages 132 to 136 of the records. It was urged that if Annexure '9' is deemed to have finally decided the issue in favour of the petitioner, there was no question of remitting the case to the State Government for a decision on merits after hearing the parties including the intervenors. Sri S. B. Sinha replied to the argument by saying that a technical plea of *res judicata* should not be allowed to be raised where it may defeat the fundamental rights of a party and result in injustice. He relied on the observations of the Rajasthan High Court in the case reported in 1974 Serv LJ 515 that where the question relates to inherent lack of jurisdiction of an authority (hereof the State to pass an

order inconsistently made in Annexure 9), it cannot be barred by the principles of constructive res judicata. Reliance was placed on the observations made in paragraph 24 of the judgment in Chief Justice of Andh. Pra. v. L. V. A. Dixitulu (1979 Serv LJ 332: (1979) 1 Serv LR 1): (AIR 1979 SC 193) Sri Sinha also urged that the judgment of M. P. Singh, J. should be interpreted as an open remand without deciding the finality or otherwise of Annexure 9. It does not appear necessary to decide this point, as my finding earlier is sufficient to dispose of the controversy.

12. It has next been urged on behalf of the petitioner that Annexure 16 is otherwise also fit to be quashed as the finding recorded therein has been given on the basis of irrelevant and extraneous considerations and without taking into account the relevant evidence in support of the petitioner's case. On behalf of the respondents, it has been argued that Sri Dubey rightly observed in Annexure 16 (at page 351 bottom) that there was no evidence to show that the school had been founded by the Bengalee community and his conclusion that the school cannot be declared as a linguistic minority institution cannot be interfered with. Sri Shreenath Singh has challenged, as incorrect, the grievance of Sri B. C. Ghose that Sri Dubey failed to consider Annexures 6 and 6/A, the recommendations of the District Education Officer and Annexure 7, report of the District Development Officer, Dhanbad, which has vitiated his finding. I agree with Sri Singh that many of Sri Ghose's criticisms of Annexure 16 are misconceived; but for the reasons discussed in paragraph 16 below, I am of the view that Annexure 16 and consequently Annexure 14 are fit to be quashed.

13. In reply to a query by the Bench that if Annexure 16 is quashed, what further order should be passed in the case, Sri B. C. Ghose replied that the question whether the school is a minority institution should be decided on merits by this Court on the basis of the materials produced in the case. He said that since the claim is in respect to a fundamental right, the High Court cannot avoid examining and deciding the dispute on merits. Sri Shreenath Singh very enthusiastically supported the suggested course and took great pains in placing and analysing all the materials available on the record. He emphatically asserted that the petitioner has not been able to prove his case by any cogent evidence. Sri S. B.

Sinha, who followed Sri B. C. Ghose in the main argument and also concluded the case by his final reply was not wholly in agreement with Sri Ghose on this point. He said that the power of the State, as conferred by S. 18 of the 1980 Ordinance was quasi-judicial in nature and the correctness of Annexure 16 should be examined from that angle. If it is found that Annexure 16 is vitiated in law and fit to be quashed, this Court may remit the matter for fresh consideration. I agree with Sri Sinha. The distinction between the present case and a large number of other cases (mainly of the Supreme Court) cited by the parties before us is that, as in the present case, there was no statutory provision for decision of the question by an authority in those cases. I am not rejecting Sri Ghose's claim that the question, if agitated, may have to be ultimately decided by the High Court on merits—indeed I am not deciding this question one way or the other at this stage; but in the present facts and circumstances, I am of the view that before proceeding further the statutory authority, i.e. the State in the present case should be asked to perform its duty in accordance with law, if its earlier decision is found to be illegal, I will further develop this aspect later.

14. For the application of Art. 30 of the Constitution, it is necessary that an institution is proved to have been "established" as well as "administered" by minority. The two terms have been used in the Article conjunctively (as observed in paragraph 19 of the judgment in S. Azeez Basha v. Union of India (AIR 1968 SC 662)), and the burden lies on the petitioner to prove both the facts. The respondents are, therefore, right in asserting that if the petitioner is unsuccessful in discharging the onus, he must fail irrespective of the weakness in the respondents' evidence. Sri Shreenath Singh argued that as there is no evidence in the present case to prove as to who established the school originally or at the stage when it was upgraded as a high school, the petitioner's claim has to be dismissed. The learned counsel has emphatically asserted that direct acceptable evidence of its establishment is an absolute necessity. By that, I understand, the respondents mean that there should be contemporaneous primary evidence as to the actual facts regarding the founding of the school. I do not accept that this strict manner of proof is applicable to this case. It is permissible to a party to establish a fact by leading circumstantial evidence. Further

the strict adherence to the Evidence Act is not called for in the present case. The evidence led by the parties should not, therefore, be scrutinised as strictly as suggested by Sri Singh.

15. There was considerable discussion at the Bar on the question as to whether the nature of an institution which was earlier a minority one, could later undergo a change. Sri Sinha contended that it cannot. Relying on the observations made in *K. O. Varkey v. State of Kerala* (AIR 1969 Ker 191) and in paragraphs 162 to 164 and 170 of the judgment in the *Ahmedabad St. Xavier's College Society v. State of Gujarat* (AIR 1974 SC 1389), the learned court said that the minority character of an institution cannot be given up or waived. Sri Shreenath Singh argued that the observations made in the case of the *Ahmedabad St. Xavier's College Society* (supra) did not reflect the majority view and in view of the decisions in *S. Azeez Basha v. Union of India* (AIR 1968 SC 662) and *Durgah Committee, Ajmer v. Syed Hussain Ali* (AIR 1961 SC 1402), the petitioner's argument should be rejected. This point is relevant for considering that even on the assumption that the *Dhanbad High School* had originally been established by the Bengali speaking people, is it permissible to examine and hold that due to the subsequent events, it lost its minority character? In paragraph 37 of the judgment in *Durgah Committee, Ajmer v. Syed Hussain Ali* (supra) it was stated that—

"If the right to administer the properties never vested in the denomination or had been validly surrendered by it or has otherwise been effectively and irretrievably lost to it, Article 26 cannot be successfully invoked."

This observation clearly implies that it is possible to surrender a right under Article 26. The principle was held in a later case by the Supreme Court in *S. Azeez Basha v. Union of India* (AIR 1968 SC 662) (supra) (see para 20) to be applicable to Article 30 case. In *Arya Pratinidhi Sabha v. State of Bihar* (AIR 1973 Pat 101), a Bench of this Court observed in paragraph 10 of the judgment that—

"It is one thing to say that cultural and educational rights embodied in Article 30 to establish and administer educational institutions of their choice are fundamental and guaranteed by Constitution and therefore, not subject to surrender or legislative control, but it is quite another thing to contend that in all cases the minorities are obliged to exercise that

right even though on account of exigencies of the situation, they may decide otherwise. In the instant case, it appears that whatever may have been the position in 1957 in respect of school which may have been established by *Arya Samaj*, the Managers of the school gradually decided to allow the school to receive the benefit and patronage of the Notified Area Committee and later on by permitting the school to be converted into a Government subsidised school. They decided not to manage and administer the school as a minority school and this surely is a discretion which they were competent to exercise and is not at all in conflict with the guarantee and protection given by the provisions of Articles 29 and 30 of the Constitution."

I, therefore, hold that the right under Art. 30 can be lost and it is also possible to surrender the same. It is another question to decide as to what shall be the circumstances in which this can be inferred and what should be the evidence required to prove it. I do not propose to deal with this aspect.

16. Now coming back to Annexure 16, it appears that Sri Dubey was influenced by the fact that two other high schools at *Dhanbad* have already been recognised as minority institutions. This is an irrelevant consideration. Sri Singh argued that the decision has not been influenced by this observation as is indicated by the opening words of the paragraph "Therefore, even from convenience point of view there is no justification for....." Sri Singh emphasised the word "even" and suggested that the authority has mentioned this aspect only as an additional consideration and it does not sustain the finding. Although the language does support this argument to some extent, I do not agree that this consideration could not have weighed with Sri Dubey, while forming his opinion, before he started writing his report. It was not mentioned only in the penultimate paragraph of Annexure 16, it was also emphasised earlier in the following words:

"Apart from *Zila School*, *Dhanbad* school is the only high school of general character in *Dhanbad* town—all other schools being of minority character—whether religious or linguistic."

Further it appears from Annexure 16 that Sri Dubey did not expect the general public to be associated with minority institutions at all. He has emphasised the fact that some of the documents relied on by the petitioner indicated that the

managing committee of the school included some non-Bengali speaking persons also. He has also mentioned that subscriptions had been raised by the general public for constructing the school building, and, there are non-Bengalis amongst the students as well as the staff of the school. Sri S. B. Sinha placed the constitution of the Managing Committee in *Rev. Father W. Proost v. State of Bihar* (AIR 1969 SC 465) and in the *Prabandhak Committee of Shri Takht Hari Manderji v. Chancellor of the Magadh University* (AIR 1977 Pat 12) to indicate that by mere participation of the non-minority communities—whether by donation or taking the benefits of the institution or by associating in the administration—does not necessarily lead to the conclusion that the institution was not a minority one. Sri Sinha also relied on *Dipendra Nath Sarkar v. State of Bihar* (AIR 1962 Pat 101) (FB), *State of Kerala v. Very Rev. Mother Provincial* (AIR 1970 SC 2079) and *D. A. V. College, Jullundur v. State of Punjab* (AIR 1971 SC 1737). I do not suggest that the facts mentioned in Annexure 16 and emphasised by Sri Shreenath Singh are wholly irrelevant, but the manner in which they have been referred to and used in Annexure 16 indicates that the authority was not following the correct approach as laid down by Courts. Consequently, Annexure 16 has to be set aside.

17. In paragraph 13, I have mentioned briefly the attitude taken on behalf of the parties in regard to the course which the Court should adopt now. Since Sri S. B. Sinha agreed that remitting the matter to the State for a fresh decision on the controversy may be a proper order, the objection to such a course has to be considered as pressed and developed by Sri Shreenath Singh. He placed all the annexures to the writ application which have been relied upon on behalf of the petitioner and contended that they did not furnish any proof that the school was established and administered by the Bengali speaking minority. He argued that Annexure 1 series show that non-Bengali speaking people were also on the managing committee of the school from time to time and a representative representing the Muslim community and another on behalf of the railway were always there in the managing committee. Referring to the formation of a sub-committee consisting of the Secretary, the Headmaster and a teacher Abdul Ghani for the purpose of selecting and appointing a teacher as mentioned in

Annexure 1/J, Sri Singh urged that it indicated that the control was not in the hands of the Bengali speaking persons as the Headmaster of the school could be a non-Bengali. Reliance was also placed on Annexure B attached to the respondents' reply to the petitioner's amendment petition and referred to in paragraph 30 thereof which is a photostat copy of a report dated 16-8-1944 titled as "inspection form". At the bottom of back of page 391 (i.e. the second page of Annexure B) against the question "Are all the classes of the local community represented on the Committee?", the answer is in the affirmative by the word "Yes". Against the 2nd item "If there is a proprietor, has he control over the decision of the Committee?", the answer mentioned is 'No'. With respect to the report of Smt. Leela Banerjee, D.E.O. in Annexure 6 and the report of Sri B. N. Panda, District Development Officer in Annexure 7 as also the D.E.O.'s report in Annexure 6-A/2, Sri Singh argued that the same being opinions of certain officers who could not have any personal knowledge, the affairs of the school specially in relation to its past history cannot be of any use. The conclusion which one arrives at after analysing the materials produced in this case is that the petitioner has failed to produce any evidence worth the name for proving the minority character of the school. The writ application, therefore, must be dismissed on such a finding. After considering all the reasons mentioned by Sri Singh in his argument, I do not consider myself in a position to agree with him that it is case of no evidence whatsoever in support of the petitioner's claim. All the relevant evidence has not been produced in this case before us, according to the parties. Sri Sinha repeatedly stated that only some of the documents on which the petitioner relies have been placed before this Court by way of sample. In his reply he said that many of the school records are available in the school and some of them have been brought by the petitioner in the court room and were available for inspection by the Court, if it so desired. The State counsel also stated that the file dealing with the present controversy contains many other documents which support the decision in Annexure 16. They are neither detailed in the said report nor in any of the affidavits filed on behalf of the respondents. He also offered the entire records, if the Court directed them to be produced. Sri Shreenath Singh also contended that the petitioner has suppressed bulk

of the school records which, if examined, would demolish his (petitioner's) case. He specially made a reference to the records of the period between the 1949 after the death of late Hemendra Chandra Mallik (as asserted in paragraph 13 of the writ application) and before 1964 when the petitioner became the Member/President of the Managing Committee (as asserted in paragraph 14 of the writ application). When admittedly all the relevant records have not been voluntarily produced by the parties before the High Court and have not been discussed in the affidavits, and were not placed before Sri Dubey and have, therefore, been not considered in Annexure 16, is it not the better course to remand the matter to the State, exercising statutory power under Section 18 of the 1980 Ordinance to reconsider the question after permitting all interested persons to file further evidence? It is not a fight for individual claims, it relates to an institution viz., members of the public—whether limited to the Bengali speaking minority or a larger body of the general public. Even if some party has failed at some stage to produce all the relevant materials, it may be desirable to allow a fresh opportunity in view of the larger interest involved in the case. Some of the decisions relied on by Sri S. B. Sinha and referred to above indicate that the features, stressed by Sri Singh are not conclusive for holding the general character of the school. They may furnish evidence which has to be considered along with other evidence on the record. I, therefore, do not consider it expedient to act in haste and close the controversy by confining the parties to the materials already relied on by them. Consequently I remand the matter for fresh consideration.

18. Sri Shreenath Singh repeatedly urged that it is essential for the petitioner to prove that the school was originally established by Bengali speaking community before he can be granted any relief and since his case made out in the writ application is inconsistent with the case he pleaded earlier as also with his affidavits filed later, it should be disbelieved and the application dismissed. I do not propose to deal with this aspect as the matter is going on remand. The intervenors may urge the point before the State Government.

19. In answer to a further query by the Bench during the course of hearing, learned counsel for the different parties had indicated that the 9th respondent,

Director Public Instruction and Special Secretary Education, Government of Bihar, is a proper person to make the enquiry on behalf of the State of Bihar under S. 18 of the 1980 Ordinance. He is accordingly directed to fix a date and inform the parties including the petitioner, the 10th respondent and the intervenors and permit them to rely on any further evidence, they may choose to file. It is expected that the petitioner will produce the entire records of the school including the records of the years 1949 to 1964. The 9th respondent should examine and discuss in his report the records of the Government file also. As the matter has been hanging for a considerable period, it is highly desirable that the same be concluded as expeditiously as may be possible, preferably within three months from the date on which the respondent No. 9 receives a copy of the order.

20. It was contended on behalf of the petitioner that in case of remand, the respondents must be directed to hand over the school to the petitioner and the other members of the Managing Committee for its management. On behalf of the respondents, this course was seriously challenged, inter alia, on the ground that a large amount of money has been given by the State on the basis of the school being a general one and the money may be squandered. The petitioner's counsel said that the amount which runs into lacs is in the Banks in fixed deposits and is not available for withdrawal. Sri Lal appearing for the State also referred to several fresh accounts opened by the State, according to the requirement of the present law applicable to the nationalised schools.

21. Sri B. C. Ghose had, in regard to these funds, suggested that the State may close these new accounts and withdraw the funds deposited therein. After taking into account all these papers, I am of the view that the school may be permitted to be run as a nationalised school, till the matter is decided against by the respondent No. 9. I would like to emphasise in this regard that the taking over of the school by the State is not dependent on Annexure 16 or Annexure 14. As a result of S. 3 of the 1980 Ordinance all the schools, excepting the minority schools, were automatically nationalised, without needing any notification in this regard. It is, therefore, not permissible to hold that the management of the school will be necessarily illegal after Annexures 14

and 16 are quashed. So long the petitioner does not establish his case about the school being a minority one, I do not see any compelling reason for disturbing the management of the school. The prayer on behalf of the petitioner in this regard is, therefore, rejected.

22. In the result, this writ application is allowed on the terms mentioned above. There will be no order as to costs.

RAM CHANDRA PRASAD SINHA, J.:— I agree.

Petition allowed.

AIR 1982 PATNA 152

K. B. N. SINGH, C. J. AND PREM SHANKER SAHAY, J.

Bawa Gopal Das Bedi & Sons and others, Petitioners v. Union of India and others, Respondents.

Civil Writ Jurn, Case No. 725 of 1981, D/- 2-12-1981.

(A) Gold (Control) Act (45 of 1968), S. 66 — Applicability — Reasonable belief that provisions of Act have been or being violated, is condition precedent — Seizure of entire ornaments from locker of licensee — Not justified — High Court interfered and directed return of ornaments forthwith. (Constitution of India, Art. 226).

The condition precedent for application of S. 66 is the reasonable belief that the provisions of the Act have been or are being or are attempted to be contravened. Thereafter the power extends to the seizure of such gold in respect of which contravention has been either made or is about to be made and the section did not permit an indiscriminate seizure with a view to fishing out material to form a belief and justify it by reasons culled therefrom. The belief must be of an honest and reasonable person based upon reasonable grounds. It was not a matter of subjective satisfaction. Case law discussed. (Para 7)

Where the gold ornaments were seized from a locker which was taken on hire at Patna Branch of Allahabad Bank by a licensee from Amritsar who had obtained permit for carrying gold ornaments from one State to other, and who had also dealings with jewellers of Patna, the acts of the authorities concerned in searching the locker and in seizing the ornaments kept therein were not justified when according to the De-

partment the fact whether there was a reasonable belief or not was to be determined only after enquiry. Unfettered powers of seizure were not contemplated by law makers in order to embark upon a roving enquiry, to form an opinion whether any provision of the Act has been violated or not. There should be some materials in order to be, prima facie, satisfied that some of the provisions of the Act have been violated. Persons dealing in gold ornaments would always have connection with jewellers and that alone would not be sufficient to form a reasonable belief, in order to seize the ornaments. The High Court, therefore, interfered and the authorities were directed to return the ornaments to the licensee forthwith. AIR 1972 SC 689 and AIR 1962 SC 1559, Dist. (Para 11)

(B) Constitution of India, Art. 226 — Alternative remedy — Petitioner challenging the seizure of ornaments under S. 66 of Gold (Control) Act as without any material and wholly without jurisdiction — Existence of alternative appeal under S. 80 of the Act — Jurisdiction of High Court under Art. 226 is not barred. Case law discussed. (Gold (Control) Act (1968), Ss. 66, 80). (Para 4)

Cases Referred:	Chronological	Paras
AIR 1973 SC 106		7
AIR 1972 SC 689		7, 8
AIR 1972 All 16		4
AIR 1972 All 231: 1972 All LJ 204		4
AIR 1971 SC 2451: 1971 Tax LR 1747		7
AIR 1970 SC 645		4
(1969) 23 STC 481 (All)		7
AIR 1968 SC 98		4
AIR 1968 SC 1232		7
AIR 1967 SC 1		7
AIR 1967 SC 523		7
AIR 1967 SC 1801		4
AIR 1966 SC 197		4
AIR 1964 SC 925		7
AIR 1962 SC 316: 1962 (1) Cri LJ 364		7
AIR 1962 SC 1559		8
AIR 1961 SC 372		7
AIR 1961 SC 609		4
AIR 1961 SC 1570		7
AIR 1960 SC 554: 1960 Cri LJ 735		7
AIR 1954 SC 415: 1954 Cri LJ 1029		7
AIR 1951 Bom 299		7

S. N. Kakkar and Chandramauli Kumar Prasad, for Petitioners; A. K. Sinha, Sr. Standing Counsel and Govt. of India, for Respondents.

P. S. SAHAY, J.:— The petitioners have moved this Court for quashing of the proceedings relating to the search and seizure of their gold ornaments from

locker No. 64 of Allahabad Bank, Rajendra Nagar Branch, and for a direction to the respondents to release the aforesaid gold ornaments.

tral Excise, Gold Range, Amritsar, of gold licence No. 11/63 of petitioner No. 1 firm was found and was seized by the officers.

2. Here it will be necessary to state the facts mentioned in the application. Petitioner No. 1, Bawa Gopal Das Bedi and Sons, is a registered partnership firm dealing in the business of gold and petitioners 2 to 4 are its partners. The firm is a licensee under the provisions of the Gold (Control) Act, 1968 (hereinafter to be referred as the Act) bearing dealer licence No. 11/63. The firm is also permitted for inter-State movement of gold ornaments and sales. A copy of the certificate granted by Assistant Collector, Central Excise, Amritsar, dated 8-3-1973 has been filed and marked as Annexure 1. Under the Gold (Control) Rules (hereinafter to be referred as the Rules) every licensed dealer has to maintain accounts under Rule 11 and the details have to be filled up in form G.S. 12. The case of the petitioners, further, is that some of the petitioners left Amritsar on 3-1-1981 with gold ornaments weighing 4482.750 grams and reached Kanpur and there they sold 79.600 grams to a licensed dealer named Kashi Jewellers and 203.200 grams to another licensed dealer of the same place, namely, Society Jewellers.

On 27-1-1981 in the business premises of Alankar Jewellers two godrej keys of the lockers of the Bank were recovered and it may be mentioned that they belonged to petitioners Nos. 3 and 4. Jai Nath Prasad gave a statement before the Department and a copy of the same is filed as Annexures 4 and 5. Petitioner No. 1 having lost the key of the locker of Allahabad Bank, filed an application before the Manager of the Bank on 29-1-1981 that the key has been lost and a prayer was made for breaking open the locker and the petitioner was asked to come after ten days so that necessary directions may be taken from the higher authorities in this regard. A similar application was filed by Pradeep Kumar on 28-1-1981 regarding the loss of key of State Bank. On 6-2-1981 petitioner No. 2 went to Allahabad Bank for opening the locker and was told that the Officers of the Central Excise Department had opened the locker and has seized the ornaments kept there weighing 3735.650 grams on 5-2-1981. Petitioner No. 2 thereafter filed an application before respondent No. 2 for the return of the ornaments but it was refused and on the other hand the Officers took his statement copy marked Annexure 6.

On 9-1-1981 the petitioners' firm purchased 636.700 grams of gold ornaments from Lakshmi Jewellers, Coimbatore, and, thus, the petitioners' firm was in possession 4836.650 grams of ornaments. Some of the petitioners came to Patna and on 10-1-1981, 1101 grams of gold were sold to Alankar Jewellers and the remaining gold ornaments weighing 3735.650 grams were kept in locker No. 64, which was hired by petitioners Nos. 3 and 4 and their brother Pradeep on 31-7-1978 (Annexure 3), of Allahabad Bank, Rajendra Nagar Branch, Patna by petitioner No. 4. The relevant entries were made in form G.S. 12 and copy of the same has been filed and marked Annexure 2. It is, further stated in the petition that three raids were conducted by the Central Excise Department in the business premises of Messrs. Alankar Jewellers, Muradpur, and also at the residence of the proprietor, Sri Jai Nath Prasad. On 21-1-1981 a brief case belonging to petitioner No. 4 and Pradeep Kumar containing a blank voucher bearing serial No. 231 also bearing the stamp of the Inspector (Gold Control Officer) Cen-

Thereafter, petitioner No. 2 went to Kanpur and on his return sent an application under registered cover, copy of which has been filed and marked Annexure 7, but no reply was received from the authorities concerned and then again a reminder was sent, a copy of which has been filed and marked Annexure 8. It has also been stated that the Blank Voucher No. 231, was lost and for that the petitioners filed an application before the Inspector (Gold Control), Amritsar, and the said voucher was cancelled by the Inspector by his order dated 3-1-1981 (vide Annexure 9). It is stated in the application that in spite of various reminders the authorities were not releasing the gold ornaments which have been illegally seized by them. In paragraph No. 23 of his application some allegation was made against respondents Nos. 3 and 4 but the learned counsel at the time of hearing sought permission to delete the paragraph and the prayer was allowed.

3. Mr. S. N. Kakker, learned counsel appearing on behalf of the petitioners, has contended that the search and seizure is an inroad into the fundamental right of the petitioners and the power of seizure has been illegally exercised under S. 66 of the Act without any material and is, therefore, wholly without jurisdiction. He has, therefore, submitted that the search and seizure being illegal, the petitioners are entitled for the return of those ornaments. Learned Senior Standing Counsel, appearing on behalf of the Department, has submitted that from the facts mentioned in this application no illegality on the part of the Department has been shown by the petitioner and the authorities had reasonable belief that the provisions of the Act have been contravened and in that view of the matter, they were fully justified in seizing the ornaments from the locker. He has, further, submitted that the Department was conducting an enquiry into the matter to investigate into the entire case and to issue show cause notice to the petitioners under S. 79 of the Act to adjudicate the matter under S. 78 of the Act.

It was, further urged that the Department had yet to investigate and adjudicate the case against the petitioners and even after adjudication the petitioners have alternative remedy by way of appeal and revision prescribed under the Act and the application was, therefore, premature and the petitioners were, therefore, not entitled to any relief in this writ application. A detailed counter-affidavit has also been filed which will be discussed in detail later and it is stated that blank voucher form belonging to the firm of the petitioners was found in the house of Jai Nath Prasad followed by two keys of the lockers which admittedly belonged to the petitioners; one of Allahabad Bank and the other of State Bank and the whole matter will be crystallised only after due enquiry.

4. Mr. Kakker has placed reliance on a decision of the Allahabad High Court in the case of *L. Kashinath v. Collector of Central Excise, Allahabad* (AIR 1972 All 16) where in a similar circumstance the gold ornaments which were seized by the authorities were ordered to be released. The aforesaid decision has been upheld on appeal preferred by the Department and the case is reported in the same volume, the Collector, Central Excise, *Allahabad v. L. Kashinath Jewel-*

lers (AIR 1972 All 231). As regards the preliminary objection of alternative remedy a similar objection was also raised in the *Allahabad* case which was negatived by their Lordships relying on the cases of *C. A. Abraham v. Income-tax Officer, Kottayam* (AIR 1961 SC 609); *Champa Lal v. Commr. of Income-tax* (AIR 1970 SC 645); *Collector of Customs, Bombay v. Shanti Lal* (AIR 1966 SC 197); *New Manek Chowk Spinning and Weaving Mills v. Municipal Corporation, Ahmedabad* (AIR 1967 SC 1801) and *Zila Parishad, Moradabad v. Kundan Sugar Mills, Amroha* (AIR 1968 SC 98).

In the instant case it has been urged on behalf of the petitioners that the authorities have acted beyond their powers and jurisdiction conferred on them under the Act. In other words, if it is found that the seizure itself is without jurisdiction it will be neither proper nor justifiable to ask the petitioners to avail of the alternative remedy and from the views expressed in the decisions mentioned above it is clear that the petitioners are also entitled to relief if they can succeed in their submissions, under Article 226 of the Constitution irrespective of the existence of an alternative remedy. The preliminary objection raised on behalf of the respondents, therefore, fails.

5. It will be necessary to examine in detail the facts of *Allahabad* case to see whether it can be pressed into service on the facts and circumstances of the instant case, in aid of the petitioners. Before going to that I will briefly refer to some of the provisions of the Act which are relevant for the purpose of this case.

6. The Gold Control Act was enacted in 1968 and the preamble reads as follows:

"An Act to provide in the economic and financial interests of the community for the control of the production, manufacture, supply, distribution, use and possession of and business in, gold, ornaments and articles of gold and for matters connected therewith or incidental thereto."

The object of this Act is to prohibit smuggling of gold into the country from other countries and its circulation so that the country may not be put to any loss of foreign exchange and in that view of the matter, detail provisions have been made in the Act in order to achieve its object. A dealer carrying on business in

gold and ornaments has to obtain a licence under S. 27 and the acquisition of gold by dealer is regulated under S. 31 and no licenced dealer is entitled to buy or otherwise acquire or agree to buy or otherwise acquire or accept or receive any article, ornament or primary gold from a person who is not a licensed dealer or refiner. Under Chapt. XI S. 55 every dealer is required to keep, in the form prescribed under the Rules, a true and complete account of the gold owned, possessed, held, controlled, bought or otherwise acquired or accepted or otherwise received or sold, delivered, transferred or otherwise disposed of, by him in his capacity as a licensed dealer.

Chapter XII of the Act makes provisions for entry, search, seizure and arrest. Any Gold Control Officer may search the business premises of a licensed dealer under S. 58 if he has reason to believe that the provisions of the Act has been or is being, or is about to be contravened. S. 60 prescribes the condition under which the search shall be conducted. S. 65 confers power on the Gold Control Officer to seize gold if he has reason to believe that in respect of the gold the provisions of the Act have been contravened. S. 66 of the Act provides for a power of seizure and subs. (1) (a), which is relevant, can be usefully quoted.

"66 (1). If any Gold Control Officer has reason to believe that in respect of any gold any provision of this Act has been, or is being or is attempted to be, contravened, then, he may seize:—

(a) such gold along with the package, covering or receptacle, if any (and the contents thereof), in which the gold is found."

Section 68 gives the power to arrest a person. Chapter XIII provides for confiscation and penalties. Section 71 provides for confiscation of gold in respect of which any provisions of the Act is contravened. Chapter XIV deals with adjudication, appeal and revision and confiscation may be adjudged or penalty may be imposed under S. 78. Opportunity has to be given before passing any order under S. 79. Any person aggrieved by the order can prefer an appeal before the higher authorities under S. 80 and there is also a provision for revision. Chapter XV prescribes the procedure for the offences and their trial. Any person, who contravenes the provisions of the Act, is liable for prosecution under

S. 85 and under S. 87 punishment is provided for an offence for failure to submit returns or to maintain the accounts under the provisions of the Act and the Rules framed thereunder. Persons who contravened are tried by Magistrate exercising first class powers under S. 98.

7. After having given the scheme of the Act I will briefly deal with the facts of the Allahabad case on which strong reliance has been placed by Mr. Kakker. The Officers of the Excise Department having learnt from confidential sources searched the business premises of Kashinath Jewellers, Lucknow, who was a licensed dealer, and seized gold ornaments which weighed 22151.370 grams. Against that seizure a protest was made but the Department did not release the goods. Thereafter writ was preferred before the Allahabad High Court. The allegation was that the forms were not maintained as required under S. 55 and at the time of admission a Pleader Commissioner was appointed because the Department agreed to return those gold ornaments which were properly accounted for. After the accounting was done and verified a major portion of the ornaments seized were returned and only 3770.015 grams of gold were not returned and it was retained for the purpose of enquiry under the Act. The learned single Judge, who heard the application, held that the petitioner of that case, on his own admission and showing, had failed to maintain the accounts and thus he had contravened the provisions of S. 55 of the Act. But that, according to his Lordship, did not entitle the authorities to seize the gold ornaments in purported exercise of their power under S. 66 of the Act.

If there was a contravention of S. 55 of the Act then a procedure was laid down for that and the authorities had to follow that. But, so far the seizure was concerned it was held that the Department had alleged contravention only under Section 55 of the Act and the only charge was that he had failed to maintain the accounts. Thus, only those ornaments and articles of gold could legally be seized which were not accounted for by the petitioner in his books of accounts and, therefore, the Excise Department exceeded their jurisdiction in seizing the entire stock of the petitioner. It was, further, held that the Department had not been able to show as to how they

could form a reasonable belief as to which particular ornaments were not accounted for and in absence of any such reasonable belief the authorities were not entitled to seize any ornaments because the Act did not authorise seizure or confiscation of any other articles or ornaments except those in respect of which provisions of the Act are contravened. Concluding his Lordship held as follows:

"In the absence of the existence of the condition precedent, power of seizure exercised by the respondents is without jurisdiction. The respondents have acted in excess of their authority and beyond their jurisdiction in seizing the ornaments in respect of which no contravention of S. 55 has been alleged or ascertained. The power of seizure is a serious inroad on the fundamental right of property of a citizen. The authorities exercising the power of seizure have to act strictly according to law."

The decision of the learned single Judge was upheld on appeal and the case is reported in the same volume at page 231. Their Lordships interpreted the word "Reason to believe" occurring in different statutes. Under the Income-tax Act the same phrase has been interpreted in the *Calcutta Discount Co. Ltd. v. Income-tax Officer* (AIR 1961 SC 372); *S. Narayanappa v. Commr. of Income-tax, Bangalore* (AIR 1967 SC 523) and *Sheo Nath Singh v. Appellate Assistant Commr. of Income-tax (Central), Calcutta* (AIR 1971 SC 2451). Under S. 110 of the Customs Act their Lordships relied on the decision of Assistant Collector of Customs v. Charan Das Malhotra (AIR 1972 SC 689); *Haji Ahmad Haji Esak & Co. v. Commr. of Income-tax, Bombay City* (AIR 1951 Bom 299) and *Deoki Nandan v. M. L. Gupta* (1969-23 STC 481) (All) under the U. P. Sales Tax Act and Collector of Customs, Madras v. Sampathu Chetty (AIR 1962 SC 316) under the Sea Customs Act and on a consideration of those decisions it has been held that the condition precedent for application of S. 66 is the reasonable belief that the provisions of the Act have been or are being or are attempted to be contravened. Thereafter the power extends to the seizure of such gold in respect of which contravention has been either made or is about to be made and the section did not permit an indiscriminate seizure with a view to fishing out material to form a belief and justify it by

reasons culled therefrom. The belief must be of an honest and reasonable person based upon reasonable grounds. It was not a matter of subjective satisfaction.

It was, further, held by their Lordships that when there is a proper seizure in law then only the question of burden of proof arises on the dealer. For non-maintaining accounts as required under S. 55 it was held that the ornaments could not be seized and at best the person could be prosecuted under S. 87 of the Act. While affirming the decision of the learned single Judge their Lordships further held that the power of seizure has to be exercised strictly under an authority of law placing reliance in the cases of *Hamdard Dawakhana v. Union of India* (AIR 1960 SC 554) and *Wazir Chand v. State of Himachal Pradesh* (AIR 1954 SC 415). These decisions have been quoted with approval in subsequent decisions of the Supreme Court, namely, in the cases of *Bishan Das v. State of Punjab* (AIR 1961 SC 1570); *Khyerbari Tea Co. Ltd. v. State of Assam* (AIR 1964 SC 925); *Naresh Shridhar Mirajkar v. State of Maharashtra* (AIR 1967 SC 1); *Municipal Corporation of Delhi v. Birla Cotton, Spinning and Weaving Mills, Delhi* (AIR 1968 SC 1232) and *Bennet Coleman and Co. Ltd. v. Union of India* (AIR 1973 SC 105).

8. Learned Senior Standing Counsel for the Department has relied on some decisions of the Supreme Court and other High Courts in order to justify the actions of the authorities. The case of Assistant Collector, Customs v. Charan Das Malhotra (AIR 1972 SC 689), was a case under S. 110 (2) of the Sea Customs Act (Customs Act?), where it has been held that no enquiry at the time of seizure is necessary but only the satisfaction of the Officers. That satisfaction must be based on some materials which is completely lacking in the instant case. Similarly, in the case of *Pukhraj v. D. R. Kohli, Collector of Central Excise* (AIR 1962 SC 1559) gold and gold ornaments were seized from the possession of a passenger of a train who was travelling without ticket. The possession of gold in large quantity gave the officers sufficient material to hold that the action of the aforesaid passenger was not bona fide and he was also travelling without ticket so that his identity may not be disclosed. In that view of the matter, it was

held that the officers had sufficient reason to believe to seize the gold ornaments. The facts of that case have absolutely no semblance with the facts of the case under consideration where the gold ornaments were recovered from a locker which was taken on hire by a licensee who was dealing in gold. The other cases, relied upon, are on a similar line and need not be considered in detail.

9. On a consideration of the scheme of the Act, and the decisions, referred to above, with special reference to the provisions relating to search and seizure, I am of the opinion that S. 66 of the Act hedges in such powers conferred on the authorities and that has to be exercised strictly in accordance with law. It is also not disputed that petitioner No. 1 is a licensee and has obtained permit for carrying gold ornaments from one State to other. The firm had also dealings with jewellers of Patna and in that connection had to come here and for safe custody of the ornaments two lockers were hired; one of Allahabad Bank and the other of State Bank.

10. Now it has to be seen how far the authorities were justified in searching the locker No. 64 of Allahabad Bank and in seizing the ornaments which were kept there. In this connection it will be necessary to refer to the counter-affidavits filed by the Department. It may be stated here that it has not been stated anywhere in the counter-affidavit whether any provisions of the Act have been violated. On a close reading of the affidavit it gives the impression that the matter is being enquired into by the authorities, in order to find out if there has been a violation of the Act. The relevant portion of the counter-affidavit may be quoted in this connection:—

"(F) That locker No. 64 relating to Key No. 37 of the Allahabad Bank, Rajendra Nagar Branch, was opened on 5-2-81 in the presence of the Bank Officers. As a result of the search, 944 nos. of new gold ornaments weighing 3729.900 gms. valued at about Rs. 6,15,433 were recovered and the circumstances of the case, as stated hereinbefore, led the Gold Control Officer to reasonably believe that the provisions of the Act (Gold Control Act) were contravened and hence the new gold ornaments recovered were seized."

Earlier it has been stated as follows:—

"Such an adjudication will include the decision as to whether the seizure (including the fact whether the Seizing Officer had reasonable belief or not) was legal or otherwise."

11. Thus, according to the Department the fact whether there was a reasonable belief or not will be determined only after enquiry. This, in my opinion, is contrary to the provisions of S. 66 of the Act and I may add, that it would amount to putting the cart before the horse and justify a seizure by forming an opinion in the nature of "reasonable belief" after enquiry. Such unfettered powers were also not contemplated by law makers in order to embark upon a roving enquiry, to form an opinion whether any provision of the Act has been violated or not. Search and seizure besides being an inroad on fundamental right of a citizen, adversely affect the reputation of a person, especially of a dealer and is bound to bring disrepute to his business. Seizure of entire stock, as it has been done in the instant case, will virtually paralyse the business. While exercising such powers the authorities should be rather careful and cautious. There should be some materials in order to be, prima facie, satisfied that some of the provisions of the Act have been violated.

As I have stated earlier, nothing has been mentioned in the counter-affidavit. Even at the time of the argument learned Senior Standing Counsel could not satisfy us on this point and simply stated that the matter was being enquired into for which notices have been given to them and the petitioners were associated with Alankar Jewellers against whom there were confidential informations and in pursuance of that three successive raids were conducted. Needless to say that persons dealing in gold ornaments will always have connection with jewellers and that alone will not be sufficient to form a reasonable belief, in order to seize the ornaments. The seizure of the blank form from the house of the proprietor of Alankar Jewellers and two keys from the shop premises at best may raise a suspicion but that will not be enough to form a reasonable belief as required by S. 66 of the Act. The petitioners, therefore, have made out a case for interference by this Court under writ jurisdiction. It will be, however, open to

the authorities to take any other action which may be permissible under the law uninfluenced by the observations made by us which has been made for a limited purpose relating to the powers of search and seizure. The Department will be at liberty to form its own opinion on the materials placed before them in accordance with law. The application is allowed and the respondents are directed to return back the ornaments to the petitioners forthwith. Parties to bear their own cost.

K. B. N. SINGH, C. J.— I agree.

Petition allowed.

AIR 1982 PATNA 158

S. SARWAR ALI, Ag. C. J. AND
U. C. SHARMA, J.

Sah Mahadeo Lal Mohan Lal and etc.,
Petitioners v. State of Bihar and others,
Respondents.

Civil Writ Journ. Cases Nos. 38 and
499 of 1982, D/- 19-4-1982.

Evidence Act (1 of 1872), S. 115 — Promissory estoppel — Estoppel against Government — Dealers in foodgrains imported rice from outside State on basis of speech in the meeting of Minister that the State Govt. has taken a decision to remove levy from imported rice — This speech was reported in newspapers also — Dealers were required to pay levy under Procurement Order 1981 — Held it could not be said that State was prevented from realising levy on principles of promissory estoppel — Statement of Minister cannot be said to be statement of State Govt. so as to be binding on it. (i) Bihar Rice and Paddy Procurement Second Order (1981), Cls. 3, 4; (ii) Constitution of India, Art. 166).

The Minister is no more than an adviser and he has to act with the aid and advice of his Council of Ministers. Until such advice is accepted by the Governor whatever the Ministers or the Council of Ministers may say in regard to a particular matter does not become the action of the State until the advice of the Council of Ministers is accepted or deemed to be accepted by the Governor. Until an order or decision is communicated to the persons affected by it—it will be open to the Council of Ministers to consider the matter over and over again, and therefore, till its communication, the order cannot be regarded as anything

more than provisional in character. In order, therefore, to make any decision or promise binding on the State, it has to be accepted or deemed to be accepted by the Governor and communicated by a person authorised to make such communication. The rules of executive business of the State, clearly lay down that a Secretary, Joint Secretary etc., can authenticate an order made by the Governor. Communication can only be under the signature of such persons. Minister is not one of them. Therefore in the present case, the statement made by the Minister, either in the meeting or otherwise, cannot be said to be the statement of the State Government, so as to be binding on it. The statements, if any, made by the Minister cannot constitute promise made on behalf of the State Government. AIR 1963 SC 395, Foll.

(Para 11)

In the instant case, the Minister-in-charge of food and supply department does not unequivocally state that if in future any one brings any levy paid rice or paddy from outside the State, he would be exempted from the levy payable in the State of Bihar. What he has said is that a decision has been taken by the State Government that those, who have already brought the levy paid commodity shall not have to pay levy again. Thus, there are no clear words to the effect that if in future any one brings levy paid commodity, he shall be exempted from the operation of the Procurement Order. The promise in order to be the basis for estoppel must be clear and unequivocal. It should not be capable of two meanings or interpretations.

(Para 13)

Further, exemption can only be made under the Procurement Order when a proper notification or executive instruction under Cl. 13 of the Order, has been issued. These have to be in writing. It is only an imprudent person who would act on mere oral statement of persons in authority in Government. It would be also against public interest to bind down the Government on the basis of oral statements made by officers of the State, however, high their position. In this situation it cannot be said that it would be inequitable if the Government is not bound down to the oral statement made by the Minister.

(Para 14)

Cases Referred: Chronological Paras
AIR 1980 SC 768 7, 8
AIR 1980 SC 1285 7, 8

AIR 1979 SC 621: 1979 All LJ 368 7,
8, 9, 11
AIR 1967 Guj 229 10
AIR 1964 SC 1128: 1964 (2) Cri LJ 222 10
AIR 1963 SC 395 10, 11
AIR 1945 PC 156 10

B. P. Rajgarhia, Hari Chandra Prasad, Bachoo Prasad Singh, Pawan Kumar and S. K. Saran, for Petitioners; K. B. Singh (Govt. Pleader No. 1), Akhileshwar Prasad Sinha (Jr. Counsel to Govt. Pleader No. 1), S. Hoda (Standing Counsel No. 3) and Mihir Kumar Jha (Jr. Counsel to Standing Counsel No. 3), for Respondents.

S. SARWAR ALI, Ag. C. J.:— The petitioners are dealers in foodgrains. They hold licenses under the Bihar Foodgrains Dealers Licensing Order, 1967. They have imported rice/paddy from outside the State. The levy payable under the local law of the exporting State has been paid on the imported foodgrains. They are now required to pay levy in accordance with the law of this State, being Bihar Rice and Paddy Procurement Second Order, 1981. Their claim is that the State is prevented from realising the levy on the principle of promissory estoppel. This is the main contention raised in these two writ applications. Some other contentions have also been raised.

2. As is well known, in order to maintain the supply of rice and securing its equitable distribution and availability at fair price, paddy/rice has to be procured by the State. The procurement orders have been issued from time to time. The latest order, with which we are concerned, is called Bihar Rice and Paddy Procurement Second Order, 1981 (hereinafter referred to as the Procurement Order). It requires rice millers and wholesale dealers to sell to the State Government or its agent paddy/rice in accordance with the provisions of clauses 3 and 4 of the Procurement Order. The quantity of levy for licensed miller has been fixed per licensed huller/sheller. As an alternative they may elect to sell on production or manufacture basis. The wholesalers, on the other hand have to sell on the basis of stock held on the commencement of the Procurement Order, and future purchases. As an alternative they may elect to compound. It

is a fixed quantity of rice, namely, 1000 quintals. Admittedly, neither of these two petitioners has gone in for compounding. Thus if levy is payable, it is on the basis of their stock and purchases.

3. I may now state the basic facts, on the basis of which the principles of promissory estoppel are sought to be availed of. They are contained in the supplementary affidavits to C.W.J.C. No. 499 of 1982.

4. It is stated that the Council of Ministers of the State of Bihar in its meeting dated 3-12-1981 took a decision that no levy shall be charged on rice and paddy which is imported from other States. This was published in the daily newspaper, Searchlight, on 8-12-1981, as well as in Hindi daily newspaper, Pradeep. On 7-12-1981 Sri Lahtan Chaudhary, Minister-in-charge of Food and Supply Department called a meeting in which the Food Commissioner and Chairman of the Food and Supply Corporation and other officers were present. In the meeting he stated that the Government of Bihar had removed levy on the rice imported from other States. It is claimed that the Minister stated to the following effect:—

"The State Government has removed levy from the imported rice. This decision has been taken in the recent meeting of the Council of Ministers. Taking into consideration the prospect of Kharif season the State Government has taken the decision in order to encourage the traders to import rice from outside. Because of this there would be a fall in the price of rice in the open market." (See paragraph 3 of the Second Suppl. affdvt.) The aforesaid statement of the Minister was reported in the local daily newspapers "Searchlight" and "Pradeep". Thereafter a meeting was called by the Ministers in the premises of the Bihar Chamber of Commerce wherein in course of the speech the Minister is said to have made certain promises. It is claimed that the speech of the Minister was tape recorded. Learned counsel for the petitioners stated before us that the tape was available. We, therefore, thought it proper that we should get the relevant portion of the speech transcribed and then it would be possible to know the actual words used. The relevant portion of the speech in Hindi is as follows:—

“लेवी की बात आपने कही है, ऐसा निर्णय लिया जैसा कि कहा आपको अध्यक्ष महोदय ने कि जो बाह्यर से सामान लायेगे, लेवी देकर, पहले ऐसा निर्णय नहीं था। पहले जेनरल आर्डर था कि जो सामान जैसे चावल या धान लायेगे उसपर हम लेवी लेगे, लेकिन हमने इसको उचित समझा कि अगर बाह्यर में कोई सामान लाता है और लाकर हमारे यहाँ बेचता है तो उसने लेवी दे दी है चूँकि उससे अगर लेवी लेगे तो या तो वह लाना बंद कर देगा या उसकी परेशानी बढ़ जायेगी। इसलिए अपने यह निर्णय लिया और सारी जगहों पर इसकी सूचना जा चुकी है। मैं आपको बतला देना चाहता हूँ कि जो लोग लेवी देके लाये हैं उनसे फिर लेवी नहीं ली जायेगी लेकिन एक बात हम बताना चाहते हैं कि जो सामान वे लायेगे लेवी देकर, उनका डिस्पोजल वे जल्दी से जल्दी कर दें।”

5. It is thus contended that a promise was held out to the petitioners and all other dealers in foodgrains that if they import rice in this State, after paying levy in the exporting State and dispose of the imported rice without any delay, they shall not be liable to levy under the local law, namely, the Procurement Order. The petitioners, it is contended, had imported rice on the basis of the promise aforesaid. Had the said promise been not made they would have not imported the rice and thus subjected themselves to levy which would result in loss to them. It would be commercially unsound to import rice from neighbouring States if the levy is to be paid in this State. In this situation the principles of promissory estoppel, it was urged, were squarely applicable.

6. Counter-affidavits have been filed on behalf of the State, in which the factual assertions, as mentioned above, have not been denied. But what has been asserted is that—

(a) No notification or executive instruction was issued after 3-12-1981 allowing exemption on the imported rice. Thus the tentative decision taken by the Council of Ministers in the meeting held on 3-12-1981 was not finalised so as to constitute a decision by the Government binding on the State.

(b) A statement made by a Minister does not amount to a statement by a person or authority authorised to make a

binding statement or promise on behalf of the State;

(c) There was no promise on behalf of the State that if any rice is imported it would be exempted from levy under the Procurement Order. In any event, it was not on the basis of any inducement or promise held out by the State that the rice had been imported by the petitioners or others similarly situated; and

(d) That any statement made in relation to a past act cannot form basis for a plea for promissory estoppel.

7. Learned counsel for the parties referred to three decisions of the Supreme Court, namely, *Motilal Padampat Sugar Mills Co. Ltd. v. State of U. P.* (AIR 1979 SC 621); *Bhim Singh v. State of Haryana* (AIR 1980 SC 768); and *M/s. Jit Ram Shiv Kumar v. State of Haryana* (AIR 1980 SC 1285).

8. It appears to me, and I say this with great respect, that two trend of thoughts are disclosed in these decisions. The ratio of the decision in *Jit Ram Shiv Kumar's case* (AIR 1980 SC 1285 at p. 1302) (supra) may be stated in the words of Kailasam, J.:—

“The scope of the plea of doctrine of promissory estoppel against the Government may be summed up as follows:—

(1) The plea of promissory estoppel is not available against the exercise of the legislative functions of the State.

(2) The doctrine cannot be invoked for preventing the Government from discharging its functions under the law.

(3) When the officer of the Government acts outside the scope of his authority, the plea of promissory estoppel is not available. The doctrine of ultra vires will come into operation and the Government cannot be held bound by the authorised acts of its officers.

(4) When the officer acts within the scope of his authority under a scheme and enters into an agreement and makes a representation and a person acting on that representation puts himself in a disadvantageous position, the Court is entitled to require the officer to act according to the scheme and the agreement or representation. The officer cannot arbitrarily act on his mere whim and ignore his promise on some undefined and undisclosed grounds of necessity or change the conditions to the prejudice of the person who had acted upon such representation and put himself in a disadvantageous position.

(5) The officer would be justified in changing the terms of the agreement to the prejudice of the other party on special considerations such as difficult foreign exchange position or other matters which have a bearing on general interest of the State."

The other trend of thought is revealed in the decision in *Motilal Padampat Sugar Mills' case* (supra). Learned counsel for the petitioners contended that the decision in this case has the approval of three Judges Bench in *Bhim Singh's case* (supra). For the purpose of this case, I propose to examine the decision most favourable to the petitioners, and then find out whether on the principles therein enunciated, the petitioners can claim successfully to have established the necessary requirement for the applicability of the principles of promissory estoppel.

9. In *Motilal Padampat Sugar Mills's case* (AIR 1979 SC 621), Bhagwati, J. stated the principle of promissory estoppel thus:—

"The true principle of promissory estoppel, therefore, seems to be that where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or affect a legal relationship to arise in the future knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and this would be so irrespective whether there is any pre-existing relationship between the parties or not."

Later in paragraph 24 of the judgment it was stated—

"The law may, therefore, now be taken to be settled as a result of this decision, that where the Government makes a promise knowing or intending that it would be acted on by the promisee and, in fact, the promisee, acting in reliance on it, alters his position, the Govt. would be held bound by the promise and the promise would be enforceable against the Govt. at the instance of the promisee, notwithstanding that there

is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Article 299 of the Constitution."

10. Learned Government Pleader No. 1, on behalf of the State, contended that in the instant case no promise was made by the Government. He contended, that the statements relied upon cannot be binding on the State unless they fulfil the requirement of Art. 166 of the Constitution. He mainly relied on the decision of the Supreme Court in *Bachhittar Singh v. State of Punjab* (AIR 1963 SC 395). Shri Rajgarhiya appearing on behalf of the petitioners on the other hand relied on the decisions in *Smt. Godavari Shamrao Parulekar v. State of Maharashtra* (AIR 1964 SC 1128); *Emperor v. Sibnath Banerji* (AIR 1945 PC 156) and *Harobhai M. Mehta v. State of Gujarat* (AIR 1967 Guj 229) and contended that the statement made by the Minister is binding on the Government as the rules of executive business make a Minister-in-charge of his Department.

11. Article 166 of the Constitution is as follows:—

"Conduct of business of the Government of a State— (1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor.

(2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.

(3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion.

No court or other authority shall be entitled to require the production of any rules made under cl. (3) for the more convenient transaction of the business of the Government of the State." This Article has been considered in *Bachhittar Singh's case* (supra) and it has been held that the Minister is no

more than an advisor and that the Governor has to act with the aid and advice of his Council of Ministers. Until such advice is accepted by the Governor whatever the Ministers or the Council of Ministers may say in regard to a particular matter does not become the action of the State until the advice of the Council of Ministers is accepted or deemed to be accepted by the Governor. It was further observed that until an order or decision is communicated to the persons affected by it— "It will be open to the Council of Ministers to consider the matter over and over again, and therefore, till its communication, the order cannot be regarded as anything more than provisional in character". In order, therefore, to make any decision or promise binding on the State, it has to be accepted or deemed to be accepted by the Governor and communicated by a person authorised to make such communication. The rules of executive business of this State, clearly lay down that a Secretary, Joint Secretary etc. can authenticate an order made by the Governor. Communication can only be under the signature of such persons. Minister is not one of them. I am, therefore, of the view that in the present case, the statements made by the Minister, either in the meeting or otherwise, cannot be said to be the statement of the State Government, so as to be binding on it. The statements, if any, made by the Minister cannot constitute promise made on behalf of the State Government. It would be pertinent now to refer to the facts of *Motilal Padampat Mills's case* (AIR 1979 SC 621) (supra) to show. Therein an assurance was given by the Chief Secretary in a written communication dated 23-1-1969. The Chief Secretary undoubtedly was an authorised person who could make a promise on behalf of the State Government. Such is not the position here. The cases relied upon by the learned counsel for the petitioners are all distinguishable. They do not deal with situation of the nature under consideration in this case.

12. I now examine the contention raised on the assumption that the statement of a Minister binds the State Government. In this context it will have to be considered—

(1) Whether any clear and unequivocal promise was made; and

(2) Whether it will be inequitable to allow the State Government to go back on the alleged promise.

13. In so far as the statement by the Minister dated 7-12-1981 is concerned, we do not have the exact words used by him. The petitioner relies on the report in Searchlight and Pradeep. Those reports are the impression of the correspondent of the newspapers concerned. In order to determine whether the principles of promissory estoppel are applicable, we must know the exact words used which it is claimed constitute a promise. In this case since the actual statement made is not available to us, the petitioners can only base their case on the statement made in the meeting of the Bihar Chambers of Commerce, which is said to have been taperecorded. I have already quoted the English translation of the original which is in Hindi. The Minister therein does not unequivocally state that if in future any one brings any levy paid rice or paddy from outside the State, he would be exempted from the levy payable in the State of Bihar. What he has said is that a decision has been taken by the State Government that those, who have already, brought the levy paid commodity shall not have to pay levy again. Thus, there are no clear words to the effect that if in future any one brings levy paid commodity, he shall be exempted from the operation of the Procurement Order. The promise in order to be the basis for estoppel must be clear and unequivocal. It should not be capable of two meanings or interpretations. Such, in my view, is not the position here.

14. Coming to the question of equity it has to be noticed that the exemption can only be made under the Procurement Order when a proper notification or executive instruction under clause 13 of the Order, has been issued. These have to be in writing. Every one knows that the Government orders, of even minor magnitude, are issued in writing. The petitioners and other traders would expect that if any Government decision is taken it would be followed by written order or instruction. It is only an imprudent person who would act on mere oral statement of persons in authority in Government. It would be also in my view against public interest to bind down the Government on the basis of oral statements made by officers of the State, however high their position.

In this situation, I am of the opinion that it cannot be held that it would be inequitable if the Government is not bound down to the oral statement made by the Minister.

15. I may also point out that in the original petition the petitioner had not pleaded the statements of the Minister on which the plea of promissory estoppel is founded. They have been stated only in the supplementary affidavits. Had the petitioners imported the rice on the basis of the said statements, they would have pleaded the same in the main application.

16. Learned counsel for the petitioners contended that clause 4 of the Procurement Order constitutes unreasonable restriction to the right of the petitioners to carry on their trade and business and is thus violative of Art. 19 (1) (g) of the Constitution. It was pointed out that no stock can be removed from the wholesalers' business premises without delivery of levy demand pertaining to such stock. It has been explained in the counter-affidavit that the restriction on removal of stock becomes applicable only when the dealer refuses to deliver the demand of levy made on him, as the delivery has to be made as soon as the demand is made. In view of what has been explained in the counter-affidavit, the provision aforesaid is reasonable. In fact no one has yet complained that in actual working there is any difficulty because of the aforesaid provision.

17. Learned counsel for the petitioners contended that the seizure in this case is illegal. We referred to clause 8 of the Procurement Order, which states that where there is failure to sell the quantity of rice and/or paddy, it shall be lawful for the District Magistrate, and other authorities mentioned in the said clause, to order seizure of the entire stock of rice or paddy found within the premises of a licensee after giving him an opportunity of being heard. Learned counsel pointed out that no such opportunity was given. But, however, it has been noticed that the entire quantity of stock is not meant to be seized but a direction has only been given that the amount of levy due cannot be deemed to be seized. In other words the direction is that the amount of levy due cannot be removed. This is consistent with clause 4 of the Order. The authorities have not, in my view, attempted to exercise power

under clause 8 of the Procurement Order.

18. In the writ petitions certain other contentions, relating to the validity of the Procurement Order, have also been raised, but they were not pressed at the time of hearing and in my view rightly, as this Court has already upheld the constitutional validity of the Procurement Order.

19. In the result I am of the view that the petitioners cannot get the reliefs that they seek in these writ applications. They are, accordingly, dismissed, but in the circumstances, without costs.

U. C. SHARMA, J.— I agree.

Petitions dismissed.

AIR 1982 PATNA 163

SARWAR ALI, Ag. C. J. AND

U. C. SHARMA, J.

Dr. Shailendra Nath Srivastava and another, Petitioners v. State of Bihar and others, Respondents.

C.W.J.C. Nos. 537 and 566 of 1982, D/-13-4-1982.

(A) Patna University Act (24 of 1976), S. 65 (as amended by Patna University (Amendment) Ordinance (1982)) — Amended S. 65 is within legislative competence of State Legislature. (Constitution of India, Sch. 7, List 3, Item 25).

Section 65 as amended by the Ordinance being in pith and substance, a legislation in relation to education, i.e. under Entry 25 of List 3, cannot be said to be ultra vires. (Para 8)

(B) Patna University Act (24 of 1976), S. 65 (as amended by Patna University (Amendment) Ordinance (1982)) — S. 65 as amended is not discriminatory — Classification of teachers as Secondary School teachers and University teachers in matter of leave is reasonable. (Constitution of India, Art. 14).

Amended S. 65 which deals with the condition of service of a teacher/employee of University and lays down under what circumstances he would be deemed to be on special leave cannot be said to be discriminatory merely because there is no similar provision with respect to teachers of secondary schools. The provision as well cannot be said to be unreasonable. (Paras 10, 12)

EZ/EZ/C86/82/VNP/SNV

University teachers constitute a class by themselves. Their conditions of service including the extraordinary leave or special leave need not be identical with those of teachers of secondary schools. The Legislature in its wisdom thought that imparters of higher education must devote themselves wholeheartedly to the cause of education. This would lead to the betterment of the teaching standards. If they choose to serve the people as their representative in the Legislature, which they may as well do, then the call upon their time and energy as a legislator shall be such as to be an impediment in the discharge of their duties as imparters of higher education. The University teachers thus constitute a class by themselves. Among teachers of the University there is no discrimination. All are treated alike.

(Paras 10, 12)

(C) Patna University Act (24 of 1976), S. 65 (as amended by Patna University (Amendment) Ordinance, 1982) — Bihar Legislature (Members Salary and Allowances) Act (25 of 1960), S. 8 — There is no conflict between Ss. 65 and 58 — S. 8 does not become nugatory merely because special leave without pay is provided under amended S. 65 in specified contingencies in respect of University teachers becoming legislators. (Para 11)

(D) Patna University (Amendment) Ordinance (37 of 1982), S. 40 — Retrospectivity — Neither language nor necessary intendment of S. 40 leads to an inference of retrospectivity — Presumption that a legislation is prospective would be applicable — S. 40 operates only in relation to oaths that are taken by teachers after promulgation of Ordinance. (Evidence Act (1872), S. 114). (General Clauses Act (10 of 1897), S. 6).

(Paras 15, 16, 17)

(E) Patna University (Amendment) Ordinance (37 of 1982), S. 2 (2) — In relation to existing members of legislatures the provision relating to special leave as enacted by the earlier amendment applies from date of the promulgation of said Ordinance and not the date on which they take oath. (Para 18)

(F) Patna University (Amendment) Ordinance (37 of 1982) — Ordinance issued to remove lacuna in earlier Ordinance — Such amendment could not be characterised as abuse of power. (Constitution of India, Art. 213). (Para 19)

(G) Patna University Act (24 of 1976), Ss. 2 (o), (r), 23 (2) and 65 (as amended by Ordinance 37 of 1982) — Member of Syndicate becoming member of State Legislature — He would not cease to be a member of Syndicate.

A person does not cease to be a teacher within the meaning of the Act if he is on leave whether voluntarily or involuntarily. A teacher on leave does not cease to be a member of the body which elected him within the meaning of S. 23 (2). Thus even though the petitioner who was a member of the syndicate and a member of the State Legislature was on leave in view of the provision of the Ordinance promulgated subsequently to lay down that under what circumstances he would be deemed to be on special leave, does not cease to be a member of the Syndicate. (Para 21)

(H) Constitution of India, Art. 19 (1) (g), (6) — Requirement under amended S. 65, Patna University Act to go on leave in respect of University teachers, while they are legislators — Not unreasonable restriction on teachers' right under Article 19 (1) (g). (Patna University Act (24 of 1976), S. 65 as amended by Patna University (Amendment) Ordinance (1982)).

The provision in amended S. 65 requiring the teachers of the University to go on leave, while they are elected as legislators cannot be said to be unreasonable restriction on lecturer's right to carry on profession as the amendment was for the betterment of the teaching standards in the University. (Para 12)

Cases Referred: Chronological Paras

AIR 1982 SC 710: 1982 Cri LJ 340 13, 19

AIR 1964 SC 1284 9

AIR 1957 SC 297: 1957 Cri LJ 409 9

AIR 1947 PC 60: 1947 All LJ 305 8

1946 KB 58: (1945) 2 All ER 433: 173 LT

298, Bennina (Mitcham) Ltd. v. Bijstra 7

AIR 1941 FC 16: 1940 FCR 110 8

1909 AC 25: 99 LT 590: 78 LJKB 157,

London and India Docks Company v. McDougall & Bonthron Ltd. 7

Prabha Shankar Misra and Guru Sharan Sharma (in C.W.J.C. No. 566/82) and Prabhakar Tekriwal, Dinendra Nath, Ashok Kumar Mallick, Vinod Kumar Kanth and Radha Raman (Sr. Advocate) (in C.W.J.C. No. 537/82), for Petitioners; K. P. Varma (Advocate General), R. E. Mahto (Addl. Advocate General) and A. B. Ojha, for Respondents.

SARWAR ALI, Ag. C. J.:— In these writ applications the constitutional validity of S. 40 of Patna University (Amendment) Ordinance, 1982 amending S. 65 of Patna University Act, 1976 and Ordinance 37 of 1982 are under challenge. In view of the change in law, certain orders have been passed. They are also under challenge. Thus Annexures 3 and 4 to C.W.J.C. 537/82 and Annexure 1 to C.W.J.C. 566/82 are sought to be quashed. Both the petitioners are members of the State Legislature. Petitioner in C.W.J.C. 537/82 is also a member of the Syndicate and has been made in charge of N.S.S. Scheme. At the stage of admission we have heard the learned counsel for the parties at length. In my view, filing of counter-affidavit on behalf of the respondents is not necessary. We are, therefore, proceeding to pass final order without adjourning the case for the purpose of enabling the respondent to file a counter-affidavit.

2. As it is well known in some of the States bicameral system of Legislature is in vogue. Bihar is one such State. There are two Houses of Legislature — the Assembly and the Council. 1/12th of the members of the Council are to be elected by electorates consisting of persons who have been for at least three years engaged in teaching in educational institutions within the State, not lower than that of secondary school, as may be prescribed by or under any law made by the Parliament (Art. 171 (3) (c) of the Constitution). It is not in dispute that at present both college teachers as well as teachers of secondary schools are eligible to be voters for teachers constituencies. But it is not only teachers, who may be elected from such constituencies. If a person is an elector for any Assembly Constituency in the State, he may be elected to fill a seat in the Legislative Council of a State subject, of course, to the other qualifications as laid down in the Constitution or the relevant law. It is not in dispute that teachers of University and at least one teacher of a secondary school are members of the Legislative Council at present.

3. Section 65 of the Patna University Act, 1976 (the Act) deals with 'code of conduct'. Cl. (a) of S. 65 (prior to the present amendment) requires teachers to take prior approval of the University for the purpose of contesting an election as a candidate to the State Legislature

or the Parliament or being nominated thereto. In the event of being a member of the State Legislature or the Parliament such teacher is enjoined to take leave due or extraordinary leave during the period of the sessions of the State Legislature or Parliament. If he is engaged in the work relating to such Legislature then also he has to take such leave for the period that he is so engaged. He has also to abide by the conditions and restrictions as prescribed in the statute.

4. Section 65 aforesaid has been amended by S. 49 of Patna University (Amendment) Ordinance 1982 (hereinafter referred to as the first Ordinance). The amended provision is as follows:—

"65. 'Code of Conduct' (1) Code of Conduct for the employees of the University will be regulated by Statutes. (2) The post of teacher and a non-teacher of the University/college/institution, controlled by the University, will be normally a full time post, so long as it is not otherwise marked. Persons appointed to these posts have to comply with the works of teaching and other duties entrusted (to them) by the University/college/institution for the full term. If any teacher or employee of a University/college/institution, controlled by the University accepts any elected or non-elected post of any institution or the membership thereof, which causes hindrance in teaching or in other works of the University, such a person shall have to obtain permission from the University/college/institution and to take leave without pay for a fixed period from his employers.

Permission will not be granted to a teacher and an employee of the University/college/institution for undertaking any private business, enterprise, tuition or other work which in the opinion of the University/college/institution, is not in the interest of his appointment. A teacher/employee who proceed on extraordinary leave, will not be entitled to receive pay or allowance from the fund of the University/college/institution and will be/will not be entitled to earn increase in pay in accordance with the decision taken by the University, keeping in view the nature of the accepted service. Such extraordinary leave can be sanctioned by the University/college/institution and such leave will be regulated by Statutes.

Provided that in case, a teacher/employee of the University/college/institution, is elected to the legislature of the State or of the Centre, then keeping in view his responsibility, his representative character, and his reputation in public life, he will be deemed to be on special leave without pay from the date he takes oath of the office for the full term of his membership of the State and the Central legislature. The special leave will be regulated by Statutes. Full security will be given to the interest of teachers and employees, who proceed on special leave, so that they will continue to earn increase in pay, promotion, seniority in service etc. On completion of the term of membership of the legislature they will be entitled to resume their posts in the University/college/institution according to their position."

5. After the hearing of the case was concluded and judgment was reserved there has been further amendment of Sec. 65 of the Act by Ordinance 37 of 1982. This Ordinance provides in S. 2 (1) that in the amended S. 65 of the Act the words elected after the words members of Legislative Council should be deleted. The effect is, that now the provision applies both to the elected and nominated members. The other amendment brought about is as follows:—

"(2) The following proviso shall be added after the proviso to S. 65 of the aforesaid Act :

Provided that in the case of such teacher/employees of the University/college/institution who has become member of the State/Central legislature the first proviso shall be deemed to have come into force on 23rd Jan. 1982 the date on which Patna University (Amendment) Ordinance 1982 (Ordinance No. 19, 1982) was promulgated." (Translations made in the office of the High Court)

It would thus be seen that if a teacher/employee of the University/college/institution, to whom the provision of the first Ordinance applies, is elected to a Legislature, he is deemed to be on special leave for such period as he continues to be a member of such a legislature. In all other respects the interests of the teacher are fully safeguarded. These amending provisions are under challenge.

6. It was contended that S. 40 of the first Ordinance is in conflict with Arti-

cle 171 (3) (c) of the Constitution of India read with S. 27 (5) (b) of the Representation of the People Act, 1950. The argument was developed thus. It was pointed out that Art. 171 (3) (c) of the Constitution permits representation from teachers' constituency in Legislative Council. An elector to the teacher's constituency is :

(b) every person who is ordinarily resident in a teachers' constituency, and has, within the six years immediately before the qualifying date for a total period of at least three years, been engaged in any of the educational institutions specified under cl. (b) of sub-section (3) by the State Govt. concerned..."

A teacher, it was contended, who is on 'special leave' for over three years, shall not become eligible to be included as a voter for the teachers constituency. The reason, it was urged, is that a teacher on special leave cannot be said to be engaged in teaching. The amended provision, therefore, takes away a right conferred under the Representation of the People Act. It was, therefore, ultra vires and beyond the legislative competence of the State Legislature. The relevant entry relating to election to legislatures is Entry No. 72 of List I of the Seventh Schedule of the Constitution. The State legislature cannot legislate or encroach on this field. But this is what has been done by the impugned provisions.

7. Sri K. P. Verma, learned Advocate General appeared on behalf of the State and Sri. Ram Balak Mahto, learned Additional Advocate General appeared on behalf of the University. It was contended on behalf of the respondents that the expression 'engaged in teaching' does not envisage actual teaching in classes. Referring to the dictionary meaning of the word 'engage', it was pointed out that the word means "employed, occupied". Employ means "to make use of the service; to give employment to; to entrust with some duty or behest". The word employed means "engaged by employer". A person, it was urged, who is on special leave is also engaged by employer. While on leave he is in the employment of the employer. Thus giving the word its ordinary dictionary meaning, it was urged, a person on leave whether ordinary, extraordinary or special, is engaged in teaching, although he may not

be actually taking classes in the educational institutions concerned. It was also pointed out that the word "occupy" means "to hold a position....." Thus the alternative meaning of the expression engage also supports the contention advanced. Reference in this connection was made to *Bennina (Mitcham) Ltd. v. Bijestra* (1946 KB 58, C2) where it was observed the word engaged is deplorably ambiguous. "An employer engages a servant when he makes an agreement with him for his service. A workman is engaged on work when he is actually carrying it out. In fact, engage of a master has an entirely different meaning to engage in of a workman". It was the first meaning ascribed to the expression engaged, it was argued, which will be applicable in the instant case. Learned counsel for the petitioners referred to the decision of the Privy Council in *London and India Docks Company v. McDougall & Bonthron Ltd.*, 1909 AC 25. But this decision, in my view, is in a different context dealing with meaning of the expressions "bona fide engaged in so discharging or receiving goods or ballast to or from on Board on any ship or vessel lying therein". It was, while interpreting the aforesaid expressions, that it was observed that a lighter could not be said to be engaged if she is in the dock when her presence is not reasonably necessary for the operations mentioned in the section. This decision, in my opinion, is of no help to the petitioners as the expression "engaged" has been interpreted in a completely different context. I need not, however, express any final opinion on the contention raised on behalf of the respondents, as in my view, the alternative argument is a complete answer to the contention raised on behalf of the petitioners.

8. It was contended on behalf of the respondents that the legislation in question is in pith and substance covered by Entry 25 of List III of the 7th Schedule of the Constitution, which is "Education, including technical education, medical education and Universities, subject to the provisions of Entries 63, 64, 65 and 66 of List I; vocational and technical training of labour." Any incidental encroachment on the subject of "election" (which is a Union subject) cannot invalidate the legislation. It was also contended that, in fact, there is not even an incidental encroachment as the law does not deal, with the qualification of

voters for teachers' constituency. In my view, the legislation being in pith and substance a law in relation to Education, even if there be encroachment on a subject covered by the Union List (about which I am not expressing any opinion), the impugned provision is free from constitutional vice. The theory of pith and substance in relation to legislations is well settled by numerous decisions of the Judicial Committee as also the Supreme Court. It would be sufficient for the present purposes to extract a few lines from the decision of the Privy Council in *Prafulla Kumar Mukharjee v. Bank of Commerce Ltd.* (AIR 1947 PC 60). In that case Bengal Money Lenders Act was challenged on the ground that it encroached on the Federal Legislative List of the Government of India Act 1935 relating to promissory note, Corporations and Banking (Items 28, 33 and 38 of the Federal Legislative List). Holding that the impugned legislation was in pith and substance in relation to money lending transaction, and was within the exclusive competence of the Provincial Legislature to legislate, Lord Porter, speaking for the Board said :

"Subjects must still overlap and where they do the question must be asked what in pith and substance is the effect of the enactment of which complaint is made and in what list is its true nature and character to be found." It was further observed :—

"The extent of invasion by the Provinces into subjects enumerated in the Federal List has to be considered. No doubt it is an important matter, not, as their Lordships think, because the validity of an Act can be determined by discriminating between degrees of invasion, but for the purpose of determining what is the pith and substance of the impugned Act. Its provisions may advance so far into Federal territory as to show that its true nature is not concerned with Provisional matters, but the question is not, has it trespassed more or less, but is the trespass, whatever it be, such as to show that the pith and substance of the impugned Act is not money lending but promissory notes or banking? Once that question is determined the Act falls on one or the other side of the line and can be seen as valid or invalid according to its true content." Here the impugned provision is squarely covered by Item 25 of List III. It deals

with the condition of service of a teacher/employee of the University and lays down under what circumstances he would be deemed to be on special leave. It need hardly be emphasised that items of legislative list have to receive widest possible construction, as was observed in *United Provinces v. Mt. Atiqa Begum* (1940 FCR 110) : (AIR 1941 FC 16) "each general word should be held to extend to all ancillary and subsidiary matters which can fairly and reasonably be comprehended in it". I am, therefore, of the view that there is no lack of legislative competence on the grounds put forth on behalf of the petitioners in the two writ cases argued by Sri P. S. Mishra and Sri Radha Raman.

9. When this case was again heard for sometime in view of the amendment brought about by Ordinance 37 of 1982 learned counsel for the petitioners placed reliance on the decision in *State of Orissa v. M. A. Tulloch & Co.* (AIR 1964 SC 1284) and contended that since the impugned provision was repugnant to the Central Legislation on the topic of election, which occupied the whole field, the impugned provision was unconstitutional and beyond legislative competence. In my view the decision in *Tulloch's* case has no application in the present circumstances. The Representation of the People Act deals with the subject of election. It may occupy the whole field so far as the election is concerned. But the terms and conditions of service of a teacher who has been elected to a legislature is not a matter which could be dealt with in the Representation of the People Act. Nor did the said legislation contemplate the exclusion of State Legislature from legislating in relation to teaching staff who become members of a legislature in respect of matters connected with their service as a teacher and other matters which come under the legislative entry 'Education'. There is no repugnancy, in the sense used in *Tulloch's* case, between the State legislation and the Central legislation. Learned Additional Advocate General relied on the decision in *A. S. Krishna v. State of Madras* (AIR 1957 SC 297) and contended that the question of repugnancy could only arise when the two legislations were in the Concurrent List. Here one legislation was under List I while the other, under List III, which is a Concurrent List. Had both the legislations been on a subject in the Concurrent List, only

then the question of repugnancy could be agitated. I do not propose to express any opinion on this aspect of the matter.

10. The next contention that was raised was that the impugned provision is discriminatory. It was said that the teachers of a University are deemed to be on special leave if they are members of a legislature, either State or Central. But similar is not the position with respect to teachers of secondary schools. On behalf of the respondents, it was contended that question of discrimination does not arise as the legislation does not deal with the teachers of secondary schools at all. It was further pointed out that the present position is that most of the schools have now been taken over by the Government. Teachers of such schools are disqualified from being member of a legislature as they hold office of profit under the State Government. It was, however, conceded that there are still some proprietary and minority schools whose teachers are not so disqualified. In any event, I am of the view that University teachers constitute a class by themselves. Their conditions of service including the extraordinary leave or special leave need not be identical with those of teachers of secondary schools. The legislature in its wisdom thought that imparters of higher education must devote themselves wholeheartedly to the cause of education. This would lead to the betterment of the teaching standards. If they choose to serve the people as their representative in the legislature, which they may as well do, then the call upon their time and energy as a legislator shall be such as to be an impediment in the discharge of their duties as imparters of higher education. The University teachers thus constitute a class by themselves. Among teachers of the University there is no discrimination. All are treated alike. The impugned provision cannot, therefore, in my view, be held to be discriminatory on the ground suggested by the petitioners.

11. The two contentions mentioned above constitute the main attack on the validity of the legislations. Some subsidiary points were also taken which may be noticed. It was contended that there is a conflict between S. 8 of the Bihar Legislature (Members Salary and Allowances) Act 1960 and the present

legislation. Section 8 of the Act aforesaid provides that the grant of salary and allowances to the members shall not be a bar to their receiving other emoluments in a different capacity. But whether they are entitled to any emoluments either on the basis of a contract or a law is not dependant on this provision. I do not think that S. 8 becomes nugatory because special leave without pay is provided under a different legislation in specified contingencies.

12. It was contended that the impugned legislations constituted unreasonable restriction on the right of the petitioners to carry on the profession of teaching. The petitioners could not be forced to go on leave when they did not want so to do. For the reasons already discussed it is clear that the impugned legislation is for the betterment of the teaching standards in the University as already explained in paragraph 10 of this judgment. The provision is clearly reasonable.

13. It was next contended that the provision in question amounts to suspension of contract of service, and suspension is only possible under the relevant provision of the University Statute. I do not think that the legislative power to provide for the conditions under which special leave without pay would be applicable becomes nugatory because of some provisions of University Statutes relating to suspension of teachers. I am, therefore, of the view that the impugned provisions do not suffer from any legal or constitutional vice. They are held to be valid pieces of legislation within the legislative competence of the State Legislature and within the Ordinance making power of the Governor. The making of Ordinance, as is now well settled, is a legislative act. (See A. K. Roy v. Union of India, AIE 1982 SC 710).

14. Arguments were advanced when the case was originally heard on the meaning to be ascribed to S. 40 of the First Ordinance. I propose to deal with them, for if the contention of the respondents is accepted Ordinance 37 of 1982 becomes only by way of abundant caution and clarificatory in nature. The provision has been fully quoted. It says that a teacher etc. shall be deemed to be on special leave without pay from the date he takes oath to the post for the full term of the membership of the State and Central legislature. Learned

counsel for the petitioners contended that the provision is not retrospective in nature. It is only prospective. It applies to those who henceforth take oath of their office. It does not affect those who have taken oath prior to the present amendment. On behalf of the respondents it was contended that the amending Ordinance came into force on 23-1-1982. It, therefore, operates from the said date. Members of Legislature of defined category shall be deemed to be on leave without pay from the said date.

15. The provision cannot be said to be retrospective. Neither the language nor necessary intendment as revealed by the words used lead to an inference of retrospectivity. The presumption that a legislation is prospective is, therefore, applicable. The only question that needs to be considered further is as to whether it applies to those who take oath hereinafter, or it applies even to those who have taken oath earlier, but would be applicable from the date of the enactment of the Ordinance.

16. It is true that we have to interpret the law "according to the intent of persons that made it" (4 Co. Int. 330). But where the language is clear, specific and unambiguous, the intent is to be gathered from the language used. Here the words used in the legislation are not capable of two meanings. When it is said that the teacher-legislators shall be deemed to be on special leave from the date they take oath of their office, it is not open to the courts to substitute that date by the process of interpretation. The contention of the petitioners that the Act is not retrospective is accepted by the learned Advocate General appearing for the State. In this situation the law can operate only in relation to the oaths that are taken after the promulgation of the Ordinance.

17. What is suggested on behalf of the State amounts to addition of certain words to the section. If the intention was to apply the law even in respect of those who had taken oath earlier, and were members of legislature on the date of coming into operation of the Ordinance, we would expect that words "or the date of commencement of this Ordinance, whichever is later" or words to similar effect would have been there. I accept that under certain special circumstances it may be possible to even add to the words used in a legislation,

but those are rare occasions. If the words are ambiguous or where two meanings are possible it would be legitimate, and indeed the correct method of interpretation, to prefer a meaning which is in accord with the statutory objective, justice and other relevant considerations. But here the words used are clear and the meaning is plain. There is no room for imagining anomaly or inventing fancied ambiguity in order to depart from the plain meaning of the words. I am, therefore, of the view that the language of Sec. 65 as amended by the first Ordinance is such as to be inapplicable to teachers who have taken oath on a date prior to the promulgation of the Ordinance.

18. This brings us to the consideration of Ordinance 37 of 1982. It is now necessary to examine the true effect of S. 2 (2) of the said Ordinance. I have already quoted the aforesaid provision. It states that for those who have already become members of the Legislature, the first proviso of the Ordinance shall be deemed to apply from 23-1-1982, the date of coming into force of the first Ordinance. Learned counsel for the respondents contended that the true meaning of the aforesaid provision is that in relation to the existing members of legislatures the provision in relation to special leave as enacted by the first Ordinance applies from the date of the promulgation of the said Ordinance i.e. 23-1-1982, and not the date on which they take oath. Learned counsel for the petitioners on the other hand contended that such is not the effect of the provision. It does not affect the earlier amendment which contemplated the grant of special leave from the date of taking an oath by the members of different legislatures. In my view, it is not possible to accept the contention of the petitioners. If what is contended by them is accepted, it means that the amendment was superfluous and of no effect. Such an intention cannot be attributed to a law making body. The contention of the learned counsel for the respondents is, therefore, more reasonable and consistent with the intention as revealed by the words used.

19. Learned counsel for the petitioners contended that the enactment of Ordinance 37 of 1982 was an abuse of power and was, therefore, unconstitutional. It was contended that in view of the decision in *A. K. Roy v. Union of India* (AIR 1982 SC 710) it would be permissi-

ble for this Court to examine whether the Ordinance constituted an abuse of power. Learned Additional Advocate General rightly pointed out that the purpose of amendment was to deal with the suggested lacuna in the earlier ordinance. Indeed, the purpose of amendment in many cases is to remove the defect in law due to imperfect drafting. In my view, the contention is correct. Many a time the words used do not convey the intention of the legislature. In such a situation it is obvious that amendment of law is the only remedy. Here a controversy was raised by the petitioners themselves that the amending provision did not apply to teachers who have already taken oath and would have application only to those who take oath hereinafter. If in that situation the law making body found that the words used were capable of two interpretations or that the words used did not give effect to the intention of the legislation, I do not think that an amendment of law could, even by a stretch of imagination, be characterised as abuse of power. The contention of the learned counsel for the petitioners is, therefore, unacceptable. It was next contended that the date, 23rd Jan. 1982, has been "picked out from the hat", and is therefore arbitrary. I do not find any merit in this contention. The reason why this date has been chosen is obvious. It is the date when the earlier ordinance came into force. There is nothing arbitrary in the choice of the date for applicability of the amended provision.

20. On behalf of the petitioner in *C. W. J. C. 537/1982* it was contended that on the basis of impugned orders the petitioner was being treated as having ceased to be a member of Syndicate and was also relieved of the charges of N.S.S. Scheme. This was impermissible even if the statutory provisions under challenge were *intra vires*. So far as making the petitioner in charge of N. S. S. Scheme is concerned, it is accepted that he was made in charge by the Vice-Chancellor. The Vice-Chancellor could, therefore, issue the impugned direction that he would cease to be in charge of this scheme. One who appoints can also terminate the appointment. I do not find any legal infirmity or lack of power in the Vice-Chancellor so far this part of the order is concerned. Challenge to the other part of the annexure requires

careful examination. Certain provisions of the Patna University Act will have to be considered in this context. Section 2 (o) of the Act defines lecturer to mean "a teacher of a college of the University possessing such qualification as may be prescribed by the Statutes". Teacher has been defined in S. 2 (r) as follows:—

"A teacher includes Principal, University Professor, College Professor, Reader, Lecturer, Demonstrator and other persons imparting instruction in any department, or in any college or institute maintained by the University."

Section 23 of the Act lays down as to who shall be the members of the Syndicate. It states that two members shall be from such lecturers who have the teaching experience of at least ten years. They have to be elected in accordance with the system of proportional representation by means of single transferable vote. The proviso to S. 23 (2) is as follows:

"Provided that any member elected or nominated shall be deemed to vacate office with effect from the date on which he ceases to be a member of the body which had elected or nominated him." It is on this proviso that reliance is placed by the learned counsel for the University for contending that the petitioners shall be deemed to vacate the membership of the Syndicate. But it has to be observed that the vacation from office can only take place where a person has ceased to be a member of the body which has elected him. The body electing the petitioner is of teachers. Learned counsel for the University had, therefore, contended that a person going on leave ceases to be a teacher. Reliance was placed on the definition of a teacher in S. 2 (r).

21. It was contended that a person cannot be said to be imparting instruction in any department or college if he is on forced leave. There are two answers to this contention. The first is that the definition of teacher in S. 2 (r) is an inclusive, and not exhaustive definition. Secondly, the ordinary meaning of the expression teacher, in the context of this Act, includes, in my opinion, a teacher who is on leave and during that period may not be engaged in any actual teaching work in an institution. If the argument of the learned counsel is accepted then a person who is on leave even for a day ceases to be a teacher.

Such could not be the intention of the legislature. I am, therefore, of the view that a person does not cease to be a teacher within the meaning of the Act if he is on leave whether voluntarily or involuntarily. A teacher on leave does not cease to be a member of the body which elected him within the meaning of S. 23 (2) of the Act. Such being the position even though the petitioner is on leave in view of the provision of the Ordinance, he does not cease to be a member of the Syndicate. Annexure-3 in so far as it suggests that the petitioner has ceased to be a member of the Syndicate, is therefore, invalid and cannot be given effect to.

22. In view of the discussion aforesaid I am of the view that there is no merit in C. W. J. C. 566 of 1982 and it is accordingly dismissed. In so far as C. W. J. C. 537 of 1982 is concerned, it is allowed only to this extent that the petitioner cannot be deemed to have ceased to be a member of the Syndicate. In the facts and circumstances of the case, there shall be no order as to costs.

U. C. SHARMA, J.:— I agree.

Order accordingly.

AIR 1982 PATNA 171

M. V. VARMA, J.

Rajan Sharma, Petitioner v. Jagdish Purbey and others, Opposite Party.

Civil Revn. No. 1836 of 1980, D/- 28-4-1982.*

Civil P. C. (5 of 1908) S. 115 (1) Proviso (b) — Order of lower Court if allowed to stand occasioning failure of justice — High Court can interfere in revision.

Section 115 (1) Proviso (b) does provide for interference in revision where the order under revision if allowed to stand would occasion failure of justice. Where the order of the lower Court is aimed at and calculated to circumvent the law by achieving an end indirectly which it could not have done directly, the order would be patently illegal and is liable to be set aside in revision because if allowed to stand it would necessarily occasion a failure of justice.

(Para 3)

*Against order of Munsif 1st Court, Darbhanga, D/- 26-7-1980.

FZ/GZ/C505/82/GNB/LGC-H

A. N. Sahay and Bipin Bihari Sinha, for Petitioner; S. P. Srivastava and M. N. Verma, for Opposite Party.

ORDER:— This revision petition is for interference by this Court with the impugned order dated 26-7-1980 passed by the Munsif, first court, Darbhanga, in title suit No. 141 of 1979. By the impugned order the learned court below, on application under S. 151 of the Civil P. C. (hereinafter referred to as the Code), stayed the formal proceeding of the Title Partition Suit No. 52 of 1958, in which the final decree proceeding regarding fixation of patbandi was going on in accordance with the terms of the preliminary decree passed therein on appeal in Title Appeal No. 57/61/43 of 1962 against which the second appeal in this High Court also stood dismissed for default.

2. The grievance of the petitioner is that such a course, as adopted by the learned court below, is in effect circumvention of law and purports to do a thing indirectly which it could not do directly. From a perusal of the contents of the revision application, it is clear that in order to achieve the same said prayer as the one achieved in the impugned order, the opposite party had preferred an application for temporary injunction under O. 39 R. 1 of the Code for restraining temporarily first party petitioner from proceeding with the action for preparation of final decree in the Title Suit No. 52 of 1958 which was rejected by the same said Court holding that although the ingredients for grant of temporary injunction were available in favour of the plaintiff of Title Suit No. 141 of 1979 but owing to the legal difficulties the same could not be entertained, inasmuch as, a party could not be restrained by an injunction from proceeding with another suit. To me it appears curious that the court below assumed an advisory role in observing in the same said injunction — refusal order that the stay of the proceeding for a final decree could be granted if the plaintiff of Title Suit No. 141 of 1979 filed a petition in that behalf either in the suit or in the partition suit No. 52 of 1958. It is quite apparent that inspired by the said observation of the Court, the plaintiff of Title Suit No. 141 of 1979 preferred this application under S. 151 of the Code in the suit for the stay of the proceeding in Partition Suit No. 52 of 1958 and the court granted the said prayer against

which the present revision application has been filed.

3. Sri S. P. Shrivastava, counsel for the opposite party, has contended that in view of the proviso inserted in S. 115 of the Code by 1976 amendment, this Court is under fetters in interfering with the order impugned. In my opinion this contention has no substance, inasmuch as, proviso (b) to sub-sec. (1) of S. 115 of the Code does provide for interference where the order under revision, if allowed to stand, would occasion failure of justice. I have already indicated that the order impugned is aimed at and calculated to circumvent the law by achieving an end indirectly which it could not have done directly and this alone warrants interference. Thus on consideration of the points raised by the respective parties I find and hold that the order is patently illegal as it seeks to achieve things indirectly which could not be done directly. The order impugned, if allowed to stand, would necessarily occasion a failure of justice and hence must be set aside. The application is, therefore, allowed and the order impugned is hereby set aside but without costs.

4. However, I would like to make it clear that success of the petitioner in this Court shall not stand as a bar to the plaintiff of the suit seeking any relief in Partition Suit No. 52 of 1958, if the same is permissible in law.

5. Let the lower court records be sent down immediately. Hearing of the case may be expedited.

Application allowed.

AIR 1982 PATNA 172

S. K. CHOUDHURI AND M. P. SINGH,
JJ.

Ramdeo Jha and others, Petitioners v. Chandar Thakur and others, Opposite Parties.

Civil Revn. No. 937 of 1973, D/- 25-3-1981.

(A) Civil P. C. (5 of 1908), Order 22, Rr. 3, 4 and 11 — Abatement of appeal — Permission to bring legal representatives on record in appeal — Absence of fraud or collusion — Order of permission could not be held illegal.

In the instant case fraud or collusion or other circumstances, which indicate that there has not been a fair or real trial

HY/IV/D839/81/JDD/SSG—H

or that against the absent heirs there was a special case, which was not and could not be tried in the proceeding, was not pleaded or raised by the respondents before the lower appellate court, nor was it raised before the Court in revision. The underlying principle of Order 22, Rr. 3 and 4 of the Civil P. C. is "undisputedly a facet of natural justice or a limb of audi alteram partem". The appellate court having passed the impugned order by which left out heirs of appellant No. 1 and respondent No. 1 were allowed to be added as parties — appellants and respondents, respectively, it would be difficult to hold that there has been any illegality committed by the lower appellate court. Case law discussed. (Para 8)

(B) Civil P. C. (5 of 1908), Section 115 — Exercise of revisional powers — Failure of justice or irreparable loss — Condition precedent.

Section 115 not only requires the petitioners to show that the subordinate court has exercised a jurisdiction not vested in it by law or has failed to exercise a jurisdiction so vested in it or has acted in the exercise of its jurisdiction illegally or with material irregularity, but further to satisfy the Court that if the impugned order is allowed to stand, it would occasion a failure of justice or that an irreparable injury would be caused to the petitioners. In the absence of such failure of justice or irreparable loss the Revisional Court would not interfere. (Para 9)

Cases Referred: Chronological Paras

AIR 1979 SC 1393	2, 4, 5, 8
AIR 1975 SC 733	7
AIR 1974 Pat 338	2, 4, 7
AIR 1971 SC 742	6

Tribeni Prasad Sinha, for Petitioners;
Kumar Brajendra Nath, Shashi Bhusan Prasad Sinha and Syed Rafat Alam, for Opposite Parties.

S. K. CHOUDHURI, J.:— This civil revision by the plaintiffs who are respondents first party before the lower appellate court, is directed against the order dated 25th May, 1973 passed in Title Appeal No. 23 of 1968 by the Second Subordinate Judge, Muzaffarpur, holding that the appeal has not abated for non-substitution of the heirs of deceased appellant No. 1 as also respondent No. 1, and since it has come to the notice of the court that there are heirs of these deces-

ed persons; they should be added as parties in the appeal; the heirs of deceased appellant No. 1 as appellant and the heirs of deceased respondent No. 1 in the category of the respondents.

2. This revision was originally placed before a learned single Judge of this Court, who after hearing the parties reserved the judgment and ultimately referred the case to a Division Bench by his order dated 4th April 1980. The learned single Judge noticed in his order of reference the latest case of the Supreme Court in the case of N. Jayaram Reddi v. The Revenue Divisional Officer (AIR 1979 SC 1393) wherein it has been said that Rules 3 and 4 read with Rule 11 of Order XXII of the Code of Civil Procedure are based on the principle of audi alteram partem and the principle that underlies these provisions is that the legal representative of a deceased, who may be affected by the decision, must be afforded an opportunity of being heard before any legal liability is fastened upon him, but in view of the Bench Decision of this Court in Parhlad Jha v. Sonelal (AIR 1974 Pat 338) which according to the learned single Judge, supports the contention raised by the petitioners, thought it proper to refer the case to a Division Bench. That is how, it has been placed before us for hearing.

3. In order to appreciate the points it will be necessary to give some salient facts. A suit was filed in the court of the Munsif, for declaration of plaintiffs' title and for confirmation of possession. The suit was decreed. Accordingly an appeal was filed by the defendants first party which is pending decision in the lower appellate court. During the pendency of the appeal, appellant No. 1 died on 3rd April 1970 and an application for substitution of the heirs of the aforesaid deceased was filed within time, namely, on 1st July 1970. It may be stated here that two sons of appellant No. 1 are already on record as appellants Nos. 2 and 3 and the heirs sought to be substituted were the widow and daughters. The said application unfortunately stood rejected for non-compliance of the lower appellate court's peremptory order for service of a copy upon the other side. This order of rejection is dated 22-6-1971. It further appears that during the pendency of the appeal, plaintiff-respondent No. 1 also died. According to the petitioners, he died on 25-10-1970 whereas according to the opposite party, he died on 7-9-1970.

The substitution petition was filed by the opposite party on 9-11-1971. It was alleged therein that two of the heirs, namely, the two sons of the deceased respondent No. 1 are already on record as respondents Nos. 3 and 4 (who are petitioners Nos. 2 and 3 before this Court), and the daughters who are sought to be substituted have relinquished their share in favour of their brothers, namely, respondents Nos. 3 and 4. A rejoinder was filed by the plaintiffs-respondents contesting the date of death as also the allegation of relinquishment of shares. It is said that thereafter the defendants appellants also filed an application to condone the delay in filing the petition dated 9th January 1971 and set aside the abatement and thereafter substitute the heirs.

As the date of death of the plaintiff-respondent No. 1 was disputed, evidence was taken by the lower appellate court. After hearing the parties it held that the date furnished by the plaintiffs-respondents was correct, namely, that respondent No. 1 died on 7-9-1970. The lower appellate court also disbelieved the case of relinquishment of the shares by the daughters of deceased respondent No. 1 in favour of their brothers-respondents Nos. 3 and 4. It also held that the estate of deceased respondent No. 1 is represented by the two sons already on record as respondents Nos. 3 and 4. It held further that the appeal did not abate for not bringing on record some of the heirs of deceased appellant No. 1 as two of the heirs were already on record as appellants Nos. 2 and 3, and as also in the case of deceased respondent No. 1.

4. Mr. Tribeni Prasad Sinha, learned counsel appearing in support of this revision application challenged the impugned order as illegal and without jurisdiction as the application for substitution of the heirs of deceased appellant No. 1 stood rejected for non-compliance of the lower court's peremptory order and the application for substitution of the heirs of deceased respondent No. 1 was, *prima facie* time barred, because the lower appellate court has recorded the finding that respondent No. 1 died on 7th September 1970, and not on 21st October 1970 as alleged by the defendants appellants. He contended that his argument fully finds support from the Bench decision of this Court in the case of Prahlad Jha's case (AIR 1974 Pat 338) (*supra*). Learned counsel appearing on behalf of

the plaintiffs-respondents, on the other hand, supported the impugned order by pointing that on facts and circumstances of the case, the course adopted by the lower appellate court was just and proper, specially when the recent decision by the Supreme Court in Jayaram Reddy's case (AIR 1979 SC 1393) (*supra*) states that the basic principle underlying Rules 3 and 4 of Order XXII read with Rule 11 of the Code of Civil Procedure is a facet of natural justice or a limb of *audi alteram partem* rule. Learned counsel also contended that it being a civil revision, the scope of interference is limited in view of the present amended Section 115 of the Code of Civil Procedure.

5. At the very outset, it may be stated that it is not a case where some of the heirs of deceased appellant No. 1 as also deceased respondent No. 1 have been brought on the record and some left out. It is a case where some of the heirs of both the aforesaid deceased are on record; the heirs of deceased appellant No. 1 who are on record are the two sons, namely appellants Nos. 2 and 3, and the heirs of deceased respondent No. 1 who are on record are also the sons of the deceased, namely, respondents Nos. 3 and 4, in the appeal. It is not disputed that the widow and the daughters of deceased appellant No. 1, who are other heirs than on record, were not brought on record within time inasmuch as the substitution petition filed on their behalf which was within time, unfortunately for the appellants stood rejected for non-compliance of the peremptory order of the lower appellate court. So far as deceased respondent No. 1 is concerned, as already stated above, his two sons are already on record as respondents Nos. 3 and 4 and the heirs to be substituted are the three daughters. That application, however, was filed beyond time, from the date of death as recorded by the lower appellate court. It may also be stated here that the question that the appeal abated as a whole was raised before the lower appellate court by the respondents and the said matter and the substitution matter have been disposed of by the impugned order after remand.

In the recent decision of the Supreme Court in Jayaram Reddy's case (AIR 1979 SC 1393) (*supra*) two separate judgments have been delivered by the two learned Judges of the Supreme Court. The ques-

tion before the Supreme Court was as to whether the Government appeal arising out of a land acquisition proceeding stood abated in the High Court when the appeal was pending there, for non-substitution of the heirs of one of the respondents. Y. Prabhakar Reddy, though in the other appeal preferred by the claimants, the heirs of the said deceased who was one of the appellants in the appeal of the claimants before the High Court were substituted. Singhal, J., held that the question of abatement was not raised before the High Court and the two appeals having been heard together and disposed of by a common judgment, there was an abandonment of the technicality of abatement. According to the learned Judge the said technical plea of abatement and the consequential dismissal of the appeal was a matter at the discretion of the legal representative of the deceased-respondent and there was no justification for the argument to the contrary. The learned Judge, therefore, held that in the facts and circumstances of the case the plea that the Government appeal abated because of non-substitution of the legal representatives of the deceased Y. Prabhakar Reddy the respondent was wilfully abandoned by the respondents.

6. The other learned Judge Desai, J., who agreed with the judgment of the learned Judge Singhal, J., however, entered into the question as to whether in the facts and circumstances of the case the Government appeal had not at all (sic). The said learned Judge in his elaborate judgment after discussion of various authorities came to the conclusion that in the facts and circumstances of the case, the Government appeal did not abate. He pointed out that the basic principle underlying Order XXII, Rules 3 and 4 which on account of the provision contained in Rule 11 of that Order of the Code of Civil Procedure, applied to appeals, is undisputedly a facet of natural justice or a limb of *audi alteram partem* rule. The learned Judge pointed out that the first limb of this rule *audi alteram partem* is that a person must be given an opportunity of being heard before a decision one way or the other affecting him is recorded. He further stated in para. 28 of his judgment as follows:—

"As a corollary to this rule it is provided in the Code of Civil Procedure that where a party to the proceeding dies

pending the proceeding and the cause of action survives, the legal representatives of the deceased party should be brought on record which only means that such legal representatives must be afforded an opportunity of being heard before any liability is fastened upon them....."

The learned Judge has also discussed the case of Mahabir Prasad v. Jage Ram (AIR 1971 SC 742), in paragraph 30 of the report. The said paragraph has quoted the observation made in AIR 1971 SC 742 (744) as follows:—

"Even on the alternative ground that Mahabir Prasad being one of the heirs of Saroj Devi there can be no abatement merely because no formal application for showing Mahabir Prasad as an heir and legal representative of Saroj Devi was made. Where in a proceeding a party dies and one of the legal representatives is already on the record in another capacity, it is only necessary that he should be described by an appropriate application made in that behalf that he is also on record, as an heir and legal representative. Even if there are other heirs and legal representatives and no application for impleading them is made within the period of limitation prescribed by the Limitation Act the proceeding will not abate."

From this case the learned Judge deduced the principle that "where one of the legal representatives of the deceased party is before the court at the time when the proceeding is heard, but in another capacity, it is immaterial whether he is described as such or not and even if there are other legal representatives, the cause will not abate." Several conclusions which have emerged from the various decisions discussed by Desai, J., have been enumerated in clauses (1) to (5) of paragraph 40 of the report. Then follows paragraph 41 a portion of which may be usefully quoted here:—

"41. Is it possible to ratiocinate these decisions? Apparently the task is difficult. Now if the object and purpose behind enacting Order 22, Rules 3 and 4 are kept in forefront conclusions Nos. 1 to 4 would more or less fall in line with the object and purpose, namely no decision can be recorded in a judicial proceeding concerning the interests of a party to a proceeding without giving such party or his legal representatives an opportunity of putting forth their case. To translate this principle into

action denuding it of its ultra technical or harsh application, the Courts held that if some legal representatives are before the Court, or they are before Court in another capacity or are brought on record at some stage of the suit, the action will not abate even if there is no strict compliance with the requirements of Rules 3 and 4....."

7. The other case cited at the bar is *Harihar Prasad Singh v. Balmiki Prasad Singh* (AIR 1975 SC 733). The relevant portion relied upon by both the sides is the placitum (E), the discussion of which is to be found in paragraphs 32 and 33. Placitum (E) reads thus:—

"Where a plaintiff or an appellant after diligent and bona fide enquiry ascertains who the legal representatives of a deceased defendant or respondent are and brings them on record within the time limited by law, there is no abatement of the suit or appeal; the impleaded legal representatives sufficiently represent the estate of the deceased and the decision obtained with them on record binds not merely those impleaded but the entire estate including the interest of those not brought on record. Unless there is fraud or collusion or there are other circumstances which indicate that there has not been a fair or real trial or that against the absent heir there was a special case which was not and could not be tried in the proceedings the heirs who have applied for being brought on record should be held to represent the entire estate including the interests of the heirs not brought on the record. The fraud or collusion must be a fraud or collusion between the appellant on the one hand and the representative of the deceased respondent who is brought on record on the other and vice versa. The fraud or collusion must be between the parties on record to the detriment of the legal representative who has not been brought on record."

In *Prahlad Jha's* case reported in AIR 1974 Pat 338, it does not appear that any argument was put forward that the estate was fully represented by one of the heirs of deceased respondent No. 5. The heir on record was the father of the deceased who was respondent No. 1 and the mother was not brought on the record. The fact of death of Respondent No. 5 transpired during the pendency of the second appeal before this Court when the respondents filed an ap-

plication, that respondent No. 5 having died and his mother not having been brought on record within the period of limitation the appeal has abated. As it transpired in the second appeal that the said respondent had died in the lower appellate court, the High Court held that the appeal abated against respondent No. 5 and it had no jurisdiction to entertain the application for substitution after setting aside abatement and, therefore, the High Court remanded the case to the lower appellate court after setting aside the judgment and the decree of the lower appellate court and directing it to dispose of the appeal after passing appropriate orders on the application for setting aside the abatement of the appeal against deceased respondent No. 5. Thereafter the lower appellate court after hearing the parties rejected the said application for setting aside abatement and dismissed the appeal as incompetent. It appears that the application for setting aside abatement and substitution was filed on the plea that the appellants learnt about the death of respondent No. 5 for first time from the affidavit filed by the respondents that respondent No. 5 had died and his mother the heir, had not been brought on record within the period of limitation. They also alleged that they had no knowledge about the existence of the mother of the deceased respondent No. 5.

The findings recorded by the court below were against the appellants. It was held that the appellants have failed to make out sufficient cause for setting aside the abatement, as they were not ignorant of the death of respondent No. 5, and that respondent No. 5 died leaving behind his other heir, namely, the mother. The matter accordingly came to High Court again. It was held by the High Court that the said application for substitution was not a bona fide application and the appeal, therefore, abated against the deceased respondent No. 5, and consequently the appeal abated as a whole. It also alternatively held that the plea that the appeal has not abated, cannot be permitted to be raised as the High Court had remanded the case on the previous occasion on the ground that the appeal had abated against the deceased respondent No. 5, and, therefore, this point is barred by the principle of res judicata. This case, therefore, is distinguishable on its own facts,

and, therefore, it does not help the petitioners.

8. I may also point out here that in the present case fraud or collusion, or other circumstances, which indicate that there has not been a fair or real trial or that against the absent heirs there was special case, which was not and could not be tried in the proceedings, was not pleaded or raised by the respondents before the lower appellate court, nor was it raised before this Court during arguments. The principle that has been laid down in Jayaram Reddi's case (AIR 1979 SC 1393) (supra) by the Supreme Court has already been stated above. It bears repetition that the underlying principle of O. 22, Rr. 3 and 4 of the Civil P. C. is "in disputably a facet of natural justice or a limb of audi alteram partem". The lower appellate court having passed the impugned order by which left out heirs of appellant No. 1 and respondent No. 1 were allowed to be added as parties-appellants and respondents, respectively, it is difficult to hold that there has been any illegality committed by the lower appellate court. The principle, as laid down in Jayaram Reddi's case, fully supports the impugned order passed by the lower appellate court in the facts and circumstances of the case.

9. I shall now notice another hurdle in the way of the petitioners in attacking the impugned order. S. 115 of the Civil P. C., as it now stands, not only requires the petitioners to show that the subordinate court has exercised a jurisdiction not vested in it by law or has failed to exercise a jurisdiction so vested in it or has acted in the exercise of its jurisdiction illegally or with material irregularity, but further to satisfy the court that if the impugned order is allowed to stand, it would occasion a failure of justice or that an irreparable injury would be caused to the petitioners. In my view of the rider that if the order is allowed to stand, it would occasion a failure of justice or that irreparable injury would be caused to the petitioners, is a big hurdle in the way of the petitioners to cross which they have miserably failed. In that view of the matter also in revisional jurisdiction of this Court, no interference can be made in the present case.

10. In the result, there is no merit in the application. It is, accordingly, dis-

missed, but in the circumstance of the case I would make no order as to costs.

M. P. SINGH, J.:— I agree.

Revision dismissed.

AIR 1982 PATNA 177

S. ALI AHMAD AND M. P. VARMA, JJ.

Jiba Devi and others. Appellants v. Satya Nand Roy and others, Respondents.

A. F. A. D. No. 395 of 1976, D/- 19-3-1982.*

Civil P. C. (5 of 1908), S. 2 (11), O. 22, R. 4 — "Legal representative" — Suit for declaration of title and recovery of possession — All defendants constituted joint Hindu family — Death of minor defendant — Minor's father already on record as Karta of joint family — Minor left behind his mother — Held, by virtue of proviso to S. 6, Hindu Succession Act minor's interest in joint family property devolved upon his mother — Minor's father was not intermeddler and hence not legal representative within meaning of S. 2 (11) — Mother not being substituted within time suit abated as a whole. (Paras 7, 8, 13)

Anil Kumar Sinha and Yogendra Mishra, for Appellants; Shiv Kirti Singh, Jai Prakash Sinha and Rajendra Kishore Prasad, for Respondents.

M. P. VARMA, J.:— This appeal has been referred to a Division Bench by Hon'ble Mr. Justice S. Ali Ahmad, who is now a member of the present Division Bench hearing the appeal. The plaintiffs have filed this Second Appeal against the judgments of the courts below.

2. On perusal of the original order, dated 31-1-1969 passed by the Munsif, it appears that the same was passed on a petition framed and preferred under O. 22, R. 9 (2) of the Civil P. C. (hereinafter referred to as 'the Code') for setting aside the abatement of the main suit. The said suit was for a declaration of title and recovery of possession of some land on the ground that the plaintiffs were dispossessed by the defendants and that the defendants were all members of one joint Hindu family.

3. The trial court took a view that the plaintiffs have failed to establish sufficient cause and has also held that in view

*From decision of Lakhanjee Jha, Addl. Sub. J., Muzaffarpur, D/- 27-3-1976.

of the plaintiffs' case the suit had abated as a whole and not only against the deceased defendants. An appeal in the court below was preferred as against the order, dated 31-1-1969 and also against the decree dated 19-2-1969, which followed as a consequence to the dismissal of the suit ordered by the original court while disposing of the petition for setting aside the abatement. In effect, therefore, the appeal before the court below was a composite one, i. e. both against the order refusing to set aside the abatement as also dismissal of the suit.

4. The question which arises for our consideration is whether a second appeal could be preferred against the appellate order, which was passed in an appeal against the trial court's order refusing to set aside the abatement. Undoubtedly such an appeal could be preferred under O. 43, R. 1 clause (k) of the Code. The matter is very elementary and it needs hardly to be reiterated that no second appeal lies from an order as provided in S. 104 (2) of the Code, which says that "no appeal shall lie from any order passed in an appeal under this section."

The dismissal of a petition under O. 22, Rule 9 (2) of the Code, which enables a plaintiff to apply to the court to set aside the abatement or dismissal of suit under O. 22 of the Code, is appealable as an appeal from an order under O. 43 of the Code and the order of the first court clearly specifies that "the petition dated 2-8-68 for setting aside the abatement of the suit be dismissed." In no circumstance, therefore, the appeal before the court below can be treated as against dismissal of the suit itself. It seems that after the order, dated 31-1-1969, passed by the first court, a formal consequential decree was prepared by the said court on 19-2-1969 which was also made a subject of attack in the appeal before the appellate court below and I feel that under that misconception, the appeal which should have been described and filed as a Miscellaneous appeal was preferred as a Title appeal. I further find that even the lower appellate court's order concludes by saying that "it further follows that the learned Munsif was justified in holding that the suit abated as a whole and rightly refused to set aside the abatement thereof." Such a finding clearly establishes that the appeal was being heard against the dismissal of the petition for setting aside abatement and definitely not against the dismissal of the

suit itself. In my opinion, if the plaintiffs had any grievance against the dismissal of the suit followed by a decree, it was open for the plaintiffs to prefer an independent appeal against the said decree, if the same was permissible in law. But that having been not done, the appeal before the court below cannot but be treated as an appeal under Order 43, Rule 1 (k) of the Code. In that view, the present Second Appeal becomes incompetent as barred by Section 104 (2) of the Code. The first appeal filed in the court below must be held to have been preferred under Order 43, Rule 1 (k) of the Code which is directly covered by Section 104 (1) (i) of the Code.

5. However, if the appeal before the court below is treated as a composite appeal, as contended at the Bar by Mr. Jogendra Mishra, Counsel for the appellants, being both against dismissal of the plaintiff's petition dated 2-8-1968 for setting aside the abatement as also against the formal consequential decree, dated, 19-2-1969 prepared on the basis of the dismissal of the suit itself, making the second appeal maintainable, the question that arises for consideration is whether the court below has committed such an error of law as to warrant any interference by this Court.

6. The only question of law canvassed before us is that on the admitted position the deceased minor was a member of the joint Hindu family, of which his father was the Karta. It has been contended by Sri Mishra that this position should be taken to mean that the father of the deceased was the legal representative within the meaning of Section 2 (11) of the Code, since the father in the eye of law represents the estate of the deceased person as intermeddling with the deceased's estate. It has also been contended that the said Karta father is already on record and the suit cannot abate at all.

7. I may say that the law regarding survivorship has undergone a drastic change by proviso to Section 6 of the Hindu Succession Act, 1956, which provides that in the case of the death of a member of Mitakshara coparcener, his interest in the coparcenary property shall devolve by succession and not by survivorship if he has left behind him surviving a female relative specified in class I of the schedule of the Hindu Succession Act, 1956. Admittedly, mother is

class I heir as a female relative of the deceased and therefore, on the death of the minor, his interest in the joint family property devolved upon his mother, who had admittedly survived on the death of the minor. The coparcenary to the extent of the deceased minor ceased to exist immediately on his death and the father, who was the karta of the joint family could no longer be considered to be an intermeddler of the estate of the deceased, which had devolved upon his mother. In this view of the matter, the contention that father of the deceased minor is the legal representative fails. Such a position was permissible before the passing of the Hindu Succession Act, 1956, when the law of survivorship did hold the field in the matter of devolution of the interest of deceased coparcener.

8. I am, therefore, constrained to hold that the father of the deceased minor could not represent the estate of the deceased and therefore, it cannot be held that he is a legal representative of the deceased minor as contemplated by law.

9. To conclude, I say that the two courts below have given their concurrent findings on both the questions, namely, want of sufficient cause and the abatement of the suit as a whole by reference to evidence adduced by the parties and there is no infirmity of any sort in the findings on the said two questions.

10. In the result, on the grounds set forth above, the appeal must fail. It is accordingly dismissed but without costs.

S. ALI AHMAD, J.— I agree with my learned brother that the appeal should be dismissed. I, however, propose to give some reasons of my own in support of the above conclusion.

11-12. As has been noticed by my learned brother the suit was filed for declaration of title and recovery of possession. Defendant No. 6 was a minor. His father was defendant No. 3. All the defendants constituted a joint Hindu family of which the defendant No. 1 was the karta. On the findings defendant No. 6 died on 14-4-1968. an application was filed on behalf of the plaintiffs on 15-6-1968 saying that defendant No. 6 was dead and that his father was already on the record as defendant No. 3. It was said, in the circumstance, that it was

not necessary to substitute the heirs of the deceased-defendant. Thereafter on 15-6-1968 an application was filed on behalf of the defendants that defendant No. 6 left behind his mother as his sole heir and that the suit abated as against deceased defendant No. 6. Thereafter it transpired that an application was filed for substituting the mother of the deceased defendant No. 6. The trial court on the facts came to the conclusion that the plaintiffs were aware of the death of the deceased defendant and as such there was no justification for not filing the substitution petition within time. It, therefore, dismissed the petition under Order 22, Rules 4 and 9 of the C. P. C. It also held that as a result of abatement of the suit as against the heirs of the deceased-defendant the whole suit had abated. An appeal, therefore, was preferred to the District Judge. The lower appellate court affirmed the decree passed by the trial court. Thereafter this second appeal has been filed.

13. Mr. Mishra learned counsel appearing in support of the appellants raised an interesting point. His argument was that under Order 22, Rule 4 of the C. P. C. what is required is to substitute the legal representative of the deceased-defendant. According to Mr. Mishra the legal representative does not mean only heirs but also one who intermeddles with the property of the deceased-defendant. Learned counsel in that context invited our attention to Section 2 (11) of the C. P. C. where the expression 'legal representative' has been defined. No doubt a person who intermeddles with the estate of deceased is included in the definition of legal representative, according to Section 2 (11) of the C. P. C. However, according to the learned counsel since the father as defendant No. 3 and the karta as defendant No. 1 was already on the record, no substitution was necessary, because the two aforesaid persons must be held to be intermeddlers in respect of the estate of deceased. The question, therefore, that requires consideration is what is meant by the word 'intermeddlers'. According to Random House Dictionary of the English Language intermeddler means one who interferes or intermeddles. According to the same dictionary 'meddle' means to interfere officially and unwantedly. The karta of a family is an agent. He, therefore, per se cannot be said to be an intermeddler with the estate

of deceased. It was not said in either of the two courts below that the defendant No. 3 father or defendant No. 1 the Karta was intermeddling with the estate of deceased. It was really the ingenuity of Mr. Mishra which prompted this argument in this Court. Had in fact the defendant No. 1 or defendant No. 3 was intermeddling with the estate of deceased then obviously no application would have been filed in the trial court for substituting the mother in place of the deceased defendant which was filed on the basis of an application filed by the defendant themselves when the suit has become bad for non-substituting the mother. Therefore, I am of the view that although an intermeddler, in law, is a legal representative, but in this case the appellants have failed to prove the same. The result, therefore, is that the suit has rightly been dismissed by the courts below.

14. My learned brother has also held that the appeal in the court below was in substance not an appeal under S. 96 of the C. P. C. but was an appeal under Order 43. Rule 1 (k) of the C. P. C. On that account it has been held by my learned brother that no second appeal lies in this Court. I don't express my opinion on this aspect of the matter.

Appeal dismissed.

AIR 1982 PATNA 180

B. P. JHA AND M. P. VARMA, JJ.

Sarjug Devi and another, Appellants
v. Bhamar Lal Pugalia, Respondent.

A.F.A.D. No. 759 of 1973, D/- 19-2-1982.*

Transfer of Property Act (4 of 1882), Ss. 67 and 68 (1) (d) — Mortgage by A to B — Mortgagor undertaking to give possession of the mortgaged property to mortgagee to take the usufruct towards interest — A not giving possession as undertaken — B is entitled to a decree under S. 68 (1) (d) of the Act for the mortgage money with interest.

A mortgagee who does not get possession of the mortgaged property under agreement with the mortgagor, that the usufruct of the land should be taken for interest, can file a suit for sale under S. 67 of the T. P. Act. (Para 6)

*From decision of Chandranand Singh, 2nd Addl. Sub. J., Purnea (Purnia), D/- 25-8-1973.

But where under a mortgage by A to B, the mortgagor undertook to give possession of the mortgaged property to mortgagee to take in the usufruct towards interest, A not having given possession as undertaken, B was entitled to a decree for money under Section 68 (1) (d) of the T. P. Act. AIR 1936 Pat 439, Dist. Case law discussed. (Paras 13, 14)

Cases Referred: Chronological Paras

AIR 1952 Mad 856	13
AIR 1941 Patna 301	1, 8, 13, 14
AIR 1936 Patna 439	1, 8, 13, 14
AIR 1919 Mad 1134: ILR 41 Mad 259 (FB)	13

Arun Chandra Mitra, for Appellants;
Shyam Sunder Sinha 'Shyam' and Prem Kumar Jha, for Respondent.

M. P. VARMA, J.:— The second appeal has been referred to by S. Ali Ahmad, J., after formulating the following three questions for their being answered as an authority by a Bench of this Court:

"(1) In cases where a mortgagee does not get possession of the mortgaged property, then as to whether he can maintain a suit under S. 67 of the T. P. Act for the sale of the mortgaged property?

(2) In case it is held that no decree for sale of immovable property can be granted then as to whether the suit can be decreed for money under S. 68 of the T. P. Act or for possession under the Contract Act? Although he has prayed for only a decree for sale of the mortgaged property

(3) Whether the law explained in the case of Jamna Das Bisesar Lal v. Mani Ram Halwai (AIR 1936 Patna 439) is a good law in view of the decision in the case of Harnath Singh v. Maiya Ambika Devi (AIR 1941 Patna 301)?"

2. The brief facts giving rise to the present appeal by the defendants are that the plaintiff respondent had taken certain properties in mortgage from the defendants who had executed two mortgage deeds (Exts. 1 and 1/a) dated 15-3-62. The two deeds contain identical covenants. They provided that the defendants had agreed to put the plaintiff in khas possession and the plaintiff was to utilise the usufructs of the properties in lieu of interest.

3. The defendants had also agreed to pay the principal amount. According to

the plaintiff, the defendants never delivered possession of the mortgaged lands, in spite of demands nor paid the principal money or interest. It was the further case of the plaintiff that the mortgages were legal and anomalous and, therefore after the expiry of the stipulated date in the deeds, he was entitled to sue for realisation of the mortgage money with interest and on failure of the defendants to pay the amount within the time fixed by the court, there was further stipulation for the sale of the mortgaged property.

4. The case of the defendants, on the other hand, was that the mortgage was a usufructuary mortgage in so far as both the deeds (Exts. 1 and 1/a) are concerned and they had put the plaintiff in possession of the mortgaged property, whereafter, the plaintiff gave the mortgaged land in batai to the defendants and they were dividing the crops with the plaintiff and since the plaintiff made demand of the mortgage money which the defendants were unable to pay, the plaintiff brought the suit for realisation of the entire mortgage money with interest out of sheer annoyance.

5. The trial court dismissed the suit holding that the mortgage was a usufructuary one and the mortgagee did not come in possession of the mortgaged land and hence the plaintiff could not sue for recovery of the mortgage money by putting the property to sale. The appellate court, on appeal by the plaintiff, did hold that the mortgage deeds, i.e., Exts. 1 and 1/a, were anomalous mortgages and, therefore, the plaintiff was entitled to recovery of the mortgage money with interest at the rate of 9 per centum per annum as claimed in the suit by sale of the mortgaged property. The appellate court thereby decreed the plaintiff's claim against which the appeal has been preferred.

6. At the final hearing of the appeal before the learned single Judge, the three questions referred to above were raised by the appellants which fall for our determination. As regards the first question as to whether a mortgagee, who does not get possession of the mortgaged property, can maintain a suit under Section 67 of the T. P. Act (hereinafter to be referred to as the 'Act') for sale of the mortgaged property, it has to be noted, that S. 67 of the Act deals with the right of a mortgagee to

sue for foreclosure or sale of the mortgaged property. Section 67 of the Act also provides that a mortgagee has, at any time after the mortgage money became due to him, a right to obtain from the court a decree that the property be sold. This necessarily means a right to recover mortgage money through a decree which is to be satisfied by sale of the mortgaged property. Under the law there is no change in the position even after amendment of the Act in 1929 because the combination of simple and usufructuary mortgage is now treated as an anomalous mortgage. The two mortgage deeds under reference contain covenants of hypothecation of property. Of course there is also a personal covenant to pay and hence the mortgagee gets a right to sue for sale of the mortgaged property. In my view, a suit for sale of the mortgaged property is permissible and, therefore, the first question is answered accordingly.

7. In my view, although I have held above that a suit for sale of mortgaged property is permissible, but since I am going to hold that the plaintiff is entitled to a money decree, the second question formulated does not arise for consideration in this case.

8. As regards the third question, whether the law explained in the case of Jamna Das Bisesar Lal v. Mani Ram Halwai (AIR 1936 Patna 439) is a good law in view of the Bench decision in the case of Harnath Singh v. Maiya Ambika Devi (AIR 1941 Patna 301), on a reading of the judgment in the case of Jamna Das (supra), it appears that the rights and liabilities of the mortgagee were determined in accordance with law as it existed prior to amendment, in the year 1929, of the Act because the usufructuary mortgage in that case was created in the year 1915. Hence, the rights of the mortgagee, it appears, were determined in accordance with the law then existing, and not in accordance with the amended law. I, therefore, do not find any scope for holding that there is any conflict in the legal position by reference to the case of Harnath Singh (supra).

9. Now coming to the facts of the present case, in my opinion, it clearly falls within the scope of S. 68 of the Act, which provides for a mortgagee to sue for recovery of mortgage money. It would be relevant to mention here that

the plaintiff prayed for the following reliefs in paragraph 9 of the plaint, which reads as follows:

"9. That the plaintiff begs to pray for the following reliefs:—

(a) That a mortgage decree for Rupees 3,094 may be passed in favour of the plaintiff against the defendants with interest pendente lite and future till realisation at the rate of Rs. 9 p.c. p.a. with all costs, etc. and that a time may be fixed in the decree for payment of the amount due and that in default of the payment within the time allowed, the dues of the plaintiff may be satisfied by sale of the mortgaged lands as described in schedule B below.

(b) That in case the proceeds of the sale are found to be insufficient to satisfy all dues of the plaintiff, then a liberty may be reserved to the plaintiff to apply for a personal decree for the balance against the defendants with costs according to O. 34, R. 6, C.P.C.

(c) That the plaintiff may be awarded any other reliefs fit and proper in the eye of law."

Thus it is clear that the plaintiff claimed relief for a money decree for the sum referred to above with interest thereon and it was clearly stipulated that in case the amount is not paid within a certain time fixed by the court, the dues of the plaintiff may be satisfied by the sale of the mortgaged property as described in the schedule of the plaint. So it is clear that basically, it appears to be a suit for money decree, S. 68 (1) (d) of the Act also provides that where the mortgagee being entitled to possession of the mortgaged property, the mortgagor fails to deliver the same, the mortgagee has right to sue for money decree. The amended definition of the term 'usufructuary mortgage', which came into effect in 1929, does include within its ambit not only where the mortgagor never delivered possession but also where he has expressly or by implication bound himself to deliver possession of the mortgaged property to the mortgagee. So far as the instant case is concerned, there is no absolute covenant in the mortgage deeds (Exts. 1 and 1/a) to pay and, in substance, the deeds are usufructuary mortgage. There appears to be a dominant intention to put the mortgagee in possession of the mortgaged lands in the instant case. And, if it is so held—and I do hold—

that it was a case of usufructuary mortgage, I see no difficulty in the mortgagee suing for mortgage money, in case the mortgagor fails to deliver possession of the mortgaged property. And, to this effect, I find, there is averment in paragraph 5 of the plaint also.

10. In the result, the appeal fails and it is dismissed but without cost and the judgment of the lower Appellate Court is upheld on the grounds mentioned above.

B. P. JHA, J.:— 11. I agree with my learned Brother's judgment. In the present case the main prayer was to pass a money decree as required under S. 68 of the T. P. Act (hereinafter to be referred to as the 'Act') with interest. In the prayer portion it was mentioned that if the mortgagor failed to pay the decretal amount within the time fixed by the court in the decree then, alternatively, it was prayed that the mortgaged lands would be put to sale. Therefore, the suit was essentially for passing a money decree. The lower Appellate Court erred in passing a decree for sale which is contrary to the prayer portion of the plaint. My learned Brother is correct in passing a money decree in favour of the plaintiff on the basis of the prayer made in the plaint as well as on the basis of the averment made in paragraph 5 of the plaint. In that paragraph of the plaint it was specifically stated that the due date of repayment of the mortgage money was in Chait, 1370 F. S., and the defendants did not pay the principal amount on the due date and as such the suit was filed for realisation of the money advanced by the plaintiff.

12. The mortgagee can bring a suit for mortgage money or for possession. In the present case, the mortgagors did not deliver possession nor paid the mortgage money to the plaintiff. The case of the defendants to the effect that they were bataidars of the plaintiff was not accepted as correct by the lower Appellate Court. It is correct that the mortgagee is not entitled to bring a suit for sale of the mortgaged lands under S. 67 of the Act as it is prohibited under S. 67 (a) of the Act. So far as the present suit is concerned, it is maintainable under S. 68 (1) (d) of the Act.

13. On a perusal of the stipulations made in the mortgage bonds (Exts. 1 and 1/a), it is clear that it was a case of

usufructuary mortgage bond. I agree with my learned Brother that both the mortgage bonds (Exts. 1 and 1/a) are usufructuary mortgage bonds. In both the deeds, the stipulations are that the defendants will put the plaintiff in possession of the mortgaged lands. It was further stipulated therein that the plaintiff will be authorised to redeem the deeds in Chait, 1370 F. S. when the defendants agreed to pay the money. It was further stipulated in the mortgage bonds that in case the mortgagors did not pay the amount in the month of Chait, 1370 F.S., the plaintiff shall remain in possession of the mortgaged property and enjoy the usufructs thereof in lieu of interest till redemption. It is, therefore, clear that both the deeds are usufructuary mortgage bonds. An identical case was considered by a Division Bench of this court in Harnath Singh v. Maiya Ambika Devi (AIR 1941 Patna 301), and it was held that the mortgage bond was an usufructuary mortgage bond. The terms of the mortgage bond in AIR 1941 Patna 301 (supra) are identical to the present mortgage bonds. I hold that the decision in AIR 1941 Patna 301 (supra) is a correct decision. I also agree with my learned Brother to the effect that so far as the present facts are concerned, the decision in Jamna Das Bisesar Lal v. Mani Ram Halwai (AIR 1936 Patna 439) does not apply as it was a case before the amendment of the Act in 1929. Mohammad Noor, J. relied on a Full Bench decision of the Madras High Court in Marturu Subbamma v. Gadde Narayya (ILR 41 Mad 259) (AIR 1919 Mad 1164). That case also related to the period prior to 1929 amendment. Before the 1929 amendment, if there was no delivery of possession of the mortgaged land then it was not an usufructuary mortgage. After 1929 amendment if the mortgagor binds himself expressly or impliedly to deliver possession, then it will also come within the purview of usufructuary mortgage bond. After 1929 amendment, so far as (1918) ILR 41 Mad 259: (AIR 1919 Mad 1164) (supra) is concerned, it was no longer a good decision in view of the decision in Ayilavajula Subbaraya Sarma v. Chilakapati Subramanyam (AIR 1952 Mad 856). Subba Rao J. as he then was, had specifically held that the decision in (1918) ILR 41 Mad 259: (AIR 1919 Mad 1164) (supra) will not be applicable to a period after 1929 amendment.

14. I, therefore, answer the first question and hold that under S. 67 of the Act the plaintiff is not entitled to bring a suit for sale of the mortgaged property. But the present suit will fall within the purview of S. 68 (1) (d) of the Act. We have, therefore, passed a money decree and a money decree is maintainable under S. 68 (1) (d) of the Act. I will also say that so far as the present case is concerned, the decision in AIR 1941 Patna 301 (supra) is a correct decision and the decision in AIR 1936 Patna 439 (supra) does not apply to the facts of the present case. So far as question No. 2 is concerned, the suit can be decreed for money under S. 68 of the Act as there is averment to this effect in paragraph 5 of the plaint as well as there is a specific prayer to this effect in paragraph 9 of the plaint. We, therefore, pass a decree for Rs. 2,800 (principal amount) plus pendente lite interest at the rate of 6 per centum per annum during the pendency of the suit and the appeal and till the amount is realised.

15. In the result, the appeal is dismissed but without costs and the decree of the lower Appellate Court is upheld with modification in respect of the nature of the decree as indicated above.

Appeal dismissed.

AIR 1982 PATNA 183

M. P. VARMA, J.

Jagnarayan Mishra and another, Petitioners v. Ramadhar Pathak and others, Opposite Party.

Civil Revn. No. 349 of 1969, D/- 14-5-1982.*

Bihar Consolidation of Holdings and Prevention of Fragmentation Act (22 of 1956), S. 4 (c) — Title suit — Commencement of consolidation proceedings — Defendant filing an application under Section 4 (c) — Application should be decided prior to the proceedings of the suit.

In a title suit, defendants filed an application under S. 4 (c) on commencement of consolidation proceedings, stating therein that the suit had abated under S. 4 (c). Application was rejected with an order that the same would be disposed of along with the suit.

*Against order of B. P. Singh Sub. J., Arrah, D/- 15-1-1979.

GZ/GZ/C946/82/TGD/SNV

Held, application under S. 4 (c) should have been disposed of and should not have been deferred for determination after the whole trial was gone into because the determination of that question, if the same has terminated in favour of the defendants would have completely disposed of the suit and saved the parties from the burden of prolonged litigation. (Para 4)

Dhrub Narayan, for Petitioners.

ORDER:— The present application in revision has been filed against an order passed by Sri Baleshwar Prasad Singh, Subordinate Judge, Arrah, dated 15-1-1979 in Title Suit No. 141 of 1970, rejecting the prayer of the petitioners to dispose of their application filed under S. 4 (c) of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 (hereinafter referred to as 'the Act') before disposal of the suit itself.

2. The suit in question is for declaration of title and recovery of possession. It was filed in the year 1970. During the pendency of the suit notification under S. 3 of the Act has been issued and consolidation proceeding has already started. The petitioners filed an application in the said suit under S. 4 (c) of the Act stating therein that the petitioners had received notice under S. 10 (1) of the Act with respect to the suit land and therefore, the suit in question has abated under S. 4 (c) of the Act. The learned Subordinate Judge, it appears, without taking into consideration the expediency and the circumstances of the case, rejected the petitioners' petition by order dated 15-1-1979 holding therein that the petition under S. 4 (c) would be disposed of along with the judgment to be passed in the suit after final hearing.

3. Learned counsel for the petitioners has rightly submitted that the impugned order is a clear case of refusal to exercise jurisdiction vested in the court by law.

4. The petition of the defendants filed in the court below for determination whether the suit had abated under S. 4 (c) of the Act should have been disposed of and should not have been deferred for determination after the whole trial was gone into, because the determination of that question, if the same has terminated in favour of the defendants would have completely disposed of the suit and saved the parties from

the burden of prolonged litigation besides saving this Court's precious time. The order impugned is therefore, patently wrong and is fit to be set aside.

5. In the result, the order is set aside. The application is allowed, but without costs. The court below is directed to dispose of the defendants' petition in question after hearing the parties in accordance with law.

Application allowed.

AIR 1982 PATNA 184

M. P. VARMA, J.

Nand Lal Sah, Petitioner v. Ram Kali Devi and others, Respondents.

Civil Revn. No. 970 of 1982, D/- 14-5-1982.

Civil P. C. (5 of 1908), O. 18, R. 2 (4)
— After close of the case, court permitting plaintiff to adduce further evidence
— Chance of adducing rebuttal evidence should not be refused to opposite parties. (Evidence Act (1872), S. 138).

(Para 2)

Jogendra Prasad Sinha, for Petitioner; Keshri Kishore Saran, Prashant Vedasin and Avinash Kumar Sharan, for Respondents.

ORDER:— The contesting defendant No. 5 of Title Suit No. 136/1971 has come in revision against an order dated 11-5-1981 passed by Sri G. S. Poddar, Additional Munsif at Muzaffarpur, by which the learned Munsif has refused to give the petitioner a chance of rebuttal of the evidence adduced on behalf of the plaintiffs-opposite party in the court below. It is not necessary to state the facts of the case. The short point in this revision is whether the court below could refuse the chance of adducing evidence in rebuttal by the petitioner-defendant when after the close of the case, the court has permitted the plaintiff-opposite parties to adduce further evidence, oral or documentary.

2. The order impugned is patently a refusal to exercise jurisdiction vested in the court by law, because if the plaintiff-opposite parties were allowed to adduce further evidence after the close of the defendant's case, there could be no justification for the court to refuse the defendant a chance of rebuttal. The reasons assigned by the learned Munsif are not tenable, because the necessity to

make a prayer to examine the pleader commissioner arose only when the plaintiff entered into further evidence. No two scales can be adopted by the court. If a court grants indulgence for further evidence to one party, it cannot refuse the prayer for rebuttal of the other side. It is immaterial if the prayer was rejected earlier.

3. In the result, this application succeeds and the court is directed to allow the prayer of the defendants and to proceed with the case in accordance with law. No order as to costs.

Revision allowed.

AIR 1982 PATNA 185

BIRENDRA PRASAD SINHA, J.

Thakur Sah, Appellant v. Sheo Pujan Prasad and others, Respondents.

A.F.A.D. No. 365 of 1979, D/- 29-4-1982.*

Civil P. C. (5 of 1908), O. 6, R. 2 — Limitation Act (36 of 1963), Arts. 64 and 65 — Plea of adverse possession — Specific statement of adverse possession and supporting evidence is necessary. (Adverse possession).

A suit was filed for declaration of title to certain land and confirmation of possession of the plaintiff. The plaintiff claimed that the defendant was a benamidar in a Court sale and the plaintiff was the real purchaser. The plaintiff also submitted that his title was perfected by adverse possession. The plea of plaintiff's title under the sale was barred by S. 66 of the Civil P. C. As regards the alternative plea, the defendant averred that it was not raised and there was no evidence in that respect. The lower Court upheld the plaintiff's title by adverse possession. It was held in the instant appeal that though the plaintiff had stated in the plaint that he continued in possession after the Court sale and had perfected his title by adverse possession, it had not been stated that his possession was at any time adverse to that of the certified purchaser. In order to maintain a plea of adverse possession it must be stated that the plaintiff had ever asserted any hostile title against the real owner or that a dispute with regard to ownership and possession had

ever arisen. There was nothing either in the plaint or in the evidence, to show as to when the possession of the plaintiff became adverse, if at all. A mere statement in the plaint that the plaintiffs had acquired title by adverse possession is not enough to raise such a plea. Long possession cannot necessarily be adverse possession. There was no evidence which could indicate that the plaintiffs had acquired title by adverse possession. The plaintiff's claim was, therefore, not maintainable. (AIR 1964 SC 1254, Foll.).

(Para 6)

Cases Referred: Chronological Paras
AIR 1964 SC 1254 4

Janardan Sinha, Parimal Chandra Das and Manoj Kumar Srivastava, for Appellant; Vijayeshwar Prasad and Shambhu Prasad, for Respondents.

JUDGMENT:— This is an appeal by the defendant-appellant. The plaintiffs filed a suit for declaration of title and confirmation of possession in respect of 2 kathas 3 dhurs of land of survey plot No. 229/1022 of khata No. 286 situate in village Hansrajpur Khurd, police station Baniapur in the district of Saran after declaring that the sale deed dated 3-7-1962 executed by defendant No. 3 in favour of defendant No. 1 was a farzi and fraudulent transaction and was not binding on the plaintiffs. The plaintiffs claimed that the disputed land belonged to them and was in their possession since before the Revisional Survey. The ex-landlords filed a rent suit for realisation of rent of khata Nos. 286 and 288 and obtained a decree. The decree was put in execution and the holding was auction-sold in 1925. The original plaintiff claimed that he along with Nathuni Sah, father of defendant No. 1, had jointly purchased the said holding in the auction sale but in the farzi name of one Bhaju Sah who was a relation of Nathuni Sah. According to the plaintiff, Bhaju Sah did not pay any single pie in the auction purchase and never had any concern with the auction purchased land. The plaintiff continued in possession of the disputed land of khata No. 286. The plaintiff's further case is that defendant No. 1 with intent to derive illegal gain dishonestly got a sale deed executed by defendant No. 3, son of Bhaju Sah, in respect of the disputed land on 3-7-1962 without paying any consideration. The plaintiff also claimed that the suit land had been in his possession since more than 12 years openly

*From decision of P. N. Shukla, 2nd Addl. Sub. J., Chapra, D/- 8-3-1979.

and his title to the same had also been perfected by adverse possession.

2. Defendant No. 1 only contested the suit and it was contended on his behalf that the suit as framed was not maintainable and was barred by S. 66 of the Civil P. C. According to the defendant-appellant, Bhaju Sah had no concern with Nathuni Sah. The lands had been purchased by Bhaju Sah alone in the auction sale and neither Nathuni nor the plaintiff had any concern therewith. According to the defendant, the plaintiff never came in possession over the disputed land and Bhaju was not a benamidar.

3. The suit was decreed on contest by the trial court. The trial Court held that the auction purchase in question in the name of Bhaju Sah was benami for Nathuni Sah and that the original plaintiff, and after his death the substituted plaintiffs acquired title to the suit land by adverse possession as well. The appeal by defendant No. 1 was dismissed by the lower Appellate Court and the findings of the trial Court were affirmed.

4. Mr. Janardan Sinha, learned counsel appearing on behalf of the appellant, contended that in view of the case of the plaintiffs that the original plaintiff had purchased the disputed land in the benami name of Bhaju Sah and the findings arrived at by the courts below, the plaintiffs cannot maintain the suit as the same was barred by S. 66 of the Civil P. C. Mr. Sinha relied upon a decision of the Supreme Court in *S. M. Karim v. Mst. Bibi Sakina* (AIR 1964 SC 1254) wherein it was held that Section 66 of the Code of Civil Procedure provides that no suit shall be maintained against any person claiming title under a purchase certified by the court on the ground that the purchase was made on behalf of the plaintiff or on behalf of someone through whom the plaintiff claims. It is obvious that the plaintiffs cannot maintain the suit claiming title under a benami nature of transaction. Learned counsel appearing on behalf of the plaintiff-respondents does not dispute this proposition. He, however, submitted that the plaintiffs perfected their title by long and uninterrupted possession and in view of the findings given by both the courts as regards adverse possession of the plaintiffs, this appeal should be dismissed.

5. It is no doubt true that the plaintiffs can take an alternative plea that

they had acquired title by adverse possession, but then they cannot rely upon the benami nature of transaction. As was held by the Supreme Court in the above case, the alternative claim must be clearly made and proved. Mr. Janardan Sinha, the learned counsel for the appellant, submitted that a plea of adverse possession has not been raised in this case nor there is any evidence in that respect. According to him, the finding in respect of adverse possession is not based on any evidence at all.

6. Learned counsel appearing on behalf of the plaintiff-respondents drew my attention to paragraphs 2, 4 and 5 of the plaint and submitted that it has been specifically pleaded that the plaintiffs continued in possession of the disputed land even after the auction sale and had perfected their title by adverse possession. There is no doubt that the plaint sets out the fact that after the auction purchase in the benami name of Bhaju Sah the plaintiffs continued in possession of the property but after going through the plaint I do not find that it has been anywhere stated that this possession was at any time adverse to that of the certified purchaser. In order to maintain a plea of adverse possession it must be stated that the plaintiff had ever asserted any hostile title against the real owner or that a dispute with regard to ownership and possession had ever arisen. It was observed by the Supreme Court in the above case that "adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found." There is nothing in the present case, either in the plaint or in the evidence, to show as to when the possession of the plaintiffs became adverse, if at all. A mere statement in the plaint that the plaintiffs had acquired title by adverse possession is not enough to raise such a plea. Long possession cannot necessarily be adverse possession. When asked, learned counsel appearing on behalf of the plaintiff-respondents could not point out any evidence which could indicate that the plaintiffs had acquired title by adverse possession. In such a situation the courts below were entirely wrong to give a finding of adverse possession in favour of the plaintiffs. Such a finding is not based on any evidence. In the

circumstances mentioned above, it is not possible to accept the alternative case of the plaintiffs based on their possession after the auction purchase without a proper plea in that regard in the plaint.

7. In the result, this appeal succeeds and is allowed with costs. The judgment and decree passed by the courts below are set aside and the suit of the plaintiffs is dismissed.

Appeal allowed.

AIR 1982 PATNA 187

S. SHAMSUL HASAN, J.

Ghan Shyam Das Gupta, Appellant v. Devi Lal and others, Respondents.

A.F.A.D. No. 275 of 1981, D/- 19-5-1982.*

Bihar Buildings (Lease, Rent and Eviction) Control Act [3 of 1947], S. 11 (1) (d) — Suit for eviction under — Tenant in Dinapore Cantonment Area in default in payment of rent prior to enforcement of Act to Cantonment Area — He is still liable to be evicted.

Non-payment of rent by the tenant in Dinapore Cantonment Area prior to the enforcement of the Act to the Cantonment Area can be taken into consideration for the purpose of deciding whether the tenant was a defaulter and on default would render him liable for eviction under S. 11 (1) (3). Case law discussed. (Paras 10, 14)

Cases Referred: Chronological Paras

AIR 1982 Andh Pra 1 (FB)	6
AIR 1980 SC 299	13
1971 BLJR 328: 1971 Pat LJR 66	6
AIR 1965 SC 1491	9, 10, 13
(1950) 2 All ER 525: 36 TLR (Pt 2) 728	
Master Ladies Tailors Organisation v. Minister of Labour	8
(1898) 2 QB 547: 67 LJQB 935: 79 LT 303, Re Athlunney	12
(1848) 12 QB 120: 116 ER 811. R. v. Inhabitants of St. Mary, Whitechapel	8
Narmadeshwar Prasad Singh and Madan Prasad Singh No. 2, for Appellant; Balbhadra Prasad Singh and Binde-shwari Prasad Sinha, for Respondents.	

JUDGMENT: This appeal by defendant-tenant arises out of a suit for eviction under the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947,

(hereinafter referred to as 'the Act') on the ground of non-payment of rent and personal necessity, on the suit being decreed, and the appeal, filed by the defendant-appellant, being dismissed holding that the appellant was a defaulter for the months of May, June, July, Oct. and Nov., 1968, and Dec., 1969, to Feb., 1970.

2. The suit relates to a double storied building bearing holding No. 11/76, Ward No. 2 situate in Mahalla Sadar Bazar Dinapore Cantonment. The appellant is said to be a tenant in a portion of the said building. The original plaintiff, Smt. Janki Devi, was the purchaser from the original owner, who was the landlord of the appellant before purchase by Janki Devi. There is no dispute about the title of the landlord. After the purchase of the premises in question by Smt. Janki Devi a lease was entered into between her and the appellant tenant for a period of two years and eleven months on a rental of Rs. 32.50 paise per month. Accordingly, a deed of lease was executed on 6-9-1965. After the expiry of the terms of the lease a suit for eviction was filed and arrears of rent and mesne profit from May, 1968 to 6th Aug. 1968 and from 6th Aug., 1968, to 10th Dec., 1968 respectively were claimed. During the pendency of this suit Smt. Janki Devi died and she was substituted by her heirs and legal representatives. The suit was withdrawn by permission of the Court dated 6-11-1976. The plaintiffs were, however permitted to file a fresh suit on the same cause of action. Subsequently, claim for arrears of rent and mesne profit was decreed by the Additional Munsif, 1st Patna, on 5-12-1973. The suit for arrears of rent was also decreed in S. C. C. Suit No. 14/71. During the pendency of the above suits the Act was made applicable to Dinapore Cantonment with effect from 14-2-1970. The learned Munsif on a petition being filed under S. 11A of the Act by his order dated 8-1-1971 directed the appellant to deposit arrears of rent from March, 1970, to Dec., 1970, on the monthly rental of Rs. 32.50 paise and to pay further rent at the same rate. The appellant deposited rent up to Nov. 1973, and, thereafter defaulted to make deposit. The ground of personal necessity was also urged.

3. The plea of the defendant-appellant was that no notice under S. 106 of the T. P. Act had been tendered. Ac-

*From order of Ganga Ram, 2nd Addl. Sub. J., D/- 23-4-1981.

cording to him, rent was sent regularly. It was also denied that there was any arrear of rent. According to the appellant, rent was tendered by money order which the respondents refused to accept and even after the introduction of the Act, the appellant went on depositing rent in Court and thereafter by money order. The claim of personal necessity was also denied.

4. The question required to be determined in this case is whether non-payment of rent for the period prior to the enforcement of the Act can entitle the landlord to seek eviction of the tenant under S. 11 (1) (d) of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947. According to the appellant, the statute not being retrospective in nature would not create a right in favour of the respondents. According to the appellant, since the Act was made applicable to Dinapore Cantonment only in Feb., 1970, as per findings of the courts below he is defaulter for only 14 days in Feb., 1970, which would not justify in law a decree for eviction.

5. Learned counsel appearing for the respondents submitted that, the statute cannot be said to be applied retrospectively, simply because a part of the requisites for its action is drawn from a period prior to its passing or enforcement. Non-payment of rent for the period prior to enforcement of the Act in Dinapore Cantonment can be taken into account for the purpose of eviction under S. 11 (1) (d) of the Act. There is no dispute that the Act as such is not operative retrospectively. It has, therefore, to be examined whether on the principle enunciated by the learned counsel for the respondents a decree of eviction can be sustained. There is no dispute and the law in this regard is well settled that all the statutes are prospective, unless it is made expressly, or by necessary implication, operative retrospectively. The statute that creates obligation or imposes duty or brings into operation disability must be presumed to be prospective, unless retrospectivity is shown by implication.

6. Learned counsel for the appellant relied upon a decision in *Girdhar Das Anandji v. Jivaraj Madhavji Patel* (1971 BLJR 828) paragraph 19 whereof is relevant and it is quoted below—

"19. Some of the principles, which may be relevant for the present pur-

poses may be, thus, briefly summarised.

(a) Statutes taking away, impairing or imperilling substantive rights are ordinarily prospective.

(b) In order that a statute may be applied retrospectively in the above situation there must be either express provision in the statute or such an intention must be necessarily inferred from the provisions thereof.

(c) If it is doubtful whether the statute was intended to be operative retrospectively, the doubt should be resolved against such operation.

(d) An enactment which puts a new restriction or puts a more onerous condition on the exercise of substantive right is presumed to be prospective and will be held to be retrospective only if it is so made either expressly or by necessary implication.

(e) The law dealing with procedure in the absence of anything to the contrary, is retrospective in operation.

(f) The above rules apply even to pending actions"

He has fortified his submission by relying on this decision that the Act should not be interpreted to apply retrospectively. Similar is the decision in *Gaddam Narsa Reddy v. Collector, Adilabad District*, (AIR 1982 Andh Pra 1) (FB). There are numerous decisions of the Supreme Court which are obviously the basis of the aforesaid two decisions.

7. The net result is that if the statute does not expressly or impliedly declare its retrospective application, this has to be examined with reference to the dominant intention of the language of the statute and the object and the Scheme of the Act, as well as the nature of the rights affected and the circumstances under which the statute is brought into existence.

8. The question, however, that arises for determination in this case is whether, as submitted by the learned counsel for the respondents, without endowing the statute or S. 11 (1) (d) with retrospectivity, a past act could also be taken into account to enforce a right granted by the relevant provisions of the statute. As far as this legislation is concerned, I have already said, it is not expressly retrospective and it is not necessary for me to go into the question whether S. 11 (1) (d) is impliedly retrospective because the point raised by the defendant

is on the basis of the assumption that the operation of the provision of the statute is not retrospective. Learned counsel for the respondents has relied on a passage from Maxwell on the Interpretation of Statutes, 12th Edition, at page 217. The passage cited is from the decision in *Master Ladies Tailors Organisation v. Minister of Labour* ((1950) 2 All ER 525) wherein Somervell L. J. while holding that the provision for accrual of holiday remuneration, before the Wholesale Mantle and Costume Wages Council (Great Britain) Wages Regulation (Holidays) Order, 1949, came into force, was not ultra vires, stated that the fact that prospective benefit is to be measured by antecedent facts does not necessarily make the provision for that benefit retrospective. Lord Denman C. J. in *R. v. Inhabitants of St. Mary, Whitechapel* ((1848) 12 QB 120) at page 127 states "that the statute is in its direct operation prospective, as it relates to future removals only, and that it is not properly called a retrospective statute because a part of the requisites for its action is drawn from time antecedent to its passing."

9. Learned counsel for the respondents has further relied on the decision in *Kapur Chand v. B. S. Grewal* (AIR 1965 SC 1491). The Supreme Court was dealing with the provisions of Punjab Security of Land Tenures Act (10 of 1953). S. 9 of that Act contains grounds on which a tenant could be ejected. S. 9 of that Act has been cited at page 1493. The portion relevant for our purpose is as follows:—

"9 (1) Notwithstanding anything contained in any other law for the time being in force, no landowner shall be competent to eject a tenant except when such tenant—

(i) is a tenant on the area reserved under this Act or is a tenant of a small landowner; or

(ii) fails to pay rent regularly without sufficient cause; or

(iii) is in arrears of rent at the commencement of this Act; or

(iv) xx xx".

Dealing with S. 9 the Court was pleased to hold as follows:—

"Mr. Iyengar argues that S. 9 (1) (ii) applies prospectively and the conduct of the tenant prior to the enactment of S. 14-A cannot be taken into account. In our opinion, the conduct of the tenant

prior to the coming into force of the new section can be taken into account. No doubt a statute must be applied prospectively. But a statute is not applied retrospectively because a part of the requisites for its action is drawn from a moment of time prior to its passing. The clause in question makes a particular conduct the ground for an application for eviction. The necessary condition for the application of S. 9 (1) (ii) may commence even before the Act came into force and past conduct, which is as relevant for the clause as conduct after the coming into force of the Act, cannot be overlooked. The Tribunals were, therefore, right in considering conduct of the appellant prior to the coming into force of S. 14-A while determining whether the appellant was irregular in paying the rent."

Section 9 (1) deals with the failure on the part of the tenant to pay rent regularly without sufficient cause. Irregularity in payment prior to enforcement of the concerned Act has been held to give a valid ground for eviction even if the statute came into existence after the default.

10. In my view, this decision of the Supreme Court and the provision of the concerned enactment apply squarely to the instant case. On the basis of the Kapur's decision (AIR 1965 SC 1491) (supra) and the aforesaid passages from Maxwell on the Interpretation of Statutes I have no hesitation in holding that non-payment made by the appellant prior to the enforcement of the Act will render him liable for eviction under S. 11 (1) (d) of the Act.

11. It was argued by the learned counsel for the appellant that S. 9 (1) (i) and (ii) of the aforesaid Punjab Act is not similar to S. 11 (1) (d) of the instant Bihar Act. According to him, in the Punjab Act, use of the word 'regularly' envisages an act of continuous default in a recalcitrant manner while in Section 11 (1) (d) of the Bihar Act non-payment of only two months' rent does not envisage a person who does not pay regularly as in the Punjab Act. In my view, there is no ground for such a distinction. It has already been held that 'default' under the Act need not be for two consecutive months. If the default occurs in an irregular manner during any two months, the effect of S. 11 (1) (d) of the Act will be visited upon the tenant.

12. Learned counsel for the appellant has relied on a passage in *Re. Athlumney* ((1898) 2 QB 547) Wright, J., while dealing with the Bankruptcy Act, 1890, was pleased to hold that the Act did not apply to a debt, including interest, before the date of the passing of the Act. This decision, in my view, has no application to the facts of the present case. That decision did not deal with the principle as laid down in *Maxwell*, stated above. The only question to be determined there was whether a provision was retrospective or not.

13. Learned counsel for the appellant has relied on a decision in *Mani Subrat Jain v. Raja Ram Vohra* (AIR 1980 SC 299) and the following observations: "the benefit of interpretative doubt belongs to the potential evictee unless the language is plain and provides for eviction." This decision also, in my view, does not come to the aid of the appellant. The principle of interpretation laid down in this decision cannot be doubted but what has to be determined in the instant case is not the right of a tenant but the extent of his liability under the Act. The earlier decision of the Supreme Court in *Kapur's case* (AIR 1965 SC 1491) (supra) deals with a matter directly involved in the instant case, while the decision in *Mani Subrat Jain's case* (AIR 1980 SC 299) of the Supreme Court is on a different point altogether.

14. Concluding, therefore, I have no hesitation in holding that non-payment of rent by the appellant prior to the enforcement of the Act in Dinapore Cantonment can be taken into consideration for the purpose of deciding whether a tenant is defaulter or not. I, therefore, hold that the appellate Court below was entirely right in treating the appellant as liable for eviction, being defaulter during the period indicated in the judgment.

15. The appeal, therefore, has no merit and, it is, accordingly, dismissed, with costs.

Appeal dismissed.

AIR 1982 PATNA 190

HARI LAL AGRAWAL AND
NAZIR AHMAD, JJ.

M/s. Tip Top and others, Appellants
v. Smt. Indramani Devi, Respondent.

A. F. O. D. No. 219 of 1970, D/- 15-1-1982.*

(A) Bihar Buildings (Lease, Rent and Eviction) Control Act (3 of 1947), S. 11 (1) (d) — Water tax and latrine tax — Do not constitute part of rent when payment thereof to landlord by tenant is not reserved by apt words.

Where the payment of water and latrine taxes were not reserved to the lessor by apt words in the agreement between the parties, the water tax and latrine tax could not be considered to be a part of the rent in view of the provisions of Ss. 100 (2) and 135 of the Bihar & Orissa Municipalities Act. Consequently, non-payment thereof to the owner did not amount to default in payment of rent within meaning of S. 11 (1) (d) of the Rent Act. (Para 13)

(B) Bihar Buildings (Lease, Rent and Eviction) Control Act (3 of 1947), Ss. 11 (1) (d) and 13 — Forwarding of rent by M. O. on refusal to accept — Rent forwarded within stipulated period — Tenant would be deemed to have discharged his obligation.

Where the tenant on refusal of landlord to accept the rent forwarded the same by money order before the expiry of grace period allowed under the Act, the tenant could not be said to have defaulted in payment of rent even if the rent was actually received by the landlord after the expiry of the grace period. (Para 17)

According to the scheme of S. 13 all that was required by a tenant was to remit the rent for the month which was refused, within a reasonable time after the expiry of the next following month and then to remit the rent for the subsequent months by the last day of each succeeding month. These remittances being not under the general law but being permissible under the statute, the post office cannot be said to be an agent of the remitter, namely, the tenant and actual tender of the rent to the landlord beyond the grace period of one month

*From decision of Raghubans Prasad, Addl. Sub. J., Ranchi, D/- 15-12-1969.

would not make the remittance in any way invalid. Similarly, if the landlord is not met or not found and the money is returned to the tenant then also the remittance cannot be held to be invalidated as the law did not put so much risk on a tenant and all that was required of him was to make the remittance within the stipulated period and if he did that, he discharged the statutory obligation. (Para 17)

(C) Bihar Buildings (Lease, Rent and Eviction) Control Act (3 of 1947), S. 3 — Mortgage reserving Rs. 900/-, in advance at the rate of rent of Rs. 75/- only per month — It is void under S. 23 of Contract Act being hit by S. 3. (Contract Act (1872), S. 3).

Where an agreement between the landlord and occupier though was styled as mortgage for five years and was entered into for raising money for construction reserved payment of only Rupees 900/- at a time at the rate of Rupees 75/- per month, it was apparent that the only intention to take recourse to the document was to get the rent for the whole year in advance and this being directly prohibited by S. 3 the mortgage bond was illegal and, therefore, it cannot be made any basis for recovery of possession in court, being directly hit by S. 23 of the Contract Act. (Para 20)

(D) Bihar Buildings (Lease, Rent and Eviction) Control Act (3 of 1947), S. 11

(1) (c) — Bona fide requirement of landlord — Need of landlord to establish her son in business not denied — Available premises nearby under landlord's control not acceptable to tenant as alternative premises for his business — Landlord, held, proved bona fide requirement.

Once a landlord establishes his personal necessity then the law gives him the choice of selection of the most suitable accommodation for that purpose which may suit him according to the facts of each case. (Case law discussed). (Para 24)

Where the landlady's need to establish her sons in business was not denied and the premises nearby of the owner were not acceptable to the tenant himself in the alternative, the landlady could be said to have proved her requirement bona fide for the premises in tenant's occupation for setting up her sons in business. (Para 24)

(E) Bihar Buildings (Lease, Rent and Eviction) Control Act (3 of 1947), S. 11

(1) (a) — Breach of conditions of tenancy — Tenant acting upon condition in contract to pay latrine and water taxes for sometime — Failure to observe them would amount to breach of conditions of tenancy rendering him liable to eviction.

(Para 25)

Cases Referred : Chronological Paras

AIR 1979 SC 272	23
AIR 1975 Pat 154	16
1969 BLJR 283: ILR 47 Pat 1042	12
AIR 1964 Pat 298: 1963 BLJR 334	10
AIR 1963 SC 1459	10
AIR 1957 SC 309	10
AIR 1956 Assam 113	10
(1956) 60 Cal WN 783	23
AIR 1950 Cal 249	23

Balbhandra Prasad Singh and Bhupendra Narain Sinha, for Appellants; K. D. Chatterji, B. P. Rajgarhia, S. K. Sharan, Pawan Kumar and Bachoo Prasad Singh, for Respondent.

HARI LAL AGRAWAL, J.:— This is an appeal by the defendants against the judgment and decree of the Additional Subordinate Judge, Ranchi, decreeing the plaintiff's suit in part directing the defendants to vacate the suit premises.

2. The property in suit consists of two shop units, Nos. A and B out of the block of six shop rooms in 'J. J. Park' along with the adjoining lands and structures at its back being part of plot No. 1772, holding No. 420 in Ward No. III of the Ranchi Municipality, which is fully described in the schedule of the plaint, in which the defendants are running a laundry business commonly known as Messrs Tip Top. The defendants were in occupation of the suit premises since a year before the execution of a document forming the basis of the present suit which was executed on 10-9-1958 and has been marked as Ext. 2. The document has been described as a usufructuary mortgage bond or Bhugut-bandha bond. According to the stipulations in this document, the mortgagees, namely, the defendants, were to remain in possession of the suit premises from 13-9-1958 for a period of five years. I shall refer to the stipulations and the covenants evidenced under this document in greater detail later, but at the outset I may indicate that the plaintiff instituted the suit for recovery of khas possession of the suit properties as mortgagor on the expiry of the period of the usufructuary mortgage, with mesne profits from the period 13-9-1963. Alter-

natively, the plaintiff pleaded that in case the transaction evidenced by the mortgage bond was treated as a lease then even in that case it was for a fixed period of five years which stood terminated by efflux of time on 12-9-1963 and, therefore, the plaintiff became entitled to recover possession thereof with mesne profits. A money decree for Rupees 2,750/- on account of arrears of rent inclusive of taxes was also claimed in the alternative, representing the arrears of rent amounting to Rs. 2,175/- and Rs. 575/- on account of municipal taxes for the period after 23-3-1964.

Yet another alternative plea was advanced in the plaint to the effect that in case the transaction is deemed to have created only a monthly tenancy, then even the defendants were liable to vacate the premises on the grounds of (1) personal necessity of the plaintiff-landlady, namely, 'for setting up her sons in business who had come of age and were sitting idle without any occupation, the family being a trading one', and, (2) the defendants being defaulters having not paid any amount for the period after 12-9-1963. Some other grounds of creating nuisance by flowing foul water in the adjoining area etc. were also urged, but the same were not established and have not been pressed in this Court either.

3. One written statement was filed by defendants Nos. 1, 2, 4 and 5 and another by defendant No. 3, followed by an additional written statement. The relevant pleas of defence with which we are concerned in this appeal are that the defendants were in possession of the premises as monthly tenants and the mortgage deed in question (Ext. 2) was executed in order to defeat the provisions of law, namely, the Bihar Buildings (Lease, Rent & Eviction) Control Act, 1947 and, therefore, their possession was neither of mortgagees nor lessees for any fixed period. They also disputed the grounds of their eviction indicated above, namely, defaults in payment of rent or requirement of the premises for occupation by the plaintiff in good faith.

4. The trial court framed various issues and the relevant of them were issues Nos. 6, 7 and 8 which read as follows:—

"6. Was the nature of possession of the defdts. over the suit premises on the basis of the deed (dated) 10-9-1958 as mortgagees or tenants for fixed period

or as tenants from month to month during the period of the deed and after expiry of the same?

7. Are the defendants liable to be evicted from the suit premises on the primary ground of being trespassers or on any of the alternative grounds of the plaintiff's personal necessity or the defendants being defaulters?

8. Is the plaintiff entitled to a decree for Rs. 2,750/- as claimed, or to any amount?"

The findings recorded on these issues are as follows:

(i) The defendants were occupying the suit premises in the capacity of monthly tenants during the period of Ext. 2 and also after the expiry of the same and Ext. 2 was merely a colourable device meant to circumvent the mischief of the B. B. C. Act.

(ii) The plaintiff did not reasonably and in good faith require the suit premises for the purpose of setting up her sons in business. The defendants' case about having offered rent @ Rs. 75/- per month after the termination of the period of Ext. 2 during the first month hand to hand to the plaintiff's husband and then through money orders till before the filing of the suit was well proved.

(iii) The municipal tax which the defendants had agreed to pay over and above the sum of Rs. 75/- per month would also be included in the term "rent" and admittedly the defendants having not paid the dues of those taxes for years together prior to the institution of the suit they were "obviously defaulters within the purview of the said Act.....The defendants are liable to be evicted from the suit premises on the ground of being defaulters for more than two months' rent".

(iv) The plaintiff's claim for mesne profits cannot stand but the defendants are clearly liable to pay the sum of Rupees 2,750/- to the plaintiff.

5. Before I enter into the discussions and consider the arguments advanced by learned counsel for the respective parties, I may do better to advert to the relevant stipulations evidenced by the controversial usufructuary mortgage bond. It is executed for a consideration of Rs. 4,500/- promised to be advanced from time to time by the mortgagee to the mortgagor through her husband, her constituted attorney, in instalments. The

first instalment of Rs. 900/- was to be paid at the time of the registration of the document and the balance of Rupees 3,600/- in four equal yearly instalments of the same amount of Rs. 900/- payable on the 13th September of the succeeding years, namely, 1959, 1960, 1961 and 1962. The above mortgage money and other sums payable on the mortgage account were deemed to be fully satisfied by the possession and enjoyment of the mortgaged property by the mortgagee for the said period of five years and the mortgagee was to give up possession immediately thereafter. Cl. 6 of this document contained a stipulation with respect to the payment of certain taxes etc. in the following terms :

"6. That the mortgagee shall pay all charges for consumption of electricity, latrine tax and water taxes and rates appertaining to the mortgaged property during the subsistence of the mortgage and shall also keep the same in good habitable condition and shall deliver the entire property in such good condition immediately on expiry of the period of the mortgage. The mortgagors shall be liable to pay all other taxes and rates and the costs of annual and major repairs that may be reasonably necessary."

6. The parties had also entered into an agreement simultaneously on 10-9-1958 which has been marked as Ext. E (1). Relevant clause of this agreement, namely, clause No. 5, reads as follows :

"That should the second party feel that he would require the mortgaged premises for his business even after the expiry of the period of mortgage, he, the second party shall apply to Shri Rikhab Chand Sarawgi of Ranchi before a fortnight of the expiry of the period of mortgage for a lease for such further period as he, the second party may require, and if the first party requires any loan, the transfer shall be a complete usufructuary mortgage for such period as may be sufficient to satisfy the loan keeping the net value of the usufruct at Rs. 75/- per month. If the first party does not require any loan the transfer shall be a lease for such period not exceeding four years from 13.9. (torn) as the second party elects on a monthly rent of Rs. 75/- only."

7. On the evidence adduced by the parties it remains undisputed that although a proposal was made by the

plaintiff for execution of a fixed period lease by the defendants in respect of the suit premises after the expiry of the period of five years stipulated under the mortgage bond (Ext. 2), the lease agreement did not come through as the defendants were not agreeable to any fixed period lease term and insisted for a monthly tenancy.

8. It is clear that the plaintiff has failed in the trial court on her main grounds, namely, recovery of possession of the premises either as a mortgagor or a fixed period lessor. She has also failed to prove default in payment of the monthly rent of Rs. 75/- as such as well as the ground of personal necessity. The defendants, however, have been treated as defaulters on account of the non-payment of the municipal taxes to the plaintiff treating the same as payable to her as part of the rent and, therefore, the learned counsel appearing for the appellants in the first instance advanced arguments to overcome this finding of the trial court.

9. The main argument of Shri Balbhadra Prasad Singh, the learned counsel for the appellants, in this regard was regarding the obligation to pay the latrine and water taxes etc. under the terms of the document (Ext. 2). The liability for it and its non-payment was, however, not disputed by him which could not be treated as part of the "rent" as such and, therefore, its non-payment did not attract the rigours of clause (d) of S. 11 (1) of the 1947 Act. With reference to the various provisions of the Bihar & Orissa Municipal Act, to which I shall presently refer, he argued that even in case of its non-payment the defendants were liable to the municipal authorities who could initiate an appropriate proceeding for recovery of the same and even if the landlord could claim the same, that would give an independent cause of action to the plaintiff and on this account no forfeiture of the tenancy right could be incurred under clause (d) referred to above.

10. The expression "rent" has not been defined in the Bihar Buildings Control Act, but Mr. K. D. Chatterji referred to a passage from the commentary on Transfer of Property Act by Mulla. At page 658 of the 6th edition he has discussed "rent" in the following way:

"According to the old English authorities 'rent' has three essential features, (1) that it must be reserved to the lessor and not to any stranger, (2) that it must be reserved by apt words, and (3) that it cannot be a reservation of something in case which forms part of the demised premises."

The third ingredient of the 'rent', according to the English authorities, does not appear to have found favour in some of the Indian courts. The third ingredient, however, is not very much relevant for the purposes of this case. Under the Indian law, any payment by the lessee that is part of the consideration of the lease, is rent, as was laid down by the Supreme Court in the case of *State of Punjab v. British India Corporation* (AIR 1963 SC 1459). Thus when the lease provides for collection charges in addition to rent such charges would form part of the rent; so also stipulation to pay assessment or taxes payable by the lessor according to several cases. In this connection reference was made by Mr. Chatterji to the case of *Kishanlal Singol v. Hari Kisson Lohia* (AIR 1956 Assam 113) where the learned Chief Justice was considering the case of a default by a tenant in paying the municipal and other maintenance charges to the landlord. Under the terms of the contract executed by the defendants the rent was payable in the first week of each month, with all requisite taxes, municipal, latrine etc., @ 10% of the rent, i.e., Rs. 60/- as rent and Rs. 6/- as municipal and other maintenance charges. After a certain time the defendants refused to pay Rs. 6/- and were agreeable to pay only Rs. 60/- plus Rupees 3/- as municipal taxes. In these circumstances, it was held that having agreed to pay 10% of the rent to the landlord the tenant was not entitled to reduce the same and its non-payment amounted to default in payment of rent. The ratio of this case, in my view, is based upon the first two ingredients of 'rent' as indicated above, as payment of 10% of the rent as maintenance and municipal taxes etc. was reserved to the lessor by apt words.

In the case of *Karnani Properties Ltd. v. Miss Augustine* (AIR 1957 SC 309) the Supreme Court also had to consider the term "rent" with reference to Houses and Rents — West Bengal Premises Rent Control Act (17 of 1950). There also this term was not defined and in that view

of the matter it was observed by the learned Judge that the term "rent" must be taken to have been used in its ordinary dictionary meaning which was comprehensive enough to include all payments agreed by the tenant to be paid to his landlord for the use and occupation not only of the building and its appurtenances but also of furnishings, electric installations and other amenities agreed between the parties, provided by and at the cost of the landlord. Here also the emphasis was on the payments which were agreed to be paid to the landlord, thus attracting again the first ingredient.

Somewhat similar question also came to be considered before a Bench of this Court in the case of *Sagarmal Agarwalla v. Smt. Annapurna Neogi* (1963 BLJR 334): (AIR 1964 Pat 298) where the Court found that the tenant had agreed to pay municipal taxes also as a part of the rent. The landlord had sued him for recovery of the arrears of rent as well as the municipal taxes as in the present case. Answering the legality of such a contract, i.e., to pay municipal taxes over and above the monthly rental, it was held that — "as no provision of the Act applies to a contract for payment of municipal taxes by a tenant to a landlord, it must be held that the defendant is liable to pay the municipal taxes to the plaintiff in addition to the rent fixed by the Controller". I must, however, point out that this decision was rendered before the 1947 Act was amended by the Bihar Act 16 of 1965 changing the basis of fixation of fair rent.

11. In this context let us examine the facts of the case in hand with respect to the payment of the latrine tax and water tax. The terms of the agreement (Ext. 2) do not clearly speak that these taxes were to be paid by the defendants to the plaintiff. All that was intended by the stipulations between the parties (as extracted above), in my view, was that the lessor shifted the burden of payment of these taxes upon the defendants without specifically saying that they were to make the payments of these taxes to the plaintiff as was the position in all the reported cases which were either cited or I could find out, referred to above. Apparently, therefore, the payments of these taxes were not reserved to the lessor by apt words as such, although from the evidence it ap-

appears that the tenant paid these taxes on some occasions to the landlady under Exts. 3 series. Ext. 3 is a water tax receipt dated 23-3-1964 granted by the plaintiff to the defendant No. 1 for a sum of Rs. 150/- only on account of the water tax for the year 1958-59. Similarly Ext. 3 (a) is a receipt of the same date for the year 1959-60 and Ext. 3 (b), again of the same date, is a receipt for the subsequent year, i.e., 1960-61. It is evident that the amount of water tax was not paid along with the rents but at one time for three consecutive municipal years and that also several years after they had fallen due.

12. Let us now come to the relevant provisions of the Bihar & Orissa Municipal Act. Sections 100 and 34 thereof are the two relevant sections in this respect. According to sub-sec. (2) of Section 100, latrine tax, subject to the provisions of S. 135, is payable by the person in actual occupation of a holding during the relevant period, but this liability is also not absolute and in certain circumstances it shifts on the owner of the holding. For example, where the occupier does not approach the municipality for the assessment of the latrine tax in his name or if the owner does not make a similar prayer, the occupier cannot be sued for latrine tax (see *Dalbhum Traders & Industries Ltd. v. Commrs. of Jugsalai Notified Area Committee*, 1969 BLJR 283). Section 134 deals with the water tax. According to the scheme of this provision when the owner pays water tax himself, he can recover from the tenant $\frac{3}{4}$ th of the entire amount of water tax paid by him. The liability to pay water tax, therefore, under the municipal law is squarely on the owner of a holding having a right to recoup himself to the extent indicated above. The obligation with respect to the water tax of a tenant arises only in case he is mutated in the municipal records as the occupier and not otherwise. According to S. 135 where a holding is occupied in severalty by more than one person, the Commissioners may levy the latrine tax from the owner who may recover from each occupier such sum as shall bear to the entire amount of the tax so levied in the same proportion as the value of the part of the holding in the occupation of such person bears.

13. From the discussions made above, I have no doubt in my mind to hold that although the plaintiff landlady had a

right to recover from the tenant-defendants all the payments of the latrine and water tax in pursuance of the provisions of the Municipal Act discussed above, but their failure to pay it to her formed independent cause of action and cannot go hand in hand with the default in the payment of the monthly rent and, therefore, the default in this regard would not attract the mischief of cl. (d) of S. 11 (1) of the 1947 Act. I would accordingly hold that the trial court took a wrong view of law in holding that on account of the non-payment of the water and latrine taxes, the defendants committed a default in payment of house rent within the meaning of S. 11 (1) (d) and, therefore, were liable to be evicted.

14. It is admitted case of the plaintiff that the defendants paid the yearly instalments of Rs. 900/- in terms of the mortgage bond (Ext. 2). The trial court has also accepted the defendants' case that after the expiry of the period of 5 years of the bond, the defendants had tendered a sum of Rs. 75/- to the plaintiff's husband, being the first month's rent after the expiry of the period of 5 years which was refused by him. On the evidence I do not feel inclined to take a different view in this regard, although Mr. K. D. Chatterji had contended that the evidence of PW 4, the son of the plaintiff who had denied this plea of the defendants, should be accepted.

It is also undisputed that thereafter the defendants had started remitting the rent for each subsequent month by money order according to S. 13 of the Bihar Act which were all refused by the plaintiff's representative. The money order coupons are Ext. D series and printed in the paper book in a tabular form. Sub-sec. (1) of S. 13 of the 1947 Act reads as follows :

"(1) When a landlord refuses to accept any rent lawfully payable to him by a tenant in respect of any building, the tenant may remit such rent, and continue to remit any subsequent rent which becomes due in respect of such building, by postal money order to the landlord." The above provision entitles a tenant, on the landlord's refusal to accept any rent, to remit the said rent and go on remitting the rent for the subsequent months falling due by postal money orders. Clause (d) of S. 11 (1) itself provided that in the absence of any contract between the parties regarding the time for

payment of the rent of any particular month, the said rent could be paid by the "last day of the month next following that for which the rent is payable or by not having been validly remitted....." in accordance with S. 13.

15. Ext. D (22) is the remittance of the rent for the period of one month commencing from 13-9-1963 to 12-10-1963 which was refused by the landlord. It was stated in the money order coupon that rent was being remitted by money order as it was earlier refused by him. Other money order coupons are for the subsequent months. The dates of the remittances of the rents, however, are not clear from the exhibits printed in the paper book, but it was not contended before us on behalf of the respondents that there was any default in making the remittance in the sense that it was not handed over to the post office within the grace period of one month allowed under cl. (d) just referred to above, for being paid to the payee. All that was contended was that the defendants were bound to make the remittances with such a margin that it should have been reached (tendered) to the landlady (payee), within the said period of one month. In other words, the argument was that as in the case of hand to hand payment so in the case of remittance under S. 13, the rent should have reached the landlord within the grace period of one month and it was not sufficient that it was simply remitted within the said period.

16. Mr. Chatterji placed reliance on a Bench decision of this Court in the case of Madholal v. Madan Mohan Agrawalla (AIR 1975 Pat 154) for this contention. If I may say so with due respect, Mr. Chatterji has entirely misdirected himself in placing reliance on this case. It was a case where the tenant was remitting the rents to his landlord not in the situation contemplated by S. 13, i.e., in a case where the landlord had refused to accept the rent, but he had adopted that mode of tender for his convenience instead of going to the landlord personally, and although he was remitting the rent within the grace period of one month the remittance obviously did not reach within the said period of one month, and were tendered after its expiry. In this context it was held that the post office was acting as the agent of the tenant and the remittances could not be held to be legal as

the tender by the plaintiff's agent, namely, the post office, was made to the landlord beyond the period of one month. The learned Chief Justice (Untwalia, C. J. as he then was) in para 7 of his judgment has clearly observed as follows :

".....If the tender of money through the agency of the post office by money order was in accordance with the general law, then the post office acted as the agent of the tenant and the tender to the landlord would be on the date when it tendered to him the money sent by Money Order. If of course the case could be covered by S. 13 (1) of the Act, then remittance by money order would necessarily be after the last day of the next following month....."

17. We would have expected Mr. Balbhadra Prasad Singh, learned counsel, who took pains to cite so many English decisions, to have pointed out the fallacy in the argument of Mr. K. D. Chatterji with reference to this decision, but he also, perhaps, did not examine this decision closely. It is, therefore, clear that according to the scheme of S. 13 all that was required by a tenant was to remit the rent for the month which was refused, within a reasonable time after the expiry of the next following month and then to remit the rent for the subsequent months by the last day of each succeeding month. These remittances being not under the general law but being permissible under the statute, the post office cannot be said to be an agent of the remitter, namely, the tenant and actual tender of the rent to the landlord beyond the grace period of one month would not make the remittance in any way invalid. Similarly, if the landlord is not met or not found and the money is returned to the tenant then also the remittance cannot be held to be invalidated as the law, in my view, did not put so much risk on a tenant and all that was required of him was to make the remittance within the stipulated period and if he did that he discharged the statutory obligation. Taking any other view of the matter would lead to gross injustice and, on the other hand, defeat the very purpose and the scheme envisaged under S. 13 of the Act and would give the landlord a handle to put the tenant as a defaulter at any time. It is, therefore, not possible to accept the contention of Mr. Chatterji, on the facts

mentioned above, that the defendants should be held to be defaulters within the meaning of S. 11 (1) (d) of the Act.

18. Now I will take up the other issue, namely, as to whether Ext. 2, the usufructuary mortgage bond, can be treated to be a mortgage bond as such or it is rendered invalid under S. 23 of the Contract Act in view of S. 3 of the Bihar Buildings Act which prohibited the landlord, *inter alia*, to receive "the payment of any sum exceeding one month's rent of such building as rent in advance". The trial court has discussed this aspect of the matter in great detail and has taken the view that the only intention of the landlord by taking recourse to this document was to secure the payment of one year's rent of the premises at a time in advance. Mr. Chatterji's argument was that there being no bar under the Transfer of Property Act for a mortgagor to secure a debt by creating a usufructuary mortgage by receiving it in instalments: the document must be accepted as a mortgage bond on its face. With reference to some income-tax cases laying down the principle that it was open to a person to arrange his affairs in such a manner to bring down the rate of taxes as far as possible, he contended that although the payment of rent for a period of more than one month might be prohibited under the Buildings Control Act, there being no such restriction for realising the same by giving the property in usufructuary mortgage, the document should not be held to be invalid.

This argument, of course, is attractive but has got to be rejected as none of the authorities has said that a person can arrange his affairs in conflict with any legal provision. It has been already said that the intention of the plaintiff on the fact of it does not appear to raise money for the purpose of construction but it was only to realise the rents in a particular mode.

19. The plaintiff's son (P.W. 4) has said that the property could be let out at a monthly rental of Rs. 250/- at the time Ext. 2 was executed. It is said that the plaintiff was in need of money for construction purposes. In these circumstances, in agreement with the trial Court I hold that it does not stand to reason as to why the property could be given in mortgage for a period of five years taking only Rs. 900 at a time and thereby defeating the very purpose of

taking the loan at such a ridiculous rate of rent, i.e., Rs. 75 per month only. It seems apparent, therefore, that the only intention to take recourse to this document was to get the rent for the whole year in advance and this being directly prohibited by S. 3 of the Buildings Control Act, the mortgage bond must be held to be illegal and, therefore, it cannot be made any basis for recovery of possession in court, being directly hit by Section 23 of the Indian Contract Act, the court being fully entitled to tear the veil and examine the real intention of a transaction. The case, therefore, has been rightly examined treating the relationship between the parties as a landlord and a monthly tenant.

20. Now I take up for consideration the two other grounds for eviction pressed into service by Mr. K. D. Chatterji on behalf of the landlord, namely, (1) eviction on the ground of personal necessity, and (2) eviction on the ground of breach of the conditions of tenancy.

Personal necessity.

21. We have seen the ground of personal necessity advanced by the plaintiff, namely, for setting up her sons in business; who belong to a trading family. P.W. 4 Bijay Kumar Sarawgi, the eldest son of the plaintiff aged about 32 years, has said in his evidence that out of five brothers two were reading in Calcutta in the year 1969 when he was examined and one was in service. The remaining two were idle and wanted to open a shop. It is also an admitted position that by the side of the disputed shops the plaintiff has got another room. With respect to this accommodation the statement of P.W. 4 was that this was too small a place and was, therefore, not suitable for business. This place was being kept vacant for them so that they can amalgamate it with the shop katras after eviction of the defendants and then to start their business. He further said that in Sept., 1966 he had opened a sweetmeat shop in a tenanted accommodation available by the side of the disputed shop as indicated above, but the shop in the tenanted premises had to be vacated on account of the insistence of its landlord and the shop started in their own premises had to be closed. It also appears that the plaintiff has got another house in a lane about 10 ft. wide approximately 60 ft. further north of the shop in question which is on the Main Road in

Ranchi town. The size of the rooms/shops is only 8' x 10' and that several shops in this block were vacant. P.W. 7, Harakchand Sarawgi, a relation of the plaintiff, was the owner of the building in which the sweetmeat shop was opened. According to his evidence also in the room by the side of the suit premises no good business can be started (Bara karobar nahi ho sakta hai). According to the evidence of the defendants' witnesses, however, the accommodation by the side of the suit premises was sufficient for opening a sweetmeat shop. The trial Court has not disbelieved as such the necessity of the plaintiff for starting a business but it has held that the claim for eviction from the suit premises on this account was not bona fide within the meaning of clause (c) of S. 11 (1) of the Act inasmuch as the plaintiff had other alternative accommodations, namely, the shop-katras in the lane indicated above as well as the space available by the side of the suit premises. In paragraph 18 of the judgment the trial Court has disposed of this question in these words:

"In the present case, as indicated above, the plaintiff has a number of shop rooms, including one by the side of the Main Road, lying vacant in which her sons could have easily started some business. If that business would have expanded and necessitated larger accommodation there could have been justification for getting the suit premises vacated but having not done that if the present suit was filed by making the above grounds, to my mind, it cannot be said that the alleged requirement is reasonable and in good faith....."

22. It is, no doubt, true that cl. (c) speaks of the requirement of the landlord to be "reasonable and in good faith", but the question is that when the plaintiff established this kind of need, namely, for starting a business of her choice, can a court defeat her on the ground that instead of doing the business in a commercial area she should go to a lane beyond that area? Before recording my conclusion I may refer to some of the decisions in this regard.

23. In the case of *Basant Lal Saha v. P. C. Chakravarty* (AIR 1950 Cal 249) dealing with the West Bengal Premises Rent Control (Temporary Provisions) Act, the learned Judge while discussing the question of bona fide observed as follows:

"What is 'bona fide' under the statute is always a question of fact and the Court with a view to find out whether the requirement of the landlord is bona fide is entitled to look to every relevant fact or circumstances affecting the landlord and his position, such as the nature and character of the landlord's temporary accommodation at the time when he is asking for the decree for possession, the insecurity or otherwise of the tenure that he might be holding at the time, the fact that he himself is under a notice to quit and the scope, size and character of his requirement. But the hardship which might be caused to the tenant by granting the decree for possession or the fact that tenant on the facts of the case does not need the premises is not a proper or relevant consideration for deciding the question of bona fide."

This was a case with respect to eviction from a house and alternative accommodation was available to the landlord. The defendant wanted to defeat the landlord on this ground. Proceeding further it was observed:

"The Statute thereby recognizes a wholesome principle that a man should not be deprived of his own house if he bona fide requires it for his own occupation. Under the common law or the Transfer of Property Act, the landlord has considerable rights to evict a tenant from his property. A good many of these rights have been taken away by the Act in order to meet the prevailing acute shortage of housing accommodation for the citizens of this province. A statute like the West Bengal Premises (Temporary Provisions) Rent Control Act, 1948 is designed to meet the fugitive exigencies of the hour and in doing so the Legislature in its wisdom has still left the landlord with that remnant of his right, which is an incident of ownership to be able to evict a tenant, when he bona fide requires his property for his own occupation. This Court will be loath to confiscate that valuable right of the landlord without express statutory provision."

This view was reiterated by the same High Court in the case of *Sumatibala Sen v. Heramba Kumar Roy* ((1956) 60 Cal WN 783).

The Supreme Court also had considered the expression "reasonable requirement" with reference to J & K Houses

and Shops Rent Control Act in the case of *Mst. Bega Begum v. Abdul Ahad Khan* (AIR 1979 SC 272) and observed as follows (para 13):

"Section 11 (1) (h) of the Act uses the words 'reasonable requirement' which undoubtedly postulate that there must be an element of need as opposed to a mere desire or wish. The distinction between desire and need should doubtless be kept in mind but not so as to make even the genuine need as nothing but a desire. The connotation of the term 'need' or 'requirement' should not be artificially extended nor its language so unduly stretched or strained so as to make it impossible or extremely difficult for the landlord to get a decree for eviction. Such a course would defeat the very purpose of the Act which affords the facility of eviction of the tenant to the landlord on certain specified grounds."

24. I may incidentally mention that during the course of hearing of this appeal time was taken by the parties for the possibility of a compromise by giving to the defendants the vacant accommodation by the side of the suit premises in lieu of the suit premises on certain terms and conditions but the defendants did not become agreeable. I am stating this fact not to prejudice the case of the defendants on this account but only for the purpose of showing the fact that had the available accommodation in the main road house been quite proper and sufficient, the defendants would have gladly agreed to shift there. This circumstance also supports the case of the plaintiff that the vacant space is not a suitable space for the business. It is not a case of a residential premises where a Court can adjudge as to whether the defendant should be evicted from the entire house or only from a part of that. The suit premises is a unit of shop katra and the fact that the plaintiff's sons want to start a business has not been disbelieved but this requirement has not been held to be "bona fide" because they have had at their disposal two alternative accommodations, one in the lane and the other just by the side of the suit premises. In my considered opinion, in view of the principle flowing from the above authorities it would be denying the landlord with that remnant of her right which is an incident of ownership and this could not be the intention of the legislature. Once a

landlord establishes his personal necessity then the law gives him the choice of selection of the most suitable accommodation which may suit him according to the facts of each case. No cross-examination was directed against P.W. 4 as to why he had said that the vacant space on the Main Road was insufficient. The fact that that is kept vacant from several years (20 years) also supports the case of the plaintiff's bona fide requirement of the suit premises. Then there is some protection for a vexatious plea on this ground of personal necessity provided in the statute itself and that is contained in S. 12 of the Act which provides that where the landlord recovers possession of any building from the tenant by virtue of a decree secured under clause (c) of sub-sec. (1) of S. 11 and the building is not occupied by him, or by the person for whose benefit the building is held, within one month of the date of vacation of the building by such tenant, or the building, having been so occupied, is re-let within six months of the date of such occupation to any person other than such tenant without the permission of the Controller, the Court may, on the application of such tenant made within nine months of his vacating the building, after hearing both the parties put the tenant to possession or to pay him such compensation or both, as may be fixed by the Court.

I do not lay much stress on this provision, but on the evidence and the circumstances mentioned above I am unable to agree with the trial Court on the question of personal necessity. I, therefore, in disagreement with the trial Court, would hold that the plaintiff requires the suit premises for her personal occupation in the sense of starting business by her sons. The plaintiff is, therefore, entitled to a decree for eviction of the defendants on this ground. Breach of the condition of tenancy.—

25. One of the grounds of eviction of a tenant from a building is provided in clause (a) of sub-sec. (1) of S. 11 of the Act and that is for breach of the condition of the tenancy or for subletting the building or any portion thereof without the consent of the landlord etc.

The argument of Mr. Chatterji in this regard was that even assuming for the sake of argument that the tenants cannot be held to be defaulters within the meaning of clause (d) of S. 11 (1) of the

Act, on account of the non-payment of the latrine and water taxes, they must be deemed to be guilty of breach of the conditions or terms of the tenancy on this account within the meaning of clause (a) mentioned above. The argument of Mr. Balbhadra Prasad Singh in this regard was that the default in this regard, which, of course, was undisputed, could not be held to be a breach of the conditions of the tenancy, but only a breach of the stipulations thereof. I, however, fail to appreciate this argument of making a distinction between the "conditions" and "stipulations" of the terms of a tenancy. There might be a thin distinction between these two, but in my view, there being an express covenant in Ext. 2 which was also acted upon by the tenants as evidenced by Ext. 3 series already seen above, the default in payment of these taxes amounted to a breach of the conditions of tenancy and, therefore, on this account also the defendants are liable to be evicted.

26. No other point remains for consideration and for the reasons discussed above, I do not find any merit in this appeal and would maintain the decree for eviction of the defendants passed by the trial Court but for grounds entirely different from those given by it. I would accordingly direct the appellants to give the vacant possession of the premises in question within a period of four months, failing which the plaintiff would be entitled to recover possession through the process of law. On the facts and in the circumstances of the case, I shall make no order as to costs.

NAZIR AHMAD, J.:— I agree.

Appeal dismissed.

AIR 1982 PATNA 200

S. SHAMSUL HASAN, J.

Ram Singhasan Choubey and others, Petitioners v. Sudama Prasad Sah, Opposite Party.

Civil Revn. No. 1344 of 1981, D/- 9-4-1982.*

Specific Relief Act (47 of 1963), S. 16 (c) — Suit for specific performance of contract — Failure of plaintiff to aver in plaint ingredients of S. 16 (c) — Amend-

*Against Order of Mr. A. P. Roy, J., 4th Court, Chapra, D/- 6-8-1981.

ment of plaint sought during course of arguments — Held, the mere fact that the plaintiff had led evidence that he was ready and willing to perform his part of the contract would not justify the amendment. (Civil P. C. (1908), O. 6, R. 17).

Where in a suit for specific performance of contract the plaintiff had failed to aver in the plaint the ingredients of S. 16 (c) that he was all along ready and willing to perform the essential terms of the contract which are to be performed by him, and on this plea regarding violation of S. 16 (c) being taken by the defendant during the course of arguments, the plaintiff filed an application for amendment of the plaint, it was held that merely because the plaintiff had led evidence that he was ready and willing to perform his part of the contract in the absence of any averment in the plaint would not justify the amendment. AIR 1978 SC 484; AIR 1978 All 463, Rel. on.; AIR 1978 F & H 291; AIR 1976 Cal 115, Disting. (Para 5)

There is a distinction between an amendment, which seeks to bring a cause of action, which was conspicuously absent in the plaint, and a cause of action, which, though in the plaint, is defective, the amendment application can be allowed to rectify the defect, but, if a valuable right has accrued, the Court should be reluctant to allow the amendment. (Para 5)

Cases Referred : Chronological Paras

AIR 1978 SC 484	4
AIR 1978 All 463	5
AIR 1978 Punj & Har 291	6
AIR 1976 Cal 115	6

B. P. Pandey, S. S. Dwivedi and Hari Shankar, for Petitioners; Karuna Nidhan Keshava, Onkar Nath Sinha and Sunil Kumar, for Opposite Party.

ORDER:— The defendants are the petitioners here. They are aggrieved by the order of the learned Munsif dated the 6th Aug. 1981, by which an amendment in the plaint sought by the plaintiff-opposite party has been allowed.

2. The opposite party filed a title suit, being Title Suit No. 102 of 1971 in the Court of the Munsif IV, Chapra, for a decree for specific performance of contract in his favour and for a declaration that the sale deed dated 16-10-1969 in favour of defendants 3 to 5 is illegal, void and ineffective. The suit after filing of the written statement and framing of

the issues was taken up for hearing, evidence being led by both the sides, after the close of which arguments were heard. During the course of argument the petitioners' counsel submitted that there has been violation of S. 16 (c) of the Specific Relief Act and, therefore, the suit is fit to be dismissed. According to petitioners' counsel, the plaintiff-opposite party has failed to aver and prove that he was all along ready and willing to perform the essential terms of the contract which are to be performed by him. On this submission being made an application was filed for amendment of the plaint which was allowed by the impugned order. The amendment sought for in paragraph 10 of the plaint is as follows:—

“अमरात जो दफा नं. १० अरजी नालिश के अन्त में जोड़े जायेंगे। व मुद्दे बाज भी महादा के शर्तों के अनुकूल बकिये मो. १२२५/- रुपया अदाय करके बयनामा लिखाने को तैयार है वो पहले भी तैयार था वो भविष्य में भी तैयार रहेंगे।”

3. It is submitted by learned counsel for the petitioners that by the allowing of this amendment they have been deprived of a valuable right as the suit itself is liable to fail without this amendment and this amendment really creates a right that is barred by limitation. According to the learned counsel for the plaintiff-opposite party no new case is being added, and the amendment sought is purely technical in nature which fact has been stated by P. W. 1 in his evidence in paragraph 4 of his deposition at the very beginning and on this point there was no cross-examination on behalf of the defendants-petitioners.

4. The decision of this case rests entirely on the interpretation of the two decisions, one of the Supreme Court and the other of the Allahabad High Court, which have settled down the law with respect to the effect of the absence of an averment that the plaintiff is ready to fulfil the essential terms of the contract, in the plaint and its effect which can or cannot be cured by amendment of the plaint. In this connection I would first cite the decision of the Supreme Court in the case of *Ganesh Trading Co. v. Moji Ram* (AIR 1973 SC 484), paragraphs 2 and 5 of which are relevant, and they are usefully quoted below:—

“2. Procedural law is intended to facilitate and not to obstruct the course of

substantive justice. Provisions relating to pleadings in civil cases are meant to give to each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between parties, and to prevent deviations from the course which litigation on particular causes of action must take.

5. It is true that, if a plaintiff seeks to alter the cause of action itself and to introduce indirectly through an amendment of his pleadings an entirely new or inconsistent cause of action, amounting virtually to the substitution of a new plaint or a new cause of action in place of what was originally there, the Court will refuse to permit it if it amounts to depriving the party against which a suit is pending of any right which may have accrued in its favour due to lapse of time. But, mere failure to set out even an essential fact does not by itself constitute a new cause of action. A cause of action is constituted by the whole bundle of essential facts which the plaintiff must prove before he can succeed in his suit. It must be antecedent to the institution of the suit. If any essential fact is lacking from averments in the plaint the cause of action will be defective. In that case, an attempt to supply the omission has been and could sometime be viewed as equivalent to an introduction of a new cause of action which, cured of its shortcomings, has really become a good cause of action. This however, is not the only possible interpretation to be put on every defective state of pleadings. Defective pleadings are generally curable if the cause of action sought to be brought out was not ab initio completely absent. Even very defective pleadings may be permitted to be cured, so as to constitute a cause of action where there was none, provided necessary conditions, such as payment of either any additional court fees, which may be payable, or, of costs of the other side are complied with. It is only if lapse of time has barred the remedy on a newly constituted cause of action that the courts, should, ordinarily, refuse prayers for amendment of pleadings.”

5. The above Supreme Court decision has been relied upon by a Bench decision of the Allahabad High Court in *Mahmood Khan v. Ayub Khan* (AIR 1978 All 463). The Allahabad case is entirely applicable to the facts of the instant

case. It has been held succinctly that even if the plaintiff brings in his evidence the ingredients of S. 16 (c), it only satisfies a part of the section, leaving the other part, that is, averment in the plaint, unfulfilled. This decision, therefore, held that the amendment should not be allowed. While discussing the passages, quoted above, of the Supreme Court decision the Hon'ble Judges of the Allahabad High Court have held that the Supreme Court has made a distinction between an amendment, which seeks to bring a cause of action, which was conspicuously absent in the plaint, and a cause of action, which, though in the plaint, is defective, the amendment application can be allowed to rectify the defect, but, if a valuable right has accrued, the Court should be reluctant to allow the amendment. I am in respectful agreement with this decision. It says that to allow amendment would be to allow the plaintiff to bring a cause of action in the suit which was conspicuously absent in the plaint. I am also inclined to hold that merely because the plaintiff had led evidence that he was ready and willing to perform his part of the contract in the absence of any averment in the plaint would not justify the amendment.

6. Learned counsel for the opposite party cited a decision in the case of Rama Nand Chaudhary v. Mt. Bhonri (AIR 1978 Punj & Har 291) in which similar amendment in the plaint was allowed. In this decision the amendment was disallowed by the trial court but allowed by the High Court on the ground that the amendment was sought at the earliest possible opportunity and refusal would lead to grave injustice. In the instant case the amendment sought and allowed was at a stage when everything was over and the trial had practically concluded. The law as laid down in the aforesaid decision of the Supreme Court had not been discussed in the Punjab case. Further, in the Punjab case the case of the deftd. was that there was no contract at all. The amendment was only by way of abundant caution. The decision in the case of Manick Lal Seal v. K. P. Chowdhury (AIR 1976 Cal 115) has no application to the instant case because in the Calcutta case the amendment sought was disallowed on account of the fact that the plaintiff did not bring in the ingredients of S. 16 (c) of the Specific Relief Act in his evidence. This

case has, therefore, no application. In view of the above discussion in regard to the aforesaid two decisions and the situation in those cases I am not inclined to agree with the Punjab and Calcutta decisions aforesaid.

7. In view of the discussions made above this application is allowed and the impugned order allowing amendment of the plaint is set aside. There will be no order for costs.

Revision allowed.

AIR 1982 PATNA 202

M. P. VARMA, J.

Nabudi Mahto and others, Petitioners v. Ramchandra Singh and others, Respondents.

Civil Revn. No. 2040 of 1979, D/- 14-5-1982.*

Bihar Consolidation of Holdings and Prevention of Fragmentation Act (22 of 1956), Ss. 4 (c), 3 and 2 (g) — Ambit of — Suit for declaration of title and for recovery of possession of homestead land — Suit land notified under S. 3 and consolidation operation going on in the village — Suit falls within mischief of Section 4 (c) — By virtue of S. 2 (9) even homestead land falls within S. 4 (c).

(Para 4)

T. S. Tetarvai, for Petitioners.

ORDER:— The plaintiffs, who are petitioners here filed Title Suit i.e. T. S. No. 153 of 1974 in the court of Munsif First, Hajipur for declaration of title and recovery of possession over 1 katha of the disputed land with a prayer for removal of the structure.

2. Admittedly the area where the suit land situates has been notified under S. 3 of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 (hereinafter referred to as 'the Act') and consolidation operation is going on in the village. The subject matter of the suit is with regard to 1 katha of land of R. S. plot No. 256 of Khata No. 940 extending to cadastral survey plot No. 135 whose total area is 3 kathas and has been recorded as Baskit (homestead) in the name of grandfather of the plaintiffs. It is the case of the plaintiffs that in part of the disputed plot

*Against order of K. K. Sahava, Munsif First, Hajipur, D/- 16-7-1979.

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stands the house of the plaintiffs and 1 katha of the eastern portion which is in dispute is being used as Sahan.

3. It was on 26-4-1979 that the defendants filed a petition stating therein that due notification and publication under S. 3 of the Act has been made and consolidation proceeding is going on in the village which includes the land in dispute and the notification under S. 10 of the Act has also been received and as such, the suit is hit by S. 4 (c) of the Act. The learned Munsif on hearing the parties and on consideration of the materials placed before him held that the suit being hit by S. 4 (c) has abated.

4. Learned counsel for the petitioner Sri T. S. Tetarwai has challenged the validity of the impugned order on the sole ground that the portion of the land in dispute is not connected with the agricultural purpose and as such, it is excluded from the mischief of S. 4 (c) of the Act. It has been seen that the area with reference to suit land has already been notified under Section 3 of the Act and the consolidation proceeding is in operation in the village. It cannot be denied that the suit being a suit for declaration of title and recovery of possession the same will come within the mischief of S. 4 (c) of the Act. The learned Munsif has said that the plaintiffs' further case is that they have been dispossessed from the disputed portion of the land and defendants have constructed the house over it and their prayer in the suit is for removal of the structure. There is further finding that according to the plaintiffs' case the land was used as Sahan by the plaintiffs and on consideration of these materials the learned Munsif has given a finding that the disputed land is a homestead land and that being so it comes within the definition of Section 2 (9) of the Act. In other words even homestead land falls within the mischief of Section 4 (c) by virtue of the definition given in the Act itself.

5. Taking the aforesaid facts into consideration I am of the opinion that the Court below has rightly declared the suit to have abated under Section 4 (c) of the Act. The application, therefore, fails and is dismissed as such.

Revision dismissed.

AIR 1982 PATNA 203

M. P. VARMA, J.

Manager Thakur, Petitioner v. Narain Pd. Singh, Opposite Party.

Civil Revn. No. 1184 of 1979, D/- 7-5-1982.*

Bihar Consolidation of Holdings and Prevention of Fragmentation Act (22 of 1956), S. 4 (c) Proviso — Requirement — Petition by defendant under S. 4 (c) for abating suit — Not to be disposed of without notice and without giving other side reasonable opportunity of being heard. (Paras 2, 4)

Cases Referred: Chronological Paras AIR 1980 Pat 18: 1979 BBCJ (HC) 566 3

Nagendra Rai, R. P. Sharma and A. K. Thakur, for Petitioner; Hari Narain Singh No. 2, for Opposite Party; S. S. Dwivedi, for Intervenor.

ORDER:— The plaintiff has come in revision against the order dated 23-5-1979, passed by the Subordinate Judge, Siwan in Title Suit No. 127 of 1976, by which the learned Judge has held that the suit, filed by the petitioner, has abated under S. 4 (c) of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 (hereinafter referred to as 'the Act').

2. From the order impugned, it is apparent that the petition for abating the suit under S. 4 (c) of the Act, which was filed on 23-5-1979 by the defendant, was disposed of on the same day without the plaintiff's counsel having been heard, which is clear from paragraph 2 of the order. From the impugned order it is gathered that the counsel for the plaintiff did not turn up when the case was called out. Apparently to me it appears that this order is in violation of the proviso to S. 4 (c) of the Act, which enjoins a duty to notice the party and give an opportunity of being heard, which necessarily means a reasonable opportunity. The petition under S. 4 (c) of the Act has been disposed of on the day of filing itself, which does not seem to be proper, because requirement of giving to the other side an opportunity of being heard naturally means providing an opportunity for countering the facts, besides this the order appears to be a mere routine order. I find that the

*Against order of R. K. Sharma, Sub. J., Siwan, D/- 23-5-1979.

GZ/HZ/C944/82/VSS/MVJ—H.

court below has failed to apply its mind to the facts and law arising in the case.

3. Learned counsel for the petitioner has pointed out that the plaintiff-petitioner filed the aforesaid suit, i.e., Title Suit No. 127 of 1976, for specific performance of contract for sale on the basis of a Mahadnama executed by the opposite party with regard to the land in question. The learned counsel has further submitted that apart from the fact that the impugned order is violative of the proviso to Section 4 (c) of the Act, the court below has failed to take into consideration that the contract for sale of immovable properties does not create any interest in the immovable property and there being no prayer for declaration of right and interest in the properties, the proviso to S. 4 (c) of the Act is not attracted in case of specific performance of contract. Reliance has been placed on the case of Sukhial Sah v. Angrahit Jha (1979 BBCJ (HC) 566): (AIR 1980 Pat 18).

4. I have already said that the impugned order is infirm on account of want of proper opportunity to the parties of being heard as required under the proviso to Section 4 (c) of the Act and, therefore, the order is erroneous and without jurisdiction and fit to be set aside.

5. In this view of the matter, I propose to send back the case to the court below for hearing the parties afresh and I, therefore, refrain from expressing my opinion with respect to the point agitated that provision of Section 4 (c) of the Act is not attracted in a case for the specific performance of contract.

6. In the result, the case is sent back to the court below for hearing the parties afresh after giving reasonable opportunity to the parties and for passing necessary order in accordance with law. I may further mention here that an application has been filed on behalf of some of the intervenors under Order 1, Rule 10 read with Order 22, Rule 10 of the Code of Civil Procedure and a prayer has been made to implead them in the category of the opposite parties. Since I am remanding the case to the court below, it is not necessary at this stage to decide the present application for impleading them as parties in this revision. The intervenors may agitate their grievance, if so advised, in the court below and the

court will dispose of the same in accordance with law. There shall be, however, no order as to costs.

Revision allowed.

AIR 1982 PATNA 204

S. ALI AHMAD AND M. P. VARMA, JJ.

Taru Rani Choudhary, Appellant v. Cantonment Board, Dinapore and others, Respondents.

A. F. A. D. Nos. 455 and 456 of 1972, D/- 12-4-1982.*

Civil P. C. (5 of 1908), S. 80 — Suit against Cantonment Board, its Executive Officer and Union of India — Non-service of notice on defendants — Plaintiff whether liable to be rejected as a whole. (Cantonment Act (1924), S. 273).

Section 80 of the Code consists of two parts, one with regard to the institution of the suit against the Government and the other against the public officers. The inhibition contained in the section as to the institution of the suit against the Government is unqualified and in that view of the matter, the plaint has to be rejected as against the Union of India (defendant No. 5). But the question for consideration in the present appeals is whether on that account, the plaintiff should be non-suited altogether. In a suit filed against a public Officer, notice is mandatory only when it is in respect of any act purporting to be done by such public officer in his official capacity. If the act is not one purporting to be done by such public officer in his official capacity, no such notice is necessary. S. 273 of the Cantonment Act provides for a notice before instituting such a suit against the Cantonment Board or its officers and the language of the section is in pari materia with the provisions contained in S. 80 of the Code relating to the suit against public officers, which makes the notice mandatory only if the suit is intended to be filed in respect of any act purporting to be done by such public officer in his official capacity. There is no doubt that the plaintiff has alleged illegal threatened action against her by the officers of the Board in taking steps for demolition of the construction raised by her. As it appears from the suit that entire re-

*From decision of Lala Radha Kumar Sinha, 7th Addl. Sub. J., Patna, D/- 17-8-1972.

lief claimed therein is against the defendants 1 and 2, who are the Cantonment Board and the Executive Officer, the bar against institution of the suit against them is not unqualified either by application to provisions contained in S. 80 of the Code or those contained in S. 273 of the Cantonment Act. Hence, the court below cannot reject the whole plaint on the hypothesis that the provisions of S. 80 (2nd part) of the Code and those of S. 273 of the Cantonment Act has constituted absolute bar. AIR 1971 Pat 141, Rel. on. (Paras 6, 7)

Cases Referred: Chronological Paras
AIR 1971 Pat 141: 1970 Pat LJR 387 6

Ganpati Sanyal and Ganpati Trivedi, for Appellant; Aftab Alam, for Union of India; Radha Raman, for Cantonment Board.

M. P. VARMA, J.:— Since there were two appeals in the court below filed by two different sets of the defendants, these two appeals have been filed in this Court against the one and the same judgment, and this judgment will govern both the appeals, filed in this Court.

2. The suit was for a declaration that the defendants have no right to demolish any portion of the construction over holding No. 80 (old No. 79), Mahal No. 4 in Ward No. 5 within Dinapore Cantonment Board and for permanently restraining the Cantonment Board, Dinapore (defendant No. 1) and the Executive Officer of the said Board (defendant No. 2) from demolishing the construction.

3. Briefly stated the plaintiff instituted the suit against the defendants alleging that she is the absolute owner of the suit house through purchase and as some of the portions of the said house were in dilapidated condition she got them thoroughly repaired. The Dinapore Municipal Board had served notice on the plaintiff for demolition. At the instance of the plaintiff the Cantonment Board recommended for regularisation of the alleged offence in payment of Rs. 50/- as compensation fee. The said resolution of defendant 1 was forwarded to defendant No. 3, the Military Estate Officer for onward transmission but instead defendant No. 5 asked the plaintiff under instruction for defendant No. 5 to submit a registered acknowledgment deed admitting Government's title over the land comprising the suit house. On refusal by plaintiff the above recommendation of the Board was turned down and another notice for demolition was issued which

was challenged as illegal by the plaintiff through the present suit.

4. In the suit the plaintiff impleaded five defendants, who were Cantonment Board (defendant No. 1) Sri M. K. Sen Gupta, Cantonment Executive Officer (defendant No. 2) Sri A. Fanseca, Military Estate Officer (defendant No. 3), Dy. Director of Military Lands Cantonment, Central Command, Lucknow Cantonment (defendant No. 4) and the Union of India, Ministry of Defence, New Delhi (defendant No. 5).

5. The lower appellate court has disposed of the appeals on one question alone, namely, the application of the rigours of S. 80 of the Civil Procedure Code (hereinafter referred to as 'the Code').

6. A plain look at the averments in the plaint clearly indicates that the relief sought are mainly against defendants Nos. 1 and 2, i.e. the Cantonment Board and the Executive Officer of the Board. The learned Court below on application of the provisions of S. 80 of the Code dismissed the suit. It has rejected the whole plaint on that count by a reference to a Bench decision of this Hon'ble Court in the case of State of Bihar v. Jiwan Das Arya (1970 Pat LJR 387): (AIR 1971 Pat 141). I have examined the said decision, which lays down that S. 80 of the Code consists of two parts, one with regard to the institution of the suit against the Government and the other against the public officers. It also lays down that inhibition contained in the section as to the institution of the suit against the Government is unqualified and in that view of the matter, I am in full agreement with the submission advanced by Sri Aftab Alam, appearing for the Union that on the findings of the lower appellate court the plaint has to be rejected as against the Union of India (defendant No. 5). The contention of Sri Radha Raman appearing for the plaintiff is therefore not tenable.

7. But the question which falls in for our consideration is whether on that account, the plaintiff should be non-suited altogether. The same said Bench decision has also laid down that in a suit filed against a public officer, notice is mandatory only when it is in respect of any act purporting to be done by such public officer in his official capacity. If the act is not one purporting to be done by such public officer in his official capacity, no such notice is necessary. S. 273 of the

Cantonments Act provides for a notice before instituting such a suit against the Cantonment Board or its officers and the language of the section is in pari materia with the provisions contained in S. 80 of the Code relating to the suit against public officers, which makes the notice mandatory only if the suit is intended to be filed in respect of any act purporting to be done by such public officer in his official capacity. Applying the said ratio to the facts giving rise to the present appeals, there is no doubt that the plaintiff has alleged illegal threatened action against her by the officers of the Board in taking steps for demolition of the construction raised by her. As it appears from the suit that entire relief claimed therein is against the defendants 1 and 2, who are the Cantonment Board and the Executive Officer, as indicated above, the bar against institution of the suit against them is not unqualified either by application to provisions contained in S. 80 of the Code or those contained in S. 273 of the Cantonment Act. Defendants 4 and 5 in my opinion, for the purpose of the suit are nominal parties and as it appears from the plaint itself, the main relief is sought against defendants 1 and 2 only. Either of the two sections referred to does not constitute absolute bar as discussed above and hence, I hope that the court below cannot reject the whole plaint on the hypothesis that the provisions of S. 80 (2nd part) of the Code and those of S. 273 of the Cantonment Act has constituted absolute bar.

8. The lower appellate court has misconstrued the law laid down in the Bench decision aforesaid and has fallen into error on that wrong assumption, which was never laid down therein. However, it could only reject the plaint as against the Union of India.

9. In the result, the findings of the lower appellate Court rejecting the whole plaint, as aforesaid are set aside, the appeal is allowed in part and the same is remanded for fresh disposal as regards defendants Nos. 1 and 4 are concerned, in accordance with law. In view of the special situation arising in the case on account of the interpretation of law laid down by this Court, I do not propose to pass orders for costs. Appeal allowed in part.

S. ALI AHMAD, J.—I agree to the order passed.

Appeal allowed in part.

AIR 1982 PATNA 206

B. P. JHA AND M. P. VARMA, JJ.

Ram Swaroop Singh and others, Appellants v. Badri Narain Singh and others, Respondents.

A. F. A. D. No. 19 of 1976, D/- 18-2-1982.*

Limitation Act (36 of 1963), Art. 65 — Burden of proof — Plaintiff has only to prove his title and it is only thereafter onus shifts on defendant to establish plea of adverse possession — Under Art. 142 of old Act, plaintiff was required to prove title and also possession. (Paras 7, 12)

Cases Referred: Chronological Paras
AIR 1941 Pat 577 13

Balbhadra Pd. Singh and Rana Pratap Singh No. 2, for Appellants; Prem Lall, Kameshwari Nandan Singh and Manindra Nath Varma, for Respondents.

M. P. VARMA, J.— This is an appeal by the plaintiff-appellants against the judgment of reversal of the trial court by the first appellate court. The only question canvassed in this appeal is as regards the law relating to onus. In other words, whether on the facts and in the circumstances arising out of the pleadings and proof in the case, the onus did lay on the defendants to establish their case of adverse possession, if at all.

2. Brief facts of the case, as put forward, by the plaintiff-appellants are that in the suit laid, by virtue of the registered sale-deed dated 15-11-1962 (vide Ext. 5) executed by Sunaina Devi, who had claimed to have acquired title by virtue of an oral settlement from her father Jagdambi Sahai, the admitted landlord of the suit property, got a valid title. The plaintiffs on being dispossessed filed the suit for declaration of title and also for delivery of possession.

3. On the other hand, the defendants claimed the suit land by virtue of settlement from the same said landlord through a Hukumnama dated 21-3-1950 and payment of rental from that very date to the then landlord and also to the State Government thereafter. They also contended that the story of settlement in favour of Sunaina Devi is totally a myth and that she was never inducted in possession of the suit land.

*From decision of Bageshwari Prasad, Sub. J., Jamui, D/- 3-10-1975.

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4. The plaintiffs' suit being a suit for declaration of title and recovery of possession, the trial Court held that the plaintiffs acquired a valid title (vide Ext. 5 the sale deed) on the basis of the settlement of the said property with Sunaina Devi on nagadi-rental followed by possession. But the lower appellate court has reversed the findings, by the judgment, under appeal before us. The lower appellate court has, in clear terms, disbelieved the story of oral settlement or that of possession in favour of Sunaina Devi. The lower appellate court has also found that neither the plaintiffs nor their vendor had any title to or possession over the disputed land at any point of time, much less, within 12 years of the suit. Consequently, the plaintiffs neither acquired title nor possession over the land in dispute.

5. I have examined the discussions of the lower appellate court on this question and I must say that I do not find any such infirmity in the findings of the lower appellate court on this point, which may warrant an interference at this stage in second appeal. Having thus found, the suit of the plaintiffs, which was decreed by the trial court, was rightly dismissed by the lower appellate court.

6. In the present appeal Sri Balbhadra Pd. Singh learned counsel for appellants has tried to make out a distinction between the provisions contained in Art. 65 of the Limitation Act, 1963 and that of the provisions contained in Art. 142 of the Limitation Act 1908 which are the corresponding Articles of each other. He has relied on the introduction of the expression "based on title" appearing in Art. 65 of the Limitation Act of 1963 which was not found in the earlier corresponding Article of the Limitation Act of 1908. On that basis, learned counsel Sri Balbhadra Pd. Singh has tried to persuade that by virtue of this introduction, the plaintiffs are required only to prove title; and thereby shift the onus on the defendants to establish adverse possession. There seems to be substance in the contention. It may also be noted here that Sri Prem Lall counsel for the defendants does not dispute the position of law as put forward by the appellant.

7. Thus, in view of the contentions raised at the bar on this question, I do hold that under the present Art. 65 of the Limitation Act 1963 the plaintiffs have

only to prove their title and it is only thereafter, the onus shifts on the defendants to establish the plea of adverse possession. As I have already indicated that there is no infirmity in the findings of the lower appellate court that the plaintiffs have neither acquired any title to nor possession over the disputed land at any point of time, much less, within 12 years, the necessary conclusion is that the plaintiff has not proved his title thereto. The counsel for the appellants could not refer to any evidence to show that the plaintiffs' vendor Sunaina Devi was ever inducted in possession of the suit land which she had claimed by virtue of settlement. Needless to mention here that in such a case, it was necessary to give evidence and to plead that the oral settlement was accompanied with delivery of possession and that she was inducted on the land so settled to her. There being no such evidence, she does not get a valid title and consequently she cannot convey a valid title to the plaintiffs. I do not find any reasonable ground to interfere with the findings of the lower appellate court arrived at in the impugned judgment.

8. The learned single Judge has referred this case to a Bench for determination regarding the question flowing from the changes brought about the new Art. 65 of the Limitation Act, 1963. The changes do have the effect as there is some departure from the established position that existed with cases under Art. 142 of the old Act. The changes have already been discussed above in the foregoing paras which are more or less, in my opinion, academic, in view of my findings that the plaintiffs failed to prove their title and consequently the question of shifting the onus does not arise. This answers the question referred to this Bench by learned single Judge, whether Art. 65 of the Limitation Act, 1963 hits the present suit as held by the court below and I hold that since the plaintiffs failed to prove the title over the suit property, the suit in question must fail and there is no onus on the defendants to prove the factum of adverse possession.

9. In the result, the appeal is dismissed, but in view of certain question of law having fallen for our consideration, I do not propose to pass any order for cost.

B. P. JHA, J.:—10. While agreeing respectfully with the view of my learned brother, I want to add certain observation in this case.

11. While admitting the appeal on 7-12-78, the learned single Judge formulated the following substantial questions of law:—

“(1) Whether the court of appeal below is right in holding that Art. 65 of the Limitation Act had no application to the instant case?

(2) Whether the lower appellate court was right in reversing the judgment of the trial court and in dismissing the suit of the plaintiffs when admittedly the defendants did not produce either the Hukumnama or the rent receipts on the basis of which they had claimed the tenancy right? and

(3) Whether the lower appellate court was right in reversing the judgment of the trial court by making surmises and conjectures with regard to the interpolations found in the Jamabandi return by erasing and getting the name of Sunaina Devi, the vendor of the plaintiffs entered and also changing the area from 1.10 acres to 1.4 acres?”

12. So far as question No. 1 is concerned my learned brother has already decided the question rightly. The present case will fall within the purview of Art. 65. If any one brings a suit for possession over immovable property or interest therein on the basis of the title, the plaintiff is required to prove the title only. There is vital difference between Art. 65 and Art. 142 of the Limitation Act of 1908. Under Art. 142 of the Limitation Act, the plaintiff was required to prove the title and was also required to prove possession for 12 years. The plaintiff was also required to file suit within 12 years from the date of possession. In other words, the plaintiff was required to prove title and possession for 12 years from the date of dispossession. The change which has been brought about by Art. 65 is that the plaintiff is required to prove only title and not possession.

13. In the present case, the finding of the lower appellate court is that Sunaina Devi was not in possession of the suit land. It was Sunaina Devi, who executed the registered sale deed (Ext. 5) in favour of the plaintiffs. According to the case in *Mohammad Hanif v. Khairat Ali* (AIR 1941 Pat 577) Mr. Justice Fazl Ali held at p. 590 that in a case of oral settlement the tenant must be actually inducted on the land by the land-holder. In the present case, the finding of the lower appellate court is that Sunaina Devi, the pre-

decessor-in-interest of the plaintiffs was never actually inducted on the land. If it is so, no title was passed by Jagdambi Sahai to Sunaina Devi. It is, therefore, clear that the plaintiffs failed to prove the title of their predecessor-in-interest. So far the question No. 1 is concerned it is answered that Art. 65 of the Limitation Act is applicable to the facts of the present case. The suit will fail because the plaintiffs failed to prove the title.

14. So far as question No. 2 is concerned, the lower appellate court was right in reversing the judgment of the trial court as the plaintiffs failed to prove their title. So far question No. 3 is concerned, the lower appellate court was right in reversing the judgment of the trial court as the plaintiffs failed to prove the title. I also hold that the judgment of the lower appellate court is based on consideration of the material evidence on the record and the lower appellate court has not made any surmises or conjectures.

15. In the result, the appeal is dismissed, but without cost.

Appeal dismissed.

AIR 1982 PATNA 208
S. NARAIN, J.

Arjun Prasad and others, Petitioners v. Biteshwar Singh, Opposite Party.

Civil Revn. No. 1840 of 1981, D/- 29-3-1982.*

Civil P. C. (5 of 1908), Order 22, R. 3 — Succession Act (39 of 1925), Sec. 213 — Death of testator, sole plaintiff — Legatee claiming to be legal representative of deceased testator under will — Probate or letter of administration with a copy of will annexed, not granted — Legatee can be impleaded as L. R. of deceased testator. AIR 1942 Cal 571, Dissented from.

Universal legatee, upon prima facie proof that he is the legal representative is entitled to be substituted as the legal representative, in place of the deceased testator, whose legal representative he claims to be under the will, even if probate or letters of administration with a copy of the will annexed has not been granted in respect of that will. AIR 1942 Cal 571 Dissented from. Case law discussed. (Para 12)

*From order of Shree John Dhan, 2nd Sub. Judge, Patna, D/- 19-8-1981.

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If, without the grant of a probate or letters of administration with a copy of the will annexed, a legatee can institute a suit on the death of the testator a legatee can also be substitute as the legal representative and thereby continue the prosecution of the suit instituted by the testator. In permitting him to prosecute the suit as the legal representative of the deceased testator, the court is doing no more than to hold that he is entitled to prosecute the suit on the death of the testator and in place of the testator, whose legal representative he is. There is no distinction in principle between the right to sue and institute a suit on the death of the testator and the right to continue, on behalf of the testator, a suit which the testator himself or herself had instituted. (Para 12)

The expression "right" in Section 213 does not include within its ambit the right to prosecute a suit and is limited to the right to declare or to enforce which a suit or legal proceeding is brought. Section 213 is not a bar to the institution of the suit by the executor who has not obtained probate. An executor appointed under a will can sue to enforce a right arising under the will at any time after the death of the testator, and it will be sufficient for the purposes of Section 213, if probate is obtained before the passing of the decree in the suit. The bar imposed by S. 213 is as to the establishment of right as executor or legatee and it does not bar the institution of a suit by the executor. On a parity of reasoning Section 213 cannot bar the right to sue of a legatee also. A legatee derives his title and authority from the will of its testator and not from any grant of probate. Therefore, he can equally institute an action in the character of a legatee before the will is proved. Equally with the executor, the legatee is the creature of the will and like the executor, the legatee comes into existence as soon as the will becomes an operative document, that is to say, when the testator dies. (Para 9)

A legatee can institute a suit to enforce his/her legal right as a legatee, though a decree in respect thereof in his or her favour cannot, in view of the provisions of Section 213, be made until probate or letters of administration with a copy of the will annexed has been granted in respect of the will. The

object underlying Sec. 213 does not require that the expression "right" should be construed so widely as to include a right to sue or prosecute a suit or a proceeding. The effect of grant of probate or grant of letters of administration with a copy of the will annexed is to provide a ready means of establishing the genuineness of the will conclusively against all and the object of Section 213 is the same as that of Section 12 of the Probate and Letters of Administration Act, namely to get rid of these multiplicity of proceedings regarding the genuineness of and validity of the will. That object can well be served by reading the expression "right" in Section 213 as meaning a right which is sought to be established in the suit or legal proceeding, the right on the basis of his being the legatee of the will and not extending it to the right to sue or prosecute a legal proceeding. (Para 11)

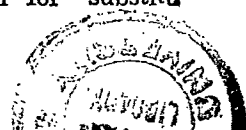
Cases Referred: Chronological Paras

1972 BLJR 18	13
AIR 1962 SC 232	7
AIR 1954 Patna 175	9, 10
AIR 1950 Mad 482	7
AIR 1942 Cal 571	15
AIR 1916 PC 202	9
(1901) ILR 38 Cal 327 (PC)	10

Samir Kumar Ghosh; C. R. Ghosh and L. N. Das, for Petitioners; Lala Sachindra Kumar and Niranjana Prasad, for Opposite Party.

ORDER:— One Peari Devi filed a suit in the court of the Second Subordinate Judge, Patna, which was registered as Title Suit No. 168 of 1972, against the petitioners in this Court for a declaration that a certain deed of gift in favour of petitioner Shivaji Mandir, was void, illegal, etc. During the pendency of the suit, Peari Devi died and Biteshwar Singh, who is the Opposite Party in this Court, filed an application for substitution in place of the deceased sole plaintiff, Peari Devi. The Opposite Party claimed to be the legal representative of the deceased plaintiff, being her legatee under a registered Will dated the 19th September, 1980, executed by the deceased plaintiff in his favour. According to the Opposite Party, the entire properties of Peari Devi devolved on him under the aforesaid Will.

2. The defendant-petitioners filed a rejoinder to that application for substitution, opposing the prayer for substitution.



tion. According to the rejoinder, the aforesaid Will was forged and fabricated and further that the alleged Will being unprobated, the legatee under the Will cannot be regarded as the legal representative of the plaintiff. The defendants asserted that there was no legal representative, of the deceased sole plaintiff and, therefore, the suit was fit to be dismissed for non-prosecution.

3. It appears that during the course of hearing of that application for substitution, a photostat copy of the aforesaid alleged Will was produced and the application for substitution was resisted mainly on the ground that the Will being unprobated, the alleged legatee under the said Will could not be recognised as the legal representative.

4. The learned Subordinate Judge in seisin of the case, overruled the objection and directed substitution of the Opposite Party. The defendants have moved this Court in revision against the aforesaid order of substitution.

5. The sole point raised in this revision petition is that in view of the provisions of Sec. 213 of the Indian Succession Act, 1925, as neither any probate, nor letters of administration with the Will or with a copy of the Will annexed has been granted no right to be impleaded as a legal representative could be established and that, when the right to be impleaded as a legal representative was under challenge, the court below had no jurisdiction to recognise the Opposite Party as the legal representative of the deceased plaintiff.

6. In my opinion, the contention, though attractive, is unsound and must be rejected.

7. Under the terms of the Will propounded by the Opposite Party, the Opposite Party is the sole legatee or, that is to say the universal legatee, or the deceased. Though, at one point, it was faintly argued that the question that the Will was not genuine had not been decided by the court below, this plea was not really taken in the revision application, and was not pressed. We must, therefore, proceed, for the purposes of this case, on the footing that the Opposite Party is the universal legatee under the Will of the deceased plaintiff. It has been held in *Andhra Bank Limited v. R. Srinivasan*, (AIR 1962 SC 232), that the expression legal representative in S. 211 of the C.P.C. includes even those legatees, who obtained only a part of the estate

of the deceased under a Will. If such a legatee can and, must be, regarded in view of the aforesaid decision, as the legal representative, it cannot be doubted that a universal legatee must be regarded, as held by the Madras High Court in the case of *Subba Naidu v. Kannia Naidu*, (AIR 1950 Mad 482), as the legal representative of the deceased testator.

8. The only question for decision is whether Section 213 of the Indian Succession Act, 1925 (hereinafter called the Act), debars a Court from recognising and impleading a legatee as a legal representative until a probate or letters of administration with the Will or a copy of the Will annexed had been obtained in respect of the Will under which he claims.

9. Section 213 of the Act, so far as is relevant, runs thus:—

"213. (1) No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in India has granted probate of the Will under which the right is claimed, or has granted Letters of Administration with the Will or with a copy of an authenticated copy of the Will annexed."

The crucial question for determination is whether the expression 'right' as used in Section 213 (1) of the Act is wide enough to include a right to prosecute a suit or proceeding or is the expression 'right' confined to the 'right' to enforce which a suit or legal proceeding is brought. In my opinion, the expression 'right' in Section 213 of the Act does not include within its ambit the right to prosecute a suit and is limited to the right to declare or to enforce which a suit or legal proceeding is brought. Section 213 of the Act is not a bar to the institution of the suit by the executor who has not obtained probate. As was pointed out in the case of *Ramcharan Singh v. Dharohar Kuer*, (AIR 1954 Patna 175), it is well settled that an executor appointed under a Will can sue to enforce a right arising under the will at any time after the death of the testator, and it will be sufficient for the purposes of Section 213, Succession Act, 1925, if probate is obtained before the passing of the decree in the suit. The bar imposed by Section 213 of the Act is as to the establishment of right as executor or legatee and it does not bar the institution of a suit by the executor. On

a parity of reasoning, Section 213 of the Act cannot bar the right to sue of a legatee also. If, as was pointed out by their Lordships of the Judicial Committee in *Meyyappa Chetty v. Subramanian Chetty* (AIR 1916 PC 502):

"It is quite clear that an executor derives his title and authority from the will of his testator and not from any grant of probate...and the consequence is that he can institute an action in the character of executor before he proves the will."

It is equally clear that a legatee derives his title and authority from the will of his testator and not from any grant of probate. Therefore, he can equally institute an action in the character of a legatee before the will is proved. Equally with the executor, the legatee is the creature of the will and like the executor, the legatee, to use the words of Reuben C. J. in *Ramcharan Singh's* case, supra "comes into existence as soon as the will becomes an operative document, that is to say, when the testator dies." As pointed out by Reuben C. J. in that case (AIR 1954 Patna 175), Sections 119 and 174 of the Act show that the conception that the property vests in the legatee immediately on the death of the testator independently of the grant of probate or letters of administration, as the case may be, is not foreign to the Act.

10. So far as the right to institute a suit is concerned, the legatee stands on the same footing as an executor. This is also clear from the circumstance that one of the decisions relied upon by Reuben C. J., who spoke for the Bench in *Ram Charan Singh* (supra) is the decision of the Privy Council in *Chandra Kishore Roy v. Prasanna Kumari Dasi*, (1901 ILR 38 Cal 327). In that case, two legatees under the will of a testator had brought a suit to recover arrears of maintenance, alleged to be due to them under the will. The suit had been instituted before they had obtained letters of administration with a copy of the will annexed, but, they obtained letters of administration prior to the passing of the decree. On the basis of Section 127 of the Indian Succession Act, 1865 (Act X of 1865), which was in pari materia with Sec. 213 of the present Act, it was contended on behalf of the defendants in that suit that the legatees were not competent to

maintain their suit, inasmuch as they had not obtained letters of administration, as even if the provisions of Sec. 187 were complied with, the compliance was after the suit commenced and was, therefore, too late. The plea of the defendants was negatived by their Lordships of the Judicial Committee, holding that the letters of administration with a certified copy of the will annexed had been obtained prior to the decree, "the provisions of the section were, therefore, strictly complied with." Their Lordships, were also of the opinion that "as the compliance was before the decree, the Court was fully competent to deal with the case."

11. In view of the aforesaid decision of their Lordships of the Judicial Committee, and the plain words of Sec. 213 of the Act, I am unable to accept the argument advanced on behalf of the petitioners that the case of a legatee stands on a footing different from that of an executor, so far as the right to institute a suit is concerned, and that the legatee can also institute a suit to enforce his/her legal right as a legatee, though a decree in respect thereof in his or her favour cannot, in view of the provisions of Section 213 of the Act, be made until probate or letters of administration with a copy of the will annexed has been granted in respect of the will. In my opinion, the object underlying Sec. 213 of the Act does not require that the expression 'right' should be construed so widely as to include a right to sue or prosecute a suit or a proceeding. The effect of grant of probate or grant of letters of administration with a copy of the will annexed is to provide a ready means of establishing the genuineness of the will conclusively against all and the object of Section 213 of the Act is the same as that of Section 12 of the Probate and Letters of Administration Act, namely to get rid of these multiplicity of proceedings regarding the genuineness of and validity of the Will. That object can well be served by reading the expression 'right' in Section 213 as meaning a right which is sought to be established in the suit or legal proceeding the right on the basis of his being the legatee of the Will and not extending it to the right to sue or prosecute a legal proceeding.

12. If, without the grant of a probate or letters of administration with a copy of the

Will annexed, a legatee can institute a suit on the death of the testator, I fail to see any reason why a legatee cannot be substituted as the legal representative and thereby continue the prosecution of the suit instituted by the testator. In permitting him to prosecute the suit as the legal representative of the deceased testator, the court is doing no more than to hold that he is entitled to prosecute the suit on the death of the testator and in place of the testator, whose legal representative he is. There is no distinction in principle between the right to sue and institute a suit on the death of the testator and the right to continue, on behalf of the testator a suit which the testator himself or herself had instituted. It follows, therefore, that universal legatee, upon *Prima facie* proof that he is the legal representative, is entitled to be substituted as the legal representative, in place of the deceased testator, whose legal representative he claims to be under the will even if probate or letters of administration with a copy of the will annexed has not been granted in respect of that will.

13. I am fortified in this conclusion by the decision of a learned single Judge of this Court in the case of *Narendra Kumar Jain v. Kamla Prasad Jain*, (1972 BLJR 18). In that case, the decision of the court below refusing to substitute the executor in place of the testator, the original plaintiff, who had died during the pendency of the suit, on the ground that no probate had been granted in respect of the will and staying the hearing of the suit till the disposal of the probate case was set aside by this Court in revision and the court below was directed to substitute the petitioner in place of the original plaintiff and, thereafter, to proceed with the suit. The argument of the learned counsel for the Opposite Party that in view of the provisions of Sec. 213 of the Act, no right as an executor can be established in a court of law and so the petitioner was not entitled to be substituted in place of the original plaintiff, was negated by Anwar Ahmad, J. in these words:—

"It is not possible for me to accept this contention of learned counsel in view of the fact that there is a vital difference in between establishing a right in Court of law on the basis of a Will which is unprobated and the right of being substituted in place of the original plaintiff

which the petitioner seeks to enforce as an executor of the Will executed by the sole plaintiff."

14. The learned lawyer for the petitioners attempted to distinguish this case on the ground that it related to the substitution of an executor, but that is a distinction without a difference, because Section 213 of the Act applies both to the executor and a legatee alike and the decision proceeds upon a construction of the expression 'right' occurring in S. 213 of the Act, the ratio being that the said expression does not include the right of being substituted in place of the original plaintiff.

15. The learned counsel appearing for the petitioners also attempted to argue that the aforesaid case was wrongly decided for the reasons given by him. I am unable to agree that the decision is incorrect and I hold that the decision is correct, both on principle and authority. There are no doubt certain observations in *Khajeh Habibulla v. Ananga Mohan Roy*, (AIR 1942 Cal 571), which lend some support to some of the contentions advanced on behalf of the petitioners that a legatee or an executor under a will of which no probate or letters of administration has been granted, cannot be substituted in place of the testator, but, for the reasons given by me earlier, I am unable to agree.

16. I must make it clear that what the court below has done is not to grant a decree to the opposite party claiming to be universal legatee, but only to direct his substitution in place of the deceased, under whose will he claims, in respect of which will, it is stated, proceeding for probate, etc., have been instituted.

17. This application is, therefore, without merit and it is, accordingly, dismissed. In the circumstances of the case, I would make no order as to costs.

Petition dismissed.

AIR 1982 PATNA 212

B. P. JHA, J.

Raghunandan Prasad, Petitioner v. Ajodhya Prasad, Opposite Party.

Civil Revn. No. 371 of 1981, D/- 25-3-1982.*

Limitation Act (36 of 1963), Article 119 — Application for direction to arbitrator

*Against order of B. K. Thakur, Sub. J., Barh, D/- 21-2-1981.

FZ/HZ/C507/82/JHS

to file award — Art. 119 does not apply. (Arbitration Act (1940), Section 30).

Article 119 (a) will apply to a case where an objection is filed to the award. If an award is filed, the court will serve a notice in respect of the filing of the award in the court. In that case, a period of thirty days is provided for filing an objection to the award from the date of the service of the notice of the making of the award. Limitation under Art. 119 (b) applies to a case for setting aside an award. Therefore, both the provisions occurring in Arts. 119 (a) and 119 (b) will apply to objectors to file objection within a period of thirty days from the date of the service of the notice of the making or filing of the award. Therefore, the petition filed by (Contd. on Col. 2)

"119. Under the Arbitration Act, 1940 (10 of 1940).

- (a) For the filing in the court of an award; Thirty days
- (b) For setting aside an award or getting an award remitted for reconsideration. Thirty days

the applicant for directing the arbitrators to file the award will not fall within the purview of Art. 119. (Para 3)

Ashok Kumar Keshri, for Petitioner.

ORDER :— This matter arises out of an order dated 21st February, 1981. By this order, the court below refused to grant an injunction to the petitioner.

2. The applicant filed an application on 24th September, 1980, for directing the arbitrators to file an award in the court. The court below is of opinion that such an application will fall under Article 119 of the Limitation Act, 1963 (hereinafter to be referred to as "the Act"). It is relevant to quote Art. 119 of the Act which runs as follows:

- The date of service of the notice of the making of the award;
- The date of service of the notice of the filing of the award.

3. In my opinion, the filing of such an application will not come within the purview of Article 119 of the Act. Article 119 (a) of the Act will apply to a case where an objection is filed to the award. If an award is filed, the court will serve a notice in respect of the filing of the award in the court. In that case, a period of thirty days is provided for filing an objection to the award from the date of the service of the notice of the making of the award. Such objection may be filed by the parties under Section 33 of the Arbitration Act, 1940. Therefore, this clause, namely, Art. 119 (a), does not apply to the petition for a direction to the Arbitrators to file an award. Limitation under Article 119 (b) of the Act applies to a case for setting aside an award. Therefore, both the provisions occurring in Articles 119 (a) and 119 (b) of the Act will apply to objectors to file objection within a period of thirty days from the date of the service of the notice of the making or filing of the award. Therefore, the petition filed by the applicant for directing the arbitrators to file the award will not fall within the purview of Art. 119 of the Act. Therefore, the court below erred in holding that it is barred under Article 119 of the Act. I, therefore, set aside the order passed by the court be-

low, as it is without jurisdiction, and remand the matter for a fresh hearing in accordance with law and to proceed in accordance with law for making the award as a rule of the court.

4. In the result, this application is allowed, the impugned order is set aside and the court below is directed to proceed in accordance with law on the basis of the materials on record.

Application allowed.

AIR 1982 PATNA 213

SPECIAL BENCH

(RANCHI BENCH)

**LALIT MOHAN SHARMA, S. K. CHOU-
DHURI AND SATYESHWAR ROY, JJ.**

Binod Anand Lakra, Petitioner v. Smt. Belulah Lakra and another, Respondents.

Matrimonial Reference No. 1 of 1980 (R), D/- 2-3-1982.

(A) Divorce Act (4 of 1869), Ss. 7, 10 — Petition for dissolution of marriage on ground of adultery — Standard of proof of adultery in a petition for divorce is not as strict as in a criminal case — Proof beyond reasonable doubt is not required. AIR 1975 Cal 243 (Pt. B)

IZ/IZ/D911/82/VCD

Dissented from, (Hindu Marriage Act (1955), S. 13 — Special Marriage Act (1954), S. 27 — Evidence Act (1872), Section 3 — Muslim Law — Divorce on ground of adultery — Standard of proof).

The standard of proof of adultery in a petition for dissolution of marriage on ground of adultery is not as strict as in a criminal case. Proof beyond reasonable doubt is not required in a petition for divorce on ground of adultery. AIR 1975 Cal 243 (Pt. B) Dissented from, AIR 1974 Madh Pra 88; AIR 1981 Madh Pra 112 (SB) and (1966) 1 All ER 524, Rel. on. (Para 8)

(B) Divorce Act (4 of 1869), Sec. 10 — Petition for dissolution of marriage on ground of adultery — Evidence and proof — Question as to what inference of fact should be drawn on basis of evidence will have to be answered from case to case. (Hindu Marriage Act (1955), Section 13 — Special Marriage Act (1954), Section 27 — Evidence Act (1872), S. 3).

It is extremely difficult to prove actual fact of adultery, as seclusion and secrecy are most likely to be observed while indulging in such promiscuous acts. While judging the allegations in this respect, it has to be borne in mind that the circumstances may be infinitely diversified by the situation and character of the parties. The question as to what inference of fact should be drawn on the basis of the evidence will have to be answered from case to case. To compare the evidence in a given case to that of an earlier reported case for this purpose is futile. (Para 7)

In the instant case, the main allegation of husband-petitioner in proof of adultery was that on a certain day when he returned from his village home he found an office co-worker of his wife in the house in his bed room and a box, clothes, tooth brush etc., belonging to him in his wife's bed room. Having regard to the standard of society, of which the petitioner and his wife were members, it was difficult to suggest that the wife respondent was not expected to have male acquaintance. The wife was serving in office where she was acquainted with hundreds of persons. In such a situation, visit by a co-worker was also not unusual. The husband had claimed in his petition that his friends and neighbours confirmed that the co-

respondent (office co-worker of his wife) used to stay in the respondent's house during the night. The petitioner, however, could not examine any witness to prove this. If the co-respondent had, in fact, shifted to the house with his luggage, it is expected that there would be witnesses to prove the fact. Thus, the close examination of the evidence and circumstances in the case indicated that the allegation of husband was not true. (Paras 9, 11)

Cases Referred : Chronological Paras
 AIR 1981 Madh Pra 112 (SB) 8
 AIR 1975 Cal 243 7
 AIR 1974 Madh Pra 88 8
 AIR 1970 Delh; 214 : 1970 Cri LJ 1441 7
 AIR 1970 Mad 104 7
 (1966) 1 All ER 524 : (1966) 2 WLR 634, Blyth v. Blyth 8

A. K. Banerjee, P. K. Banerjee and B. B. Sinha, for Petitioner; P. S. Dayal, Jagmohan Prasad Rajgarhia, A. S. Dayal A. K. Sahai and P. K. Sahai, for Respondents.

LALIT MOHAN SHARMA, J. :— This case arises out of an application by the petitioner filed under S. 17 of the Divorce Act, 1869 (hereinafter referred to as the Act.) In 1978 he filed an application under S. 10 of the Act before the Judicial Commissioner, Ranchi, who by his judgment dated 18-8-1979 granted a decree of divorce. The petitioner has now moved this Court for confirming the decree.

2. The petitioner and his wife, respondent No. 1, are Christians and were married in 1966 at a Church in Ranchi town. According to the petitioner's case he and his wife had been living at different places, all within the jurisdiction of the Ranchi Court and led a normal conjugal life for several years. In 1976 the petitioner discovered close friendly relationship between his wife and Umesh Sinha co-respondent in this case, which he did not like. The wife did not react reasonably when the petitioner protested. Their relation then started cooling down and she started neglecting and refusing to fulfil her matrimonial obligations. The petitioner went to his village home in January, 1978 and on his return on 22-1-1978, he found the co-respondent staying in their house. On the petitioner demanding an explanation, his wife told him that the co-respondent was looking after her on

being invited to do so. The petitioner found certain personal effects of the co-respondent in the bed room, indicating that he was staying in the house even during the nights. This was confirmed by some friends and neighbours. In May, 1978 the co-respondent insulted the petitioner and openly declared his love for the respondent. The petitioner, thus, came to the conclusion that the respondent had committed adultery with the co-respondent and they were leading a life of sin. On these allegations, he filed an application before the Judicial Commissioner, Ranchi, for dissolution of the marriage.

3. Notices were issued to the respondents and due service was reported, but none of them appeared in the case. The case was taken up for *ex parte* hearing and the petitioner produced his marriage certificate exhibit 1 and examined himself for proving the allegations of adultery. The evidence as recorded by the Court was very brief and was to the effect that his wife had developed an illicit relationship with Umesh Sinha and they were living in adultery. He further said that his wife in his presence in 1976 had given a present to Umesh Sinha. Apart from giving of the present, the petitioner did not state any fact on the basis of which the conclusion about the respondents leading an adulterous life could be inferred. The Judicial Commissioner, Ranchi, however, by his judgment dated 18-8-1979, held that he was satisfied that the petitioner's case was true and a decree of divorce should be granted. On 2-5-1980 the petitioner applied under Section 17 of the Act for confirming the said decree.

4. The respondent filed an application in the court below under O. IX Rule 13 of the Civil P. C. for setting aside the *ex parte* decree on the ground that she was not duly served with the notice in the case, and the petitioner had obtained her signature by misleading her, on the basis of which it had been assumed that the notice had been served on her. She also raised objection under Section 26 of the Act. She reiterated her stand by filing an application in the present case also. This case was placed for hearing on 16-2-1980 before a Bench of which I was a member. The petitioner refuted the respondent's allegation about the service of notice, but did not object

to the suggestion of the respondent that an opportunity should be given to her for leading evidence provided the petitioner was also allowed to give further evidence. After considering the circumstances, the Bench, in view of paragraph 3 of Section 17 of the Act, which is quoted below, allowed the parties to lead further evidence.—

"The High Court, if it thinks further enquiry or additional evidence to be necessary, may direct such enquiry to be made or such evidence to be taken". As further directed, a fresh notice was issued to the co-respondent also and all the three parties, thereafter, led further evidence before the court below which has been forwarded to this Court.

5. The respondent in her written statement and evidence has stated that since she could not get a child, the petitioner wanted to have a dissolution of the marriage and in early 1977, suggested accordingly to her, but she did not agree. Later on she became suspicious about her husband's character and found a photograph of the petitioner with a stranger girl in his box. Ultimately, the petitioner promised to close the unholy alliance with the girl and put the same in writing which has been marked as Ext. B in the case. The photograph has been produced in the case and marked as exhibit 2 on the basis of admission by the petitioner. The name of the girl in the photograph is now admitted by the parties as Rose Toppo. The photograph indicates that the two are very intimate and this fact has not been denied on behalf of the petitioner through his counsel before us. The case of the respondent further is that she had no knowledge of the proceeding in the court below before 9-4-1980 when the petitioner told her about it. She has emphatically denied the allegations of illicit relationship with Umesh Sinha. She had admitted this fact that Umesh Sinha is working in the National Coal Development Corporation Limited with her and had visited her place sometimes in presence of the petitioner, but has said that the allegations about her moving with him in rickshaw or presenting to him a sweater or having adultery with him are false. She admits of her presenting him with a Christmas Cake, but claims that having regard to the society in which the parties are liv-

ing this cannot be characterized as unnatural and does not lead to the inference of the respondent leading a dishonourable life. She has stated that the petitioner lived with her till April, 1980 and both of them maintained a healthy normal relationship of husband and wife.

6. The statement of the petitioner as recorded in 1979 was far short of proving the case of adultery. It merely indicated the suspicion and belief of the petitioner. There was no material on the basis of which a court of law could have come to the said conclusion. After this Court's order dated 16-12-1980, the petitioner was recalled for further examination. If his allegations are analysed, they purported to prove that:—

(i) Umesh Sinha was visiting the couple since 1976;

(ii) the respondent had presented a sweater to him;

(iii) the two respondents sometimes moved together in the Ranchi market on a rickshaw in broad day light;

(iv) on 22-1-1978, in the evening the petitioner suddenly returned to Ranchi from his village home and found Umesh Sinha in the house and a box, clothes, tooth brush etc., belonging to him in wife's bed room. Umesh Sinha was laying on the bed and the respondent was also there;

(v) the respondents did not offer any reasonable explanation as to why the co-respondent was living there.

Mr. A. K. Banerjee, learned counsel appearing on behalf of the petitioner, contended that in view of the above circumstances the conclusion is irresistible that the two respondents were living in adultery.

7. Mr. Prem Shankar Dayal, who represents the respondent has argued that even if all the allegations mentioned above be accepted as correct, they do not prove the case of adultery. He emphasised that what was earlier treated by the society with contempt is not now disapproved, and a lady cannot now be condemned as a fallen woman on account of intimacy with the other sex. In the modern age friendship between persons of opposite sexes cannot be looked down upon nor can they be stigmatised for maintaining such a relationship. The respondent is not an illiterate Adivasi girl—she is working in the National Coal

Development Corporation Limited for a number of years—and being by faith a Christian has been enjoying liberty in the matter of her acquaintance with the male sex. She is bound to be acquainted with many men working in the National Coal Development Corporation Limited. Dealing with the incident of 22-1-1978, Mr. Dayal maintained that on its basis an inference of adultery could not be drawn. He relied on *A.S. Puri v. K. L. Ahuja* (AIR 1970 Delhi 214), *Mrs. Dawan Henderson v. D. Henderson*, (AIR 1970 Mad 104) and *A. J. Tulloch v. M. P. Tulloch* (AIR 1975 Cal 243). Referring to the facts, as stated in para. 16 of the judgment in *A. S. Puri's case* (supra) Mr. Dayal emphasised that although Mrs. Ahuja was witnessing a cinema show with Mr. Puri and was resting her head on him and the latter had put his arm around her back several times during the show, the court held that adultery was not proved. He also placed reliance on the judgment in *A. J. Tulloch v. M. P. Tulloch* where the facts detailed in paragraph 29 of the judgment were not found sufficient for proving adultery. I do not find myself in a position to rely on these cases for the purpose they have been cited by Mr. Dayal. The question as to what inference of fact should be drawn on the basis of the evidence will have to be answered from case to case. No rule of evidence of a general application in this regard can be deduced. The circumstances appearing in the cited cases and on which the learned counsel for the respondent has placed great reliance, have to be judged along with other evidence in the case, as was actually done. To compare the evidence in a given case to that of an earlier reported case for this purpose is futile. As was observed in the Calcutta case, it is extremely difficult to prove actual fact of adultery, as seclusion and secrecy are most likely to be observed while indulging in such promiscuous acts. While judging the allegations in this respect, it has to be borne in mind that the circumstances may be infinitely diversified by the situation and character of the parties. Coming to the decision of the Delhi High Court, the first thing to take note of is that it was a criminal case where the petitioner was an accused. The principle which was laid down was

that the fact of adultery has to be inferred from the totality of circumstances that lead to it by fair inferences and as a necessary conclusion, and the circumstances must be such as should lead the guarded discretion of a reasonable and just mind to that conclusion it is not to be reached by rash and intemperate judgment, or upon assurances that are equally capable of two interpretations. Mr. Dayal claimed that the standard of proof of adultery would be the same whether in a criminal or civil case. He relied upon the observations of S. Basu, J. in *A. J. Tulloch's case* (supra) that the allegation of adultery in a divorce case cannot be accepted on mere preponderance of evidence, but has to be established beyond reasonable doubt. With great respect, I do not agree with the proposition that the standard of proof in the civil case is the same as in a criminal case.

8. It is, however, not necessary to discuss the general question relating to the standard of proof in all adultery cases, as the present case being one under the Divorce Act, 1869, Section 7 thereof furnishes a guideline in this respect. The relevant portion of the section reads thus:—

"Subject to the provisions contained in this Act, the High Courts and District Courts shall in all suits and proceedings hereunder, act and give relief on principles and rules which in the opinion of the said courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief".

The "principles and rules", as in England, have been referred to in the section in their widest meaning, and it is, therefore, necessary to find out the views of the English Courts. It is not apparent as to why the provisions, quoted above, have been retained long after the Britishers have withdrawn from this country and the people having their roots in England have left, but so long the legislature does not repeal the section, it has to be given effect to. Mr. Banerjee has placed the judgment of G. P. Singh, J., in *Prem Masih v. Mrs. Kumudan Bai* (AIR 1974 Madh Pra 88) referred to in *Pulikkottal Cheru v. Mary Zechariah*

(AIR 1981 Madh Pra 112) (SB) where the latest view in England as expressed in the case of *Blyth v. Blyth*, (1966) 1 All ER 524, has been discussed. It has been held that the standard of proof in a case of matrimonial offence in a petition for divorce is not as strict as in a criminal case where the proof beyond reasonable doubt is required. I am in respectful agreement with the view expressed by the Madhya Pradesh High Court and accordingly reject the argument of Mr. Dayal.

9. The question, however, remains as to whether in the present case the petitioner has furnished sufficient proof to establish his case of adultery against his wife. Having regard to the standard of society, of which the petitioner and his wife are members, it is difficult to suggest that the respondent was not expected to have male acquaintance. Since 1963 the respondent has been working in the Central Coalfields Limited (earlier N.C.D.C.), where she is acquainted with hundreds of persons. In such a situation, visit by a co-worker is also not unusual. The petitioner himself did not consider it so when the co-respondent started visiting the couple since 1976, until according to this case, a sweater was presented to him by his wife. In paragraph 9 of his application under Section 10 of the Act, the petitioner mentioned as below:—

"That the respondent and the petitioner were living happily as husband and wife and occasionally she used to invite and entertain her office colleagues including co-respondent and things did not appear to be wrong to this petitioner."

The story of gift does not appear to be correct. In his original application the petitioner did not mention the sweater, instead he stated that a "very costly present" had been given to the co-respondent in the night of Christmas 1976, which suggested that some article of large value was the subject matter of the gift. The main allegation in proof of adultery relates to the incident of 22-1-1978. He went to his village home after taking leave for a fortnight from 15-1-1978, but suddenly returned back to Ranchi on the 22nd January, 1978, in the middle of the leave, and found that Umesh Sinha was in his bed. His box, clothes and tooth brush etc., were also there. The respondent was

also in the room. Instead of being repentant the respondent took an aggressive attitude and the petitioner then left the house. Later, Umesh Sinha threatened him and asserted his friendship with the respondent. If this story be found to be correct, it may be permissible to infer that the two respondents were guilty of adultery, but if the evidence and the circumstances in the case are closely examined, they indicate that the petitioner's allegations are not true.

10. The house in which the couple were living belongs to the respondent's father. To give a ring of truth to his story, the petitioner stated in his evidence that he changed his residence after the incident and first stayed with his relative Mr. Kujur and thereafter in the Heavy Engineering Corporation's quarter where he is working. The respondent has asserted that the petitioner was living with her till 9-4-1980 when he after informing her about the present proceeding changed his residence. The change of residence is relevant for ascertaining the truth of the incident as also on the question whether the petitioner must be deemed to have condoned the respondent's misbehaviour (if found to be correct). The petitioner in the first instance did not explain as to why he cut his leave short to return back to Ranchi suddenly. In support of his case that he left the respondent's house, he should have examined Mr. Kujur which he has not done; instead the respondent examined Pratap Kujur, D. W. 4, who is an Advocate's clerk and who stated that the petitioner never stayed with him. Mr. Banerjee described the witness as the junior member of the family of Mr. Kujur, the petitioner's relation, and commented that he should not be believed in absence of the senior member of the family. If the petitioner's version is correct, he should have taken steps for examination of the senior Mr. Kujur, his relation. According to his further case the petitioner later shifted to the H. E. C. quarter, but no evidence has been produced of the same. The petitioner is an employee of the H. E. C. and should have produced some document showing allotment of a quarter to him. Not even a witness has been examined to prove his case. On the other hand,

the petitioner has described his residence as railway colony on the several petitions filed in the case on several dates in 1978 and 1980 which contradicts his statement in paragraph 32 of his deposition that after institution of this case, he was not living with his wife in the railway colony. From the evidence on record, it is fully established that the respondent's house is on the outskirts of the railway colony. This corroborates the evidence of the respondent. The evidence of the respondent that the petitioner was staying with her appears to be correct and has also been supported by D. W. 3 Daniel Khalkho and this could be true only if the petitioner's story regarding what happened on 22-1-1978 is disbelieved.

11. The petitioner has claimed in paragraph 11, of his application that his friends and neighbour confirmed that the co-respondent used to stay in the respondent's house during the night. He, however, could not examine any witness to prove this, excepting P. W. 2 Dipak Sanga, who stated that in Jan., 1978 he had seen both the respondents going inside the house. He, however, did not say that he found Umesh Sinha with any box. If Umesh had, in fact, shifted to the house with his luggage, it is expected that there would be witnesses to prove the fact. On the state of evidence, as it is, I am of the view that the petitioner has not been able to prove his case.

12. Although the petitioner did not mention in his application the fact that he and the respondent had duly adopted a daughter in 1969, as evidenced by Exhibit A, which has been proved by the respondent and not denied before us on behalf of the petitioner, it was stated at the Bar that the adopted daughter is in her early teens and is living with the respondent. If the respondent had been living a dishonourable life, it was expected that the petitioner would not have permitted the girl to live with her. Further, she would have been a relevant witness for the petitioner, if the allegations were true.

13. The respondent also produced a photograph of the petitioner with Rose Toppo, referred to above, and it has been contended on her behalf that although it is the petitioner, who has been leading a

questionable life, the respondent is still anxious to resume a normal married life with him both for the sake of the adopted girl and in their own interest. The learned counsel for the parties advanced arguments on the question as to whether the photograph was of 1980 or of an earlier date as stated by the respondent. Mr. Banerjee placed several circumstances to indicate that the respondent's story about the date of the photograph is incorrect. I do not consider it necessary to deal with this point as it does not have much relevance to the main controversy. The admitted position that before the divorce decree could become final the petitioner has been cultivating friendship with another girl and has so far completely ignored her adopted daughter and not contributed towards her up-keep, does not speak in his favour. Apart from these facts, the petitioner must fail on the basis of the findings recorded above.

14. In the result the decree nisi pronounced by the Judicial Commissioner, Ranchi, is set aside, but the parties are directed to bear their own costs throughout. This reference case is accordingly disposed of.

S. K. CHOUDHURI, J.:— I agree.

SATYESHWAR ROY, J.:— I agree.

Order accordingly.

AIR 1982 PATNA 219

S. SHAMSUL HASAN, J.

Bishwanath Prasad Verma, Appellant
v. Bhagwat Pandey and another, Respondents.

A. F. A. D. No. 539 of 1978, D/- 21-4-1982.*

(A) Bihar Town Planning and Improvement Trust Act (35 of 1951), Section 151 — Civil P. C. (1908), S. 100 — Finding of fact by Appellate Court that suit for specific performance was barred because of non-compliance of Sec. 151 of the Act — Averment in the plaint that notice under Section 151 of the Bihar Act was duly served on defendant — No specific denial by defendant — Plaintiff stating in his evidence that said notice was given — Purported notice

*From decision of A. P. Sinha, Dist. J. Gaya, D/- 4-7-1978.

was also put on record — Finding of Appellate Court held wrong. (Para 7)

(B) Bihar Town Planning and Improvement Trust Act (35 of 1951), Section 151 — Suit for specific performance of contract against Improvement Trust — Issue that no notice was served on Trust — Can be raised only by Trust.

Section 151 is a right for the benefit of trust only. Like Section 80 of the Civil Procedure Code, Section 151 of the Act provides an opportunity to the authority concerned to settle the claim without any litigation and to reconsider any step that it has taken. It does not afford any protection to anybody else except the authority concerned. It is also well settled that like S. 80 of the Code, though Section 151 of the Act is mandatory, it is always open to the authority concerned to waive its right to such a notice. AIR 1950 Pat 366, AIR 1962 Pat 303, AIR 1971 Pat 141 and 1978 BLJR 464, Foll. (Para 8)

In a suit for specific performance of contract for sale of a land which was offered to the plaintiff by the improvement trust-defendant No. 1 in the suit the issue that suit is hit by Sec. 151 of the Act as no notice under that section was issued to the Trust, could not be raised by defendant 2 who was the owner of the land adjacent to the suit land and claimed title to suit land. The suit in such circumstances, was not hit by S. 151. (Para 8)

It was more so, when the Trust merely filed a written statement in the suit and did not raise that issue at all during the trial nor did it offer any challenge in that regard. (Para 8)

(C) Specific Relief Act (47 of 1963), Section 20 — Bihar Town Planning and Improvement Trust Act (35 of 1951), Section 85 — Scope of Section 20 — Suit for specific performance of contract for sale of land against Trust — No advertisement made under S. 85 of Bihar Act — Contract is not unenforceable — Decree for specific performance can be passed.

The grant of the decree under S. 20 rests in the discretion of the Court and cannot be claimed as a matter of right. The discretion of the Court, however, must not be exercised arbitrarily or capriciously but on sound and reasonable ground based on general rules and

principles according to the circumstances of a particular case.

While exercising its discretion the Court must keep in mind the conduct of the plaintiff and the circumstances outside the contract itself, since mere existence of a valid contract is not a circumstance that is conclusive in favour of the plaintiff, though discretionary, therefore, jurisdiction of the Court must be exercised on sound and reasonable ground guided by judicial principles, keeping in mind the circumstances in each case. The conduct of the plaintiff is also an important element for consideration. (Para 9)

In a suit for specific performance of a contract for sale of land against the Improvement Trust under the Bihar Act, it could not be said that there was no valid contract which could be performed because Section 85 of the Act was not followed as no advertisement was made and therefore decree for specific performance of contract could not be passed when the Trust made an offer for sale of land which was accepted by plaintiff, money was deposited in consequence and possession was given. Mere absence of advertisement without any denial of contract by Trust, would not defeat the suit. Absence of advertisement might be a procedural omission. It was more so, when the Trust did not raise the issue that no advertisement was made and there was no evidence to show that no advertisement was made, contract was enforceable and decree for specific performance of contract could be passed as the procedure under S. 85 should be said to have been followed as it would be deemed that the advertisement was also made, (Para 10)

(D) Specific Relief Act (47 of 1963), S. 20 — Suit for specific performance of contract for sale of land against Trust — Owner of land (defendant 2) adjacent to suit land claiming title to suit land — Burden of proving that land belonged to Trust was not on plaintiff — Defendant had to prove that he had title over land and it was in his possession. (Evidence Act (1872), Ss. 110, 101).

(Para 11)

(E) Specific Relief Act (47 of 1963), Sec. 20 — Suit for specific performance of contract for sale of land against Improvement Trust — Adjacent land

owner claiming title to suit land made party to suit as defendant 2 — Agreement between him and plaintiff that suit land would be divided between them — Both parties resiling from agreement — Contract not unenforceable due to that agreement — Suit not barred by estoppel and acquiescence. (Evidence Act (1872), S. 115; Civil P. C. (1908) S. 9).

In a suit for specific performance of contract for sale of land which was offered to plaintiff by Improvement Trust under Bihar Town Planning and Improvement Trust Act, the owner of the land adjacent to the suit land who claimed title over suit land was made defendant 2. It was alleged by defendant 2 that the contract was not enforceable due to an agreement between him and the plaintiff stating that the disputed plot should be divided between them and the agreement was produced before Trust :

Held, that both parties resiled from the agreement, therefore, it could not be of any help to defendant 2 and the contract was enforceable. More so, when it was not shown that money was deposited by defendant 2 with the Trust, as a result of that agreement. The agreement was not an agreement within meaning of Civil P. C. which was enforceable in a suit. Therefore it did not affect the contract arrived at between the plaintiff and the Trust. Accordingly it could not be held that the contract was unenforceable due to subsequent agreement or that the suit was barred by estoppel and acquiescence. (Para 12)

(F) Specific Relief Act (47 of 1963), Section 20 — Suit for specific performance of contract for sale of land against Improvement Trust — Adjacent land owner claiming title to suit land made party to suit — Question whether plaintiff acquired any title to suit land or not — Is irrelevant — Title would come after deed is registered and suit was really to acquire that title.

(Para 14)

(G) Specific Relief Act (47 of 1963), Section 20 — Suit for specific performance of contract for sale of land against Improvement Trust — Consideration money paid and plaintiff coming into possession — Title claimed over suit land by adjacent land owner

not proved — Instances cited in cls. (a), (b) and (c) of Section 20(2) have no application — Plaintiff is entitled to benefit under Section 20 (3) — Suit decreed. (Para 15)

Cases Referred : Chronological Paras

1978 BLJR 464:1978 3LJ 551	8
AIR 1971 Pat 141	8
AIR 1962 Pat 303	8
AIR 1950 Pat 366	8

Bindeshwari Prasad Sinha and Shashi Shekhar Verma, for Appellant; Prem Lal, S. B. N Singh, S. K. Singh and S. P. Singh, for Respondents

JUDGMENT:— Plaintiff is the appellant here whose suit was decreed but the appeal by defendant 2, who is respondent 1 here, was allowed.

2. The property involved in the suit is a small piece of land adjacent sought of plot 69, shown in the map attached to the plaint, and marked with the letters DEF. The relief sought is an order directing defendant 1 (respondent 2 here) Improvement Trust, Gaya to execute and register a sale deed for the land marked with the letters DEF in the aforesaid map. There was also a prayer for recovery of possession in case it was found that the plaintiff had been dispossessed by defendant 2 (respondent 1).

3. The case of the plaintiff is that he owned and possessed a house standing over survey plot No. 275 under Khata No. 12 measuring .04 acres bearing Municipal holding No. 70 (i) Ward No. IX, Mohalla Rampur, P. S. Civil Lines, town Gaya. This house and land were acquired by defendant 1 (respondent 2) for its purpose rendering the plaintiff — appellant a displaced person and under the provisions of the Bihar Town Planning and Improvement Trusts Act (Bihar Act XXXV of 1951) hereinafter referred to as 'the Act') he was conferred with special status in regard to the settlement of the land by the Gaya Improvement Trust. Consequently the appellant was allotted a piece of land measuring 116 ft. East to West and 47 ft. North to South out of plot 69, leaving the remaining portion of the land in the said plot with defendant 1, as indicated in the map attached to the plaint and marked with the letters A B C D and D E F, respectively. Since the land in dispute was adjacent to the land of the appellant, de-

fendant 1 offered the same to the appellant for Rs. 822.14 Paise, which offer was accepted and the money was duly deposited and accepted by the defendant Trust. The area of the land was 101 sq. yards. The offer is apparent from the communication of the Gaya Improvement Trust dated 2-6-1970, which is Ext. 1. The deposit of Rs. 822.14 paise is proved by Ext. 3, which is the money receipt form, and the delivery of possession is proved by Ext. 4, which is a copy of the note sheet page 23 of file No. XX-30-69. From this receipt it is clear that the delivery of possession of the disputed 101 sq. yards of land was handed over to the appellant by the authority and it was accepted by him (appellant) on 18-7-1970. The suit was filed, therefore, to seek specific performance of the contract by the Gaya Improvement Trust (respondent 2) on the basis of the above documents, after giving due notice to the latter, as stated in paragraph 27 of the plaint and as required by Sec. 151 of the Act. The purported notice is Ext. 1/b dated 21-10-1970. Respondent 2 admittedly is the owner and occupier of plot No. 65, which is to the South of the disputed land. The further case of the plaintiff is that being adjacent to the disputed land respondent 2 started unjustifiably raising a claim to that portion.

4. The case of defendant 2 (respondent 1 here) is, apart from the usual objections, like non-maintainability of the suit, lack of cause of action, absence of the requisite statutory notice to the Gaya Improvement Trust (in short, 'Trust'), that prior to the acquisition of the lands in Mohalla Rampur by the Trust there were big chunks of parti lands, a portion of which was purchased by him (defendant 2) from one Smt. Parul Rani under a registered sale deed in the year 1954, over which a boundary was constructed, which included the entire land in the suit. Thereafter the defendant constructed his residential house on that land and planted trees, etc. The suit land, therefore, has been in possession of defendant 2 for more than 12 years before the institution of the suit. Hence, the defendant acquired indefeasible absolute title over the land by adverse possession. According to this defendant, when the map for Anugrah-puri was prepared, his land had been shown in one block without assigning

any number to it as it was apart from the land in possession of defendant 1 (the Trust) and the two plots, i. e., plots Nos. 65 and 69, of defendant 1, flanked the land of this defendant 2, which was without number. According to defendant 2, therefore, the plaintiff — appellant was allotted only 116 ft. x 47 ft. of land by defendant 1 and he could not acquire any right, title or interest over the land in suit. A dispute arose between the parties which led to a proceeding under Section 144, Cr. P. C. (in short 'the Code'). A settlement was arrived at between the parties at the instance of Shri Khwaja Midhat Noor, an advocate of Gaya, which compromise was filed before the authority concerned. Although it is not disputed that a compromise was arrived at, the plaintiff in his plaint has stated that he did not do so with a clear mind and was under psychological strain due to the proceeding under Section 144 of the Code and it was under that state of mind that he signed the compromise, which, according to him, does not bind him at all. The defendant further denies the story of compromise by any undue pressure or influence. By letter dated 6-7-70, defendant 2 had written to the Trust laying his claim to the disputed land and stated that he had learnt that the plaintiff had deposited money for the same. His prayer was that possession should not be given to the plaintiff and his money should be returned. In spite of this communication the Trust went ahead with the proposal to sell the land to the plaintiff, which is apparent from Exts. 3 and 4, referred to above. The letter of defendant 2 is Ext. C.

5. A written statement was also filed by the Trust (defendant 1 — respondent 2), which, apart from the usual defence, also took the plea that the suit is barred under the provisions of the Act and further stated that plaintiff — appellant is put to strict proof of the allegation that he had issued any notice to the Trust. The Trust challenged the legality, validity and sufficiency of the notice. It further stated that the authorities were not aware of the title to the disputed land of defendant 2. It, however, admitted that possession was handed over to the plaintiff. The plaintiff — appellant informed the Trust of the dispute and wanted the land to be

demarcated and complained about the obstruction put by defendant 2. In these circumstances, it is stated, on 21-7-1970 a Committee was constituted of some persons for inspecting the land in presence of the parties, but, before any report could be submitted, a joint petition was filed on 10-8-1970 by both the parties stating that they had amicably settled the dispute between themselves and desired that the disputed plot should be divided between the parties. This compromise was arrived at at the instance of Mr. Khwaja Midhat Noor, mentioned above, as a result of which also the proceeding under S. 144 of the Code was dropped. On the basis of the aforementioned joint petition the authority passed a resolution dated 23-9-1970 by which the authority proceeded to settle the land in accordance with the aforesaid compromise. A letter dated 21-10-1970 was, therefore, handed over to the Chairman by the plaintiff which letter is said to be a notice under S. 151 of the Act. It may be stated here that apart from filing a written statement the Trust did not contest the suit, which was contested only by defendant 2.

6. The trial court found that there was no violation of any of the provisions of the Act. Dealing with S. 85 of the Act it held that it had been fully complied with and dealing with S. 151 of the Act it held that the notice was duly given, which was served on defendant 1 (respondent 2) and is Ext. 1/b. It further held that defendant 2 was not in possession of the land in suit at the time when defendant 1 made offer of sale to the plaintiff and when it was accepted and possession was obtained by the latter. It also held that the compromise arrived at between the plaintiff and defendant 2 (respondent 1) by the intervention of Mr. Khwaja Midhat Noor has got no value since both the parties resiled from it and the compromise was not proved formally at the trial, and that compromise, therefore, could not affect the right of the plaintiff-appellant to obtain a decree for specific performance. The story of adverse possession by the defendant was also not accepted.

7. The appellate court allowed the appeal on the basis of the findings that have been seriously assailed by the appellant here. I will now, therefore, consider the findings of the appellate

Court. The appellate Court first took up the question whether a notice under Section 151 of the Act has been filed or not. After discussion, that is, elaborate but devoid of substance, it held that the suit is barred because of non-compliance of Section 151 of the Act. This finding is wrong on two counts. Firstly, the appellate court has not considered Ext. 1/b. at all. Although the appellate court notices the averment made in paragraph 27 of the plaint to the effect that the notice was duly served on defendant 1, it completely ignores the fact that there was no specific denial of this averment by defendant 1. In the written statement filed by defendant 1 it is only stated that the plaintiff is put to strict proof of the fact that the notice has been given. The appellate court does not notice Ext. 1/b at all. It is also wrong in saying that the learned Munsif did not give any finding on this point. The only error committed by the Munsif was that it mentioned two exhibits, which were not relevant, but it did mention Ext. 1/b, which fact has been ignored by the appellate Court. It is also incorrect to say that the plaintiff has failed to state in his evidence that any notice was given. He has stated in his evidence as P. W. 22 as follows:—

“...मैंने notice दिया और तब मुकदमा किया...”

8. Another aspect of the matter arises from a consideration of several decisions of this Court. In *Province of Bihar v. Kamakshya Narain Singh* (AIR 1950 Pat 366), *State of Bihar v. Kamaksha Prasad Sharma* (AIR 1962 Pat 303), *State of Bihar v. Jiwan Das* (AIR 1971 Pat 141) and *Bihar State Electricity Board v. K. N. H. Medical College and Hospital, Bhagalpur* (1978 BLJR 464). These cases arise out of Section 80 of the Civil P. C. Like Section 80 of the Code, S. 151 of the Act is a right which is for the benefit of the Trust only. Section 151 of the Act provides as follows:—

“No suit shall be instituted against the Trust, or any Trustee, or any officer or servant of the Trust, or any person acting under the direction of the Trust or of the Chairman or of any officer or servant of the Trust, in respect of any act purporting to be done under this Act or any rule made thereunder until the expiration of one month next after written notice has been delivered or left

at the Trust's Office or the place of abode of such officer, servant or person, stating the cause of action, the name and place of abode of the intending plaintiff, and the relief which he claims, and the plaint must contain a statement that such notice has been so delivered or left.”

It would appear from Section 151, quoted above, that like Section 80 of the Code, it provides an opportunity to the authority concerned to settle the claim without any litigation and to reconsider any step that it has taken. It does not afford any protection to anybody else except the authority concerned. It is also well settled that like Section 80 of the Code, though Section 151 of the Act is mandatory, it is always open to the authority concerned to waive its right to such a notice. The law on this question is not only settled by the aforesaid decisions of our High Court but also by the Supreme Court. The submission of learned counsel for the respondent, therefore, that this issue could be raised by defendant 2 also is not tenable. Defendant 1, the authority, merely filed a written statement and did not raise this issue at all during the trial nor did it offer any challenge in this regard. The suit, therefore, in my view, is not hit by Section 151 of the Act.

9. The point more seriously canvassed, however, was whether the appellant is entitled to a discretionary relief under the Specific Relief Act. Learned counsel for the respondent relied strongly on Section 20 of the said Act, which is similar to Section 22 of the old Act, to submit that in view of the agreement arrived at between the parties at the instance of Mr. Khwaja Midhat Noor the plaintiff-appellant is not entitled to relief sought for. Section 20 of the new Act (22 of the old Act) lays down that the Court is not bound to decree a suit for specific performance of contract even if it would be lawful under the Specific Relief Act to grant such a relief. The grant of the decree rests in the discretion of the Court and cannot be claimed as a matter of right. The discretion of the Court, however, must not be exercised arbitrarily or capriciously but on sound and reasonable ground based on general rules and principles according to the circumstances of a particular case. While exercising its discretion the Court must keep in mind

the conduct of the plaintiff and the circumstances outside the contract itself, since mere existence of a valid contract is not a circumstance that is conclusive in favour of the plaintiff, though, discretionary, therefore, jurisdiction of the Court must be exercised on sound and reasonable ground guided by judicial principles, keeping in mind the circumstances in each case. The conduct of the plaintiff is also an important element for consideration.

10. Applying the above principles it has to be examined whether the plaintiff is entitled to a decree for specific performance of the contract. Learned appellate court found that S. 85 of the Act has not been followed because no advertisement was made and has found that since S. 85 was not followed there was no valid contract which could be performed. Therefore, a decree for specific performance of contract cannot be passed. It would be worthwhile to quote sub-sec. (2) of S. 85 of the Act, which is relevant for the present purpose.

"(2) Whenever the Trust decides to lease or sell any land acquired by it under this Act from any person, it-

(a) shall give notice by advertisement in the local newspapers, and

(b) shall offer to the said person, or his heirs, executors or administrators, a prior right to take on lease or to purchase such land, at a rate to be fixed by the Trust, if the Trust considers that such an offer can be made without detriment to the carrying out of the purposes of this Act."

Firstly, it cannot be doubted that the authority made an offer which was accepted by the plaintiff, money was deposited in consequence and possession given, may be in the written statement the authority stated that possession was mere formal, but, mere statement, without proof in the face of Ext. 4, by which possession had been given, cannot lead to the assumption that the plaintiff-appellant did not come into possession of the land. Mere absence of advertisement without any denial of the contract by the authority would not defeat the suit at the instance of an outsider like defendant 2. It is true that under Section 85 an advertisement was necessary (sic) followed by

an offer of the land to a displaced person. When offer was made it was undoubtedly a valid offer because the appellant is a displaced person. The appellate court was not justified in law in holding that since the contract was not arrived at in accordance with S. 85, it is not enforceable. As I have said, the authority did not take the plea that the contract was not enforceable on that ground. Absence of advertisement may be a procedural omission but that would not defeat the contract. The Trust did not raise the issue that no advertisement was made and if the records were destroyed and if there is no evidence to show that no advertisement was made, naturally its evil consequence cannot be visited upon the plaintiff. In the absence of the records it will be presumed that the official act has been properly done. I have, therefore, no hesitation in holding that the contract between the plaintiff and respondent 2 has not been rendered unenforceable. In my view, the procedure under Section 85 has been rightly followed since it will be deemed that the advertisement was also made.

11. The appellate court held that the contract is not enforceable on the ground that it cannot be said that the disputed plot is part and parcel of plot No. 69 and it belonged to the Trust. In coming to this finding, in my view, the court has completely erred in law. The appellate court seems to have forgotten that the Trust claimed title and possession over the disputed land and offered it for sale to the plaintiff-appellant. There was no onus, therefore, on the plaintiff to show that the land belonged to the Trust. The onus was really on defendant 2 (respondent 1) to show that he had title over the land and it was in his possession and was part of plot No. 65. This onus the defendant concerned has failed to discharge. The appellate court has merely based its finding on conjecture that if the disputed plot could be part of plot No. 69, why not it could be part of plot No. 65. There is no basis for the Court to upset the finding of the trial court as wrong and erroneous.

12. The lower appellate court then went into the question of agreement which matter also was canvassed with

great vehemence by the learned counsel for the respondent. In my view, much cannot be made out of this agreement. Firstly, admittedly both the parties resiled from that agreement. Secondly, the trial court is entirely correct when it takes the view that the agreement cannot be of any use to the defendant. The agreement, though admitted by the plaintiff, has not been brought on the record of this case. It has also not been shown, except that a resolution was passed by the Trust, that money was deposited by defendant 2 (respondent 1) as a result of that agreement. The resolution also, it appears, was not passed at a proper meeting of the Trust. Be that as it may, in the absence of the actual resolution nothing really turns on that agreement. Even if the story of the plaintiff that the agreement was signed by him under certain compulsion is not acceptable, yet the fact that both the parties resiled from that agreement cannot now give it a strength that is sought to be bestowed upon it by the respondent. The agreement was not an agreement within the meaning of the Civil P. C. which is enforceable in a suit, and it, in any way, did not affect the contract arrived at between the plaintiff and defendant 1 (respondent 2). The learned appellate court is entirely wrong in destroying the original contract and rendering it unenforceable on the basis of the subsequent agreement and thereby also holding that the suit is barred by estoppel and acquiescence. It cannot be forgotten that the agreement was arrived at because defendant 2 interloped into the contract between the plaintiff and defendant 1, raised a dispute and tried to create a right for himself which he had not substantiated at the trial. If defendant 2 (respondent 1) by his conduct had raised a dispute, which necessitated his being made a party, he could have agitated it in a proper forum at his own instance. Having forced the plaintiff into a situation by dispossessing him after the contract had been entered into between the plaintiff and defendant 1, the plaintiff had no alternative but to seek his relief against him also for specific performance.

13. It may be stated here that the trial Court had negatived the claim of

the defendant that the defendant was in possession of the land since over 12 years and had built a wall round the compound. The defendant has singularly failed to prove his case and the appellate Court has also failed to meet the reasonings of the trial court in this regard.

14. The appellate court has also committed an error of law in going into the question whether the plaintiff acquired any title, to the suit land or not. This question is wholly irrelevant. Undoubtedly, title would come after the deed is registered and the suit was really to acquire that title. Undoubtedly, the plaintiff obtained possession and title would have followed after registration for which relief has been sought by the plaintiff. The whole decision on this question is an exercise in futility by that appellate court.

15. I have already discussed the scope of Section 20 of the new Act and Section 22 of the old Act. Instances cited in cls. (a), (b) and (c) of sub-sec. (2) of Section 20, Specific Relief Act, under which circumstances the Court could refuse a decree for specific performance, have no application to the facts of this case. No unfair advantage accrued to the plaintiff over the defendant nor any unforeseen hardship is visited upon the defendant nor its enforcement can be called inequitable. In fact, the plaintiff is entitled to the benefit of sub-sec. (3) of Section 20 of the Specific Relief Act. In this case the plaintiff has already paid consideration money and has come into possession but was deprived of it forcibly by defendant 2 (respondent 1), the appellant, therefore, suffering loss in consequence.

16. In the result, the appeal is allowed with costs, the judgment and the decree of the lower appellate court are set aside and those of the trial court are restored.

Appeal allowed.

AIR 1982 PATNA 226

B. P. JHA, J.

Mt. Hashihan, Appellant v. Jalaluddin and others, Respondents.

A. F. A. D. No. 374 of 1978, D/- 12-2-1982.*

Muslim Law — Suit for partition — Plea of renunciation against plaintiff — Tenability.

Renunciation or relinquishment need not be expressly stated in the document. It can be inferred from the conduct of the parties. If a suit for partition in a Mohammedan family is brought after 12 years and the plaintiff fails to explain his or her inaction, renunciation can be inferred. If renunciation is pleaded in the document and renunciation is accepted by the parties in that case, he or she must be estopped from claiming partition, as it is a part of family arrangement. Strictly speaking such renunciation will not forbid her from claiming partition, but in order to maintain harmony and peace in the family renunciation should be treated as estoppel to the party concerned.

(Para 9)

Cases Referred : Chronological Paras

AIR 1956 SC 593	6
AIR 1930 PC 57 (1)	6
(1871) 17 Suth WR 108 (PC)	4

Bishwanath Prasad, C. B. Sahay and P. K. Verma, for Appellant; S. S. Asghar Husain, Md. Wasi Akhtar and Serajul Hoda, for Respondents.

JUDGMENT :— The plaintiff Mt. Hashihan, daughter of Shaikh Nawab, filed a suit for partition claiming one-third share in the suit properties. Both the Courts negatived the claim of the plaintiff and dismissed the suit.

2. The short point for consideration is : Whether the plaintiff is entitled to one-third share in the suit properties? In my opinion, the answer must be given in the negative.

3. Shaikh Nawab died leaving behind Mt. Hashihan, plaintiff, and Jainuddin, defendant No. 1. Before his death, Shaikh Nawab executed a registered

deed of gift (Ext. 1) in favour of the plaintiff and her son. In that deed, it was mentioned that she was given 1 bigha 10 kathas as her share to which she was entitled in partition. This is also the concurrent finding of both the courts below. It is for this reason that the plaintiff lost the suit in both the Courts.

4. The defence of defendant No. 1 and his wife defendant No. 4, was that they are in adverse possession of the suit properties to the knowledge of the plaintiff. Though Shaikh Nawab died in the year 1945, the suit was filed in the year 1968. No explanation has been given by the plaintiff as to why the suit was not filed between 1945 and 1968. It is for this reason that the Courts below held that the plaintiff relinquished her claim to the suit properties. It is correct that the principle of renunciation or relinquishment has not been pleaded by the plaintiff. It is clear that no issue was framed to this effect. Parties have led evidence to the contention of renunciation by exhibiting the registered deed of gift (Ext. B). It is the case of defendant No. 1 that by accepting the registered deed of gift, the plaintiff accepted the principle of renunciation to the effect that she would not claim any share in the suit properties. Shaikh Nawab died leaving behind 4½ bighas of land. The plaintiff got by means of Ext. B 1½ bighas of land. Under Mahommedan Law, the plaintiff was entitled to one-third share. The son, being a residuary heir, was entitled to two thirds share, that is, 3 bighas. It is also pleaded by the learned counsel for the appellant that renunciation is also not specifically mentioned in Ext. B. It is correct that this fact is not mentioned in Ext. B. The Privy Council held in the case of Mst. Hurmut-ool-Nissa Begum v. Allahdia Khan, (1871) 17 Suth WR 108, that renunciation of right to inherit need not be expressed but be implied, from the averments in the deed. I hold on the basis of the concurrent findings of fact of both the courts that the plaintiff renounced her claim in lieu of partition. She accepted the lands mentioned in the deed of gift. It is also clear that one cannot renunciate at the time when she was not entitled to claim partition. In other words, she is not estopped from

*From decision of Abhiram Singh, Dist. J. East Champaran, Motihari, D/- 8-4-1978.

claiming partition at a time when she renounced her claim. But such renunciation should be accepted by the courts as it was a family arrangement. In this view of the matter, the renunciation should have been accepted and the plaintiff ought to have been forbidden from claiming partition. If she is not forbidden, the family arrangement will have no value in the society.

5. There is another aspect of the matter and that is this:— In the aforesaid Privy Council case, a residuary heir claimed partition after twelve years. Their Lordships disallowed the claim of partition, as no satisfactory explanation of his inaction was given by the residuary heir. Their Lordships also held in that case that the suit is barred by the principle of adverse possession. I apply the same principle in the present case. The plaintiff has given no satisfactory explanation of her inaction for the delay of 23 years in filing the suit for partition. Therefore, the legitimate inference is that she renounced her claim for partition in respect of the suit area. I also hold that the suit is also barred by adverse possession. The plea of adverse possession has specifically been made in paragraph 6 of the written statement of defendant No. 1 which is as follows:—

"That the defendant pleads complete ouster of the plaintiff and asserts adverse possession over the alleged interest the plaintiffs claim in the suit".

Defendant No. 4, wife of defendant No. 1, also pleaded adverse possession in para 7 of her written statement which is as follows:

"That this defendant ousted the plaintiff from the lands detailed in Schedule I of this written statement in 1953 and this defendant is coming in exclusive possession thereon to the knowledge of the plaintiff".

Therefore, it cannot be said that adverse possession was not pleaded. On the basis of the materials on record, I hold that the suit was filed in 1968. It is also an admitted position that Shaikh Nawab, father of the plaintiff, died in 1945. Admittedly, the suit was filed beyond 12 years and no satisfactory explanation has been given for the delay. Hence, I hold that the suit is barred by adverse possession.

6. On the point of pleading, learned counsel for the plaintiff cited AIR 1930 PC 57 (1) (Siddik Mahomed Shah v. Mt. Saran) to show that no amount of evidence can be looked into which was never put forward. Their Lordships of the Supreme Court in the case of Nagubai Ammal v. B. Shama Rao (AIR 1956 SC 593) has explained the decision of the Privy Council and held that the rule laid down in Siddik Mahomed Shah versus Mt. Saran and others does not apply to a case where parties go to trial with knowledge that a particular question is in issue though no specific issue has been framed thereon. I, therefore, hold that, although no pleading was made in respect of renunciation nor any issue was raised to that effect, the parties are entitled to contend about renunciation, as the parties had the knowledge about this issue in their mind. To this effect, they also adduced documentary evidence. So far as exclusive possession is concerned, both the courts have concurrently held that defendant No. 1 and defendant No. 4 were in exclusive possession in respect of the suit properties. It is an admitted position that, after the death of Shaikh Nawab, the plaintiff was in possession of 1 bigha 10 kathas of land and defendant No. 1 was in possession of 3 bighas. Defendant No. 1 executed a deed of bimokasa (a deed in lieu of dower debt) dated 12-7-1953 in favour of his wife, defendant No. 4, in respect of 2 bighas and odd out of the suit properties. Ext. D is the mutation paper suggesting the mutation in favour of defendant No. 4 in respect of 2 bighas and odd. Consequently, rent receipts (Exts. A to A/19) clearly suggest that rent receipts were issued in the name of defendant No. 4. Defendant No. 4 has also pleaded that she is in adverse possession to the knowledge of the plaintiff.

7. So far as 1 bigha is concerned, it is coming in exclusive possession of defendant No. 1 to the knowledge of the plaintiff. This position has been discussed by the trial court in paras 10 to 14 in its judgment. While discussing the plaintiff's witnesses, the trial court came to the conclusion that it was admitted by the plaintiff's witnesses that the suit lands were coming in possession of defendant No. 1. If that is so, the suit for partition must fail on this ground also.

The finding of the trial Judge about exclusive possession has also been affirmed by the lower appellate court.

8. It is also relevant at this stage to quote para 16 of the trial's court judgment which is as follows:—

"In view of the above evidences of the plaintiff herself it becomes clear that the plaintiff has never been in possession of any portion of the disputed land. It is not the case of the plaintiff in the plaint that she has been coming in possession of the disputed land jointly. The witnesses of the plaintiff as well as the plaintiff herself, have tried to convince the court that the plaintiff has been coming in possession of some of the portions of the disputed land separately, which story has fallen flat to the ground. From the recital of the Ext. B which is the deed of gift of the plaintiff, it becomes clear that the intention of Sk. Nabab, father of the plaintiff, was to give to the plaintiff $1\frac{1}{2}$ bighas of land out of $4\frac{1}{2}$ bighas of land owned and possessed by him which after his death would be the share of the plaintiff. Admittedly according to Mohammadan Law the plaintiff was entitled to $\frac{1}{3}$ share and defendant No. 1, being her brother was entitled to $\frac{2}{3}$ rd share in the lands of Sk. Nabab, their father, after his death, by way of inheritance. From Ext. B it becomes clear further that Sk. Nabab gifted the land of the plaintiff share in his life time and the P. Ws. have also proved that the same land, which was gifted to the plaintiff has been coming in her possession and either she cultivates it by herself or she gets it cultivated by others on Hunda Batal."

I affirm the concurrent findings of both the courts below and dismiss the suit.

9. The points of law raised in this case are summarised thus:— Renunciation or relinquishment need not be expressly stated in the document. It can be inferred from the conduct of the parties. If a suit for partition in a Mohammadan family is brought after 12 years and the plaintiff fails to explain his or her inaction, renunciation can be inferred. If renunciation is pleaded in the document and renunciation is accepted by the parties, in that case, he or she must be estopped from claiming parti-

tion, as it is a part of family arrangement. Strictly speaking, such renunciation will not forbid her from claiming partition but in order to maintain harmony and peace in the family such renunciation should be treated as estoppel to the party concerned. But ordinarily, there should be a pleading in respect of facts but if such a particular fact is not pleaded nor any issue is framed the parties will not be debarred from adducing any evidence if he or she has knowledge to the fact that this issue is involved in the case. Then the parties will not be estopped from raising that issue for which the evidence has been led by both the parties.

10. In the result, the appeal is dismissed. Parties will bear their own costs, throughout.

Appeal dismissed.

AIR 1982 PATNA 228

S. K. CHOUDHURI AND

M. P. VARMA, JJ.

Sk. Halaluddin and others, Appellants v. Nabi Hasan and others, Respondents.

A. F. A. D. No. 734 of 1977, D/- 21-5-1982.*

(A) Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act (12 of 1962), Ss. 43, 16 (3) — Bar of Civil Court's jurisdiction — When attracted — Question of benami can be entertained by revenue authority — Decision, even if wrong, cannot be rectified in civil suit. (Civil P. C. (5 of 1908), S. 9).

The bar of the jurisdiction of Civil Court under Section 43 of the Act would not apply in a case, where the decision of the Board of Revenue, the appellate authority or the Collector was without jurisdiction, or that the orders passed by such authorities were not passed under the Act. The question of benami can be entertained by the revenue authority in the absence of the real owner and the decision would be binding upon the latter. The decision of revenue authority (D. C. L. R.) on such a question cannot be said to be without jurisdiction. AIR 1972 Pat 1, Foll.; AIR 1978 Pat 315, Dist. Case law discussed. (Paras 6, 8, 9)

* From decision of Ramdeo Premjiwan, 3rd Addl. Munsif, Ararea, D/- 30-7-1978.

IZ/JZ/E320/82/SSG

The revenue appellate authority (SDO) allowed appeal of D-1 against rejection of his petition under Section 16 (3) of the Act and directed the purchaser D-2 to reconvey the suit land in favour of D-1. On question of benami it was held that the alleged real owner P was not a raiyat within S. 2 (k) of the Act, as the Ladavi (local term) did not confer any right on P. The said order was challenged neither in a proper forum under the Act nor in a writ petition. In civil suit filed by P challenging the said order the Courts below held that P was not a party before the revenue authorities and as such the question of benami could not have been decided in his absence and the order passed by the revenue appellate authority allowing the application under Section 16 (3) of the Act was illegal and without jurisdiction. On second appeal by D-1.

Held that the conclusion of the Courts below was patently erroneous. The order of the revenue appellate authority could not be rectified in a civil suit as Section 43 of the Act would be a complete bar for such a civil suit. The decision on the question of benami, even if wrong, would be deemed to have been decided by the revenue authority under the Act, since they had power to decide such questions which fell within the purview of Section 16 (3) of the Act.

(Paras 9, 10)

(B) Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act (12 of 1962), Ss. 30, 16 (3) — Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Rules (1963), R. 48 (ii) — State Govt. notification No. 8.0.99 dated 30-5-1967 — Notification empowering DCLR to discharge function of Collector under Section 16 (3) — That does not mean that appeal against order of D. C. L. R. under Section 16 (3) would not lie before S. D. O. — Rule 48 (ii) itself provides the prescribed appellate authority in such a case to be S. D. O. — 1975 BBCJ (HC) 528, Foll.

(Para 11)

Cases Referred: Chronological Paras

AIR 1978 Pat 315 9

1975 BBCJ (HC) 528 : 1975 Pat LJR 542 11

AIR 1974 Pat 124 : 1973 BLJR 734 8

AIR 1973 Pat 396 : 1973 BLJR 566 11

AIR 1972 Pat 1 8

(1970) C. W. J. C. No. 123 of 1969, D/- 30-1-

1970 (Pat), Budh Nandan Ram v. State of Bihar 9

AIR 1951 SC 115 7

AIR 1918 PC 140 8

(1888) 21 QBD 313 : 57 LJ QB 513, Queen v. Commr. for Special Purpose of the Income-tax 7

A. K. Samaiyar, for Appellants; Harendra Prasad, for Respondents.

S. K. CHOUDHURI, J.:— This second appeal by the defendants first party is directed against the concurrent judgments of the Courts below decreeing the plaintiffs' suit.

2. In order to appreciate the points raised in this appeal, the relevant facts which are not in dispute are these.

The defendants second party purchased the disputed land from one Sirajuddin on 6th Sept., 1968. On the 23rd Nov., 1968, the defendants first party who are the appellants before this Court filed a petition under Section 16 (3) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (Bihar Act 12 of 1962) (hereinafter called 'the Act') before the Deputy Collector Incharge Land Reforms ('D. C. L. R.' for short) claiming themselves to be the adjacent raiyats of the land in question. In this application, Sirajuddin the vendor and the defendants second party the purchasers under the document dated 6th Sept., 1968, were the opposite party. This application was registered as Case No. 35 of 1968, and it was rejected by the D. C. L. R. on 8th April, 1969. It may be stated here that on 8th Nov., 1968, the defendants second party executed a Ladavi deed in favour of Sagiruddin who was their father. The said Ladavi deed was registered on 2nd Dec., 1968.

Aggrieved by the decision rejecting the application under S. 16 (3) of the Act as aforesaid, the defendants first party filed an appeal before the Sub-Divisional Officer which was registered as Appeal Case No. 10-CA of 1969-70. The appeal was allowed by the Sub-Divisional Officer by his order dated 24th Sept., 1969, and he directed the defendants second party to execute a deed of reconveyance in favour of the defendants first party. The revenue appellate authority held that Sagiruddin was not a raiyat within the meaning of Section 2 (k) of the Act, as the Ladavi deed did not confer any right upon him. It would be relevant to state here that the stand of the defendants second party before the Revenue authority was that they were Benamidars of their father Sagiruddin. It appears that thereafter the party aggrieved did not move the higher revenue authorities, but Sagiruddin the father of the defendants second party chose to file the present suit on the 10th October, 1969. The sole plaintiff

died during the pendency of the suit, and the defendants second party were substituted in his place.

3. The plaintiff's case was that he not being a party at any stage before the revenue authorities and he being the real purchaser of the property in question, the orders passed by these authorities were nullity, without jurisdiction and not binding upon the plaintiff. The defence, *inter alia*, was that this Civil Court has no jurisdiction to try the suit and Section 43 of the Act is a complete bar for a civil suit.

4. The trial Court held that the plaintiff was not a party before the revenue authority and, therefore, the orders passed by them were not binding upon him. It held that the original plaintiff Sagiruddin was the real purchaser of the disputed land and in spite of the fact that it was brought to the notice of the Deputy Collector Incharge Land Reforms and the appellate authority namely, the Sub-Divisional Officer, he was not made a party and, therefore, the orders passed by them were without jurisdiction. It also held that Section 43 of the Act was not a bar to the maintainability of the suit. Accordingly, it decreed the suit. The learned District Judge in appeal upheld the judgment of the trial Court and dismissed the appeal. Hence the present second appeal.

5. The first question for determination in the present appeal is as to whether Sec. 43 of the Act was not a bar for a civil suit.

6. Mr. A. K. Samaiyar learned Counsel appearing on behalf of the appellants contended that Section 43 of the Act makes complete bar upon the Civil Court to entertain the present suit. Mr. Harendra Prasad, learned Counsel appearing on behalf of the plaintiffs-respondents on the other hand supported the judgments of the Courts below by contending that Section 43 is not attracted. In order to appreciate the arguments of the parties, it is necessary to read S. 43 of the Act. It reads thus:—

“43. Bar of jurisdiction of Civil Court.—(1) Save and except as provided in this Act no Civil Court shall have jurisdiction to settle, decide or deal with any question which is by or under this Act required to be settled, decided or dealt with by the Board of Revenue, the appellate authority or the Collector.

(2) No order of the Board of Revenue, the appellate authority or the Collector made under this Act, shall be questioned in any Court.”

Therefore, under sub-section (1) of this section, the jurisdiction of the Civil Court is barred to settle, decide or deal with a question which is by or under the Act required to be settled, decided or dealt with by the Board of Revenue, the appellate authority or the Collector. Under sub-section (2) of this section, the orders passed by the Board of Revenue, the appellate authority or the Collector under this Act shall not be questioned in any Court. However, the bar of the Civil Court, it cannot be disputed, would not apply in a case, where the decision of the Board of Revenue, the appellate authority or the Collector was without jurisdiction, or that the orders passed by such authorities were not passed under the Act. It has not been argued by any of the learned Counsel for the parties that the original application under Section 16 (3) of the Act was not cognizable by the Deputy Collector Incharge Land Reforms.

7. The only attack by learned Counsel for the respondents was that the appellate authority which decided the matter in appeal from the decision of the original authority having failed to decide the question of Benami, such order is without jurisdiction. His further argument was that admittedly the real owner, namely, Sagiruddin was not a party either before the D. C. L. R. or before the Sub-Divisional Officer, who was the appellate authority, the orders passed by them would not be binding on the said Sagiruddin, and, therefore, he was competent to challenge the order passed by the revenue authorities in a Civil Court. Reliance was placed by learned Counsel for the appellants in *Rai Brij Raj Krishna v. S. K. Shaw and Brothers* (AIR 1951 SC 115). The law on the subject as stated by Lord Esher, M. R. in the *Queen v. Commr. for Special Purposes of the Income-tax*, (1888) 21 QBD 313 at page 319 has been quoted in this Supreme Court decision which reads thus:—

“When an inferior Court or Tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the Legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists and if they exercise the jurisdiction without its existence; what they do may be questioned, and it will be held that they

have acted without jurisdiction. But there is another state of things which may exist. The Legislature may entrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the Legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the Legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends; and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction."

In *Brij Raj Krishna's case* (supra) the trial Court and the lower appellate Court dismissed the suit in which the order of eviction passed by the Controller under the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, on the ground of non-payment of rent was challenged. High Court allowed the appeal and decreed the suit. The Supreme Court of India set aside the judgment of the High Court. It held that the suit fell within the second category mentioned by Lord Esher, M. R. and, therefore, the suit was held to be maintainable in a civil court. In holding that the suit was not maintainable by the Civil Court, it has been stated that the Rent Control Act entrusted the Controller with a jurisdiction which includes the jurisdiction to determine whether there is non-payment of rent or not, as well as the jurisdiction, on finding that there is non-payment of rent, to order eviction of a tenant. The decision further said that "even if the Controller may be assumed to have wrongly decided the question of non-payment of rent, which by no means is clear, his order cannot be questioned in a Civil Court".

The appellants' counsel relied upon S. 43 of the Act. It has been argued that except as provided in the Act, an order passed by an authority or a tribunal cannot otherwise be challenged in a suit. Admittedly the application filed under Section 16 (3) of the Act was cognizable by the D. C. L. R. Ac-

cording to the learned counsel, if he had jurisdiction to entertain the said application, then he had jurisdiction also to decide the question of benami which was raised by the ostensible owner, namely, the defendant's second party. It has been pointed out that therefore any decision on the question of benami by a revenue authority even if it is wrongly decided, cannot be challenged in a suit. Argument further was that the language of Section 16 (3) of the Act is wide enough to include the question of benami and the question as to whether the intention of the parties was that title would pass on payment of consideration. Therefore, if these questions are raised then it is within the competencies of the Revenue Authorities to determine such questions.

8. In support of this contention, learned counsel referred to the decision in *Narendra Kumar Ghose v. Sheodeni Ram* (AIR 1972 Pat 1). In this case also the question of benami was raised by the ostensible owner. One Sheodeni Ram in that case filed an application under S. 16 (3) of the Act claiming himself to be an adjacent owner. The Sub-divisional Officer allowed the petition. On appeal filed by the ostensible owner, it was held that the real owner was not a party, and, therefore, the determination of Benami question would not be binding upon him. Accordingly, the appeal was allowed. The matter went up in revision before the Board of Revenue.

The Board of Revenue allowed the revision application observing that the real owner may get the dispute settled in a Civil Court. The matter came to High Court in its writ jurisdiction. Their Lordships noticed the principles laid down in *Gur Narayan v. Sheolal Singh* (AIR 1918 PC 140), namely, that, "the bulk of judicial opinion in India is in favour of the proposition that in a proceeding by or against the benamidar, the person beneficially entitled is fully affected by the rules of *res judicata*. With this view their Lordships concur. It is open to the latter to apply to be joined in the action; but whether he is made a party or not, a proceeding by or against his representative in its ultimate result is fully binding on him"

Their Lordships following the aforesaid principle interpreted Section 43 of the Act and stated as follows:—

"Applying the said principle for interpretation of Section 43 of the Act, it would be noticed that if an application under S. 16 (3) of the Act is allowed under Clause (iii), it

would be binding on the real owner if the question of benami was not raised by the ostensible owner or, if raised, it was decided against him or the real owner. Such a decision being binding on the real owner, it seems to me that if the question is raised then it is a question which is, by or under the Act, required to be settled, decided, or dealt with by the Board of Revenue, the appellate authority or the Collector within the meaning of Section 43 of the Act, which bars the jurisdiction of the Civil Court in regard to a question which falls to be decided by the revenue authorities. I do not find any escape from the view I have expressed above that an order under Sec. 16 (3) of the Act made against an ostensible transferee would be binding on the real transferee. That being so, if the question is raised by the ostensible transferee that he is not the real owner of the property but the real owner is somebody else, it is in the discretion of the Collector to add that person as party to the proceeding and decide the question in his presence or to decide it even without adding him as a party; in either event the decision will be binding on the real owner. It is plain that the real owner will be debarred under Section 43 of the Act from going to the Civil Court to claim recovery of possession of a property which has been directed to be transferred to the pre-emptor under Section 16 (3) of the Act. The language of sub-section (2) of Section 17 would also indicate that the real owner in occupation of the land is also liable to be ejected by the Collector if action is taken under Section 17 of the Act. I am, therefore, of the opinion that it was necessary for Board of Revenue to decide this question of benami within the ambit of its revisional powers when the point had been decided by the Additional Collector in appeal. Its view that it was open to Narendra Kumar Ghose to lay his claim over the disputed land in a Civil Court is not correct. It is not open to him to do so."

I fully agree with the view taken in Narendra Kumar Ghose's case (supra). As it is now settled, that the Benami question can be entertained by the revenue authority in the absence of the real owner and the decision would be binding upon the latter, it cannot be argued that the decision of the D. C. L. R. on that score is without jurisdiction.

The other case cited by learned Counsel for the appellants is the case of Gujan Yadav v. Sitaram Choudhary, 1973 BLTR 734 (AIR 1974 Pat 124) in support of the contention

that the revenue authority can investigate the question as to whether the intention of the party was that the title would pass on payment of the consideration, if such a point is raised in a proceeding initiated under Section 16 (3) of the Act. It has been held that the phraseology of S. 16 (3) of the Act has not undone the effect of the well settled principle of law that the transferor in spite of the recitals in the document, can show that the intention was that title would pass on payment of the consideration, and, therefore, for an effective order of pre-emption under Section 16 (3) of the Act, it is necessary that there should be a valid transfer, in the eye of law, which view is supported by the language of Cls. (ii) and (iii) of S. 16 (3) of the Act.

It has further been held that "the transferor may come and say, if it is a fact, that the document of transfer purporting to have been executed and registered by him was not so done by him; it is a forged document. In other words, he can say that he did not transfer the land by executing any document at all. Such a question, if raised by a transferor, it is plain, will have to be investigated by the revenue Court in a proceeding under Section 16 (3) of the Act. If that be so, I fail to understand why the question of the kind at issue cannot be raised by the transferee and why it should be held that investigation of such a question would be beyond the purview of the Revenue Court in a proceeding under Section 16 (3) of the Act". Both the aforesaid two decisions support the contention of the learned Counsel for the appellants.

9. To counter-act the argument put forward on behalf of the appellants, Mr. Harendra Prasad learned Counsel for the respondents relied upon the decision in the case of Nand Kishore Singh v. Satya Narain Singh (AIR 1978 Pat 315 : 1978 BBCJ (HC) 555), for the proposition that the Civil Court has jurisdiction to entertain a suit challenging the decision of the revenue authorities deciding an application under Section 16 (3) of the Act one way or the other. This case is clearly distinguishable, as the application under Section 16 (3) of the Act was filed in this case before the registration of the sale deed was completed. Accordingly, the revenue authority could not entertain such an application for initiation of a proceeding under Section 16 (3) of the Act, as such an application could be filed only after the registration is complete.

This decision has relied upon an unreported Bench decision of this Court in C.W.J.C.

No. 133 of 1969 (Budh Nandan Ram v. State of Bihar) decided on 30th Jan., 1970, wherein it has been held that if action is taken by the Collector on an application filed under Section 16 (3) of the Act before the registration of the sale deed was complete, the entire proceeding commenced on such an application was void and without jurisdiction and as such the application would fail on that ground alone. Learned Counsel for the appellants has rightly distinguished this case by pointing out that there was initial want of jurisdiction to take cognizance by the revenue authority in Nand Kishore Singh's case (*supra*) and, therefore, all orders passed in that proceeding were without jurisdiction. In the case under consideration, hardly there was any want of jurisdiction upon the revenue authority in entertaining an application under S. 16 (3) of the Act.

10. Learned Counsel for the respondents, however, argued that the question of Benami has not been answered by the Revenue Appellate Authority. This contention does not find support from the judgments of the Courts below deciding the suit. The only argument that appears to have been advanced before the Courts below was that the question of Benami should not have been decided by the revenue authority in the absence of the real owner. In other words, the argument was that Sagiruddin the real owner not being made a party before the revenue authorities, their decisions were not binding upon him and so far as he was concerned those decisions were nullity and without jurisdiction. Both the Courts below while decreeing the suit held that Sagiruddin was not a party before the revenue authorities and as such the question of Benami could not have been decided in his absence and the order passed by the revenue appellate authority allowing the application under Section 16 (3) of the Act was illegal and without jurisdiction and, therefore, the present suit was maintainable. This conclusion of the Courts below in my view is patently erroneous in view of the decisions discussed above. Accordingly, the suit should not have been decreed by the Courts below.

It is the admitted position that the Benami question was raised by the defendants second party before the D. C. L. R. The learned Counsel for the respondents argued that the revenue appellate authority, namely, the Subdivisional Officer did not decide this question. I have already pointed out while stating the facts that the revenue appellate authority held that Sagiruddin was not a raiyat within the meaning of Section 2 (k)

of the Act as the Ladavi deed did not confer any right upon him. Even if it be assumed that the Benami question has not been discussed in the manner as required under the law by the revenue appellate authority, the same could have been rectified by challenging the said order before a proper forum under the Act. Admittedly that was not done nor any writ application was filed before this Court challenging the decision of the revenue authorities. In my view, therefore, such orders cannot be rectified in a civil suit as Section 43 of the Act would be a complete bar for such a civil suit. The decision on the question of Benami, right or wrong, would be deemed to have been decided by the revenue authority under the Act; they having power to decide such questions which fall within the purview of Section 16 (3) of the Act. Therefore, this contention of the learned Counsel for the respondents also cannot be accepted.

11. The next point argued vehemently by the learned Counsel for the respondents is that the D. C. L. R. and the Sub-Divisional Officer having concurrent jurisdiction under Rule 48 of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Rules, 1963 (hereinafter called 'the Rules'), the Sub-Divisional Officer could not have entertained an appeal which was filed against the order passed by the D. C. L. R. According to the learned Counsel, therefore, there was inherent lack of jurisdiction in the revenue appellate authority in entertaining the appeal and allowing the same and therefore a civil suit would lie. Though no direct decision was cited by learned Counsel for the respondents, but he tried to support the argument by citing the decision in Ram Janam Gareri v. Narbadeshwar Singh, 1973 BLJR 566 : (AIR 1973 Pat 396). Learned Counsel pointed out that in this case it has been decided that the Sub-Divisional Officer had no jurisdiction to transfer a case from his file to the file of the Land Reforms Deputy Collector and such power has been given only to the Collector of the district under Section 31 of the Act.

This argument was upheld. By way of analogy, therefore, it was argued that the Sub-Divisional Officer who had concurrent jurisdiction with that of D. C. L. R. could not have entertained the appeal far less, allowed the same. This argument or examination of the relevant provision of the Rules, in my view, is fallacious. The whole argument on this point of the learned Counsel for the respondents was founded on the language of Section 30 and Rule 48 as they

now stand. Both Section 30 and Rule 48 have undergone changes. The present R. 48 shows inter alia that the appeal shall lie from the order passed by the Sub-Deputy Collector, or Deputy Collector, other than the Land Reforms Deputy Collector or the Sub-Divisional Officer to the Land Reforms Deputy Collector or the Sub-Divisional Officer. It is on this basis that the argument has been put forward by learned Counsel for the respondents that an appeal against the order of the Land Reforms Deputy Collector would not lie before the Sub-Divisional Officer as they have concurrent appellate jurisdiction and the appeal under the present Rule lie to the Additional Collector or the Collector of the District. It is therefore necessary to quote Section 30 as also Rule 48 as were in force at that time when an appeal under S. 16 (3) of the Act was filed. Section 30 reads as follows :—

“(1) An appeal from any final order made by the Collector under this Act except an order under Section 8 or sub-section (5) of Section 28, if preferred within sixty days of the date of such order, shall lie to the prescribed authority;

Provided that any such appeal may be admitted after sixty days of the date of the order appealed against, if the appellate authority is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within such period.

(2) An appeal under this section shall be heard and disposed of in the prescribed manner.”

Rule 48 as it then was reads thus :—

“(1) Subject to sub-section (1) of Sec. 30 an appeal against an order passed under the Act by a Collector of the rank mentioned below in the first column shall lie to a Collector of the area concerned of the rank mentioned in the corresponding entry in the second column :

(See corresponding entry below)

These two provisions were pointed out by the learned Counsel for the appellants to
(Contd. on Col. 2)

- (i) Sub-Deputy Collector.
- (ii) Deputy Collector other than Sub-divisional Officer.
- (iii) Subdivisional Officer.
- (iv) Additional Collector or Collector of the district.

counter-act the argument put forward by the learned Counsel for the respondents. The latter relied upon a notification given in Appendix B being notification No. S. O. 99 dated 30th May, 1967 (published in the Bihar Gazette (Extraordinary) dated 19-7-1967. This notification reads thus :—

“In exercise of the powers conferred by Clause (b) of Section 2 of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (Bihar Act XII of 1962), the Governor of Bihar is pleased to appoint all Land Reforms Deputy Collectors to discharge the functions of a Collector under sub-section (3) of Section 16 of the aforesaid Act, within the local limits of their respective jurisdictions.”

This notification, no doubt, gives power to the D. C. L. R. to discharge the functions of a Collector under sub-sec. (3) of S. 16 of the Act, but that does not mean that an application under Section 16 (3) of the Act if decided by the D. C. L. R., an appeal would not lie before the Subdivisional Officer. Rule 48 (ii) itself provides that the prescribed appellate authority from the decision of the Deputy Collector other than the Subdivisional Officer to be the Subdivisional Officer. Therefore, if the law as it then was prescribed the appellate authority to be the Subdivisional Officer for entertaining an appeal from the decision of the Deputy Collector (other than the Subdivisional Officer), then the appellate forum would be the Subdivisional Officer. In a Bench decision of this Court in *Ram Bilas Mahto v. Addl. Member, Board of Revenue* (1975 BBCJ (HC) 528) it has been held as follows :—

“... under Rule 48 of the Rules read with Section 30 of the Act, if the original order is passed by the Sub-Deputy Collector, the appeal will lie before the Land Reforms Deputy Collector or Additional Subdivisional Officer, if the original order is passed by the Deputy Collector other than the Subdivisional Officer then the appeal will lie before the Subdivisional Officer, if the original order is passed by the Subdivisional

Land Reforms Deputy Collector, or Additional Subdivisional Officer.
Subdivisional Officer.

Additional Collector or the Collector of the district.

Divisional Commissioner, or to such authority as may be appointed from time to time by the State Government by notification published in the Bihar Gazette.”

Officer the appeal will lie before the Additional Collector or the Collector of the district and if the original order is passed by the Additional Collector or the Collector of the district, the appeal will lie before the Divisional Commissioner or such other authority as may be appointed from time to time by the State Government by notification published in the Bihar Gazette. There is no scope for a second appeal either under the provision of Rule 48 or the Rules read with Section 30 of the Act."

Therefore, it has to be held that this contention of the learned Counsel for the respondents has also no substance.

12. For the reasons stated above, the appeal is allowed, and the judgment and the decree passed by the Courts below are set aside and the suit stands dismissed with costs throughout payable to the appellants.

M. P. VARMA, J.:— I agree.

Appeal allowed.

AIR 1982 PATNA 235

B. P. JHA, J.

Raja Mahto and another, Appellants v. Mangal Mahto and others, Respondents.

A. F. A. D. Nos. 289 and 290 of 1976, D/- 18-5-1982.*

Bihar Consolidation of Holdings and Prevention of Fragmentation Act (22 of 1956), Section 4 (c) — Scope — Suit for declaration of title and recovery of possession — Decree passed by trial Court — Publication of notification under Section 3 — Decree not nullified under Section 4 (c) — Only suit, appeal, reference or revision abates under this section and not the decree or preliminary or final decree abates. AIR 1982 Pat 37 and AIR 1980 SC 2051, Followed; AIR 1973 SC 2451, Not followed. (Para 5)

Cases Referred:	Chronological	Paras
AIR 1982 Pat 37 : 1982 3BCJ (HC) 1		3
AIR 1980 SC 2051		4
AIR 1973 SC 2451		4
AIR 1968 SC 714		4

Prabha Shanker Mishra and Anish Chandra Sinha, for Appellants; Madhu Sudan Singh (for Nos. 1 to 3) in S. A. No. 289/76 and (for No. 1) in S. A. No. 290/76, for Respondents.

* Against decision of Chandrashekhar Singh, 2nd Addl. Dist. Judge, Chapra, D/- 10-3-1976.

JUDGMENT:— I shall dispose of these two appeals, namely, Second Appeals Nos. 289 and 290 of 1976, by a common judgment as these two appeals arise out of a common judgment passed by the Civil Court.

2. Title Suit No. 87/76 of 1961-62 was filed for a declaration of title and recovery of possession and Title Suit No. 17/24 of 1963-66 relates to partition. Both the suits were tried together and one judgment was delivered by the trial Court and by the appellate Court. In this Court, against the judgment of the appellate Court, these two appeals viz; Second Appeals Nos. 289 and 290 of 1976, have been filed. One Mangal Mahto, respondent in both the appeals, has filed an application to the effect that a notification has been published under Sec. 3 of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 (hereinafter referred to as 'the Act'). It is, therefore, stated in the supplementary affidavit that the suits and the appeals abated under Section 4 (c) of the Act.

3. It is, therefore, relevant to quote Section 4 (c) of the Act, which runs thus:—

"Every proceeding for the correction of records and every suit and proceedings in respect of declaration of rights or interest in any land lying in the area or for declaration or adjudication of any other right in regard to which proceedings can or ought to be taken under this Act, pending before any Court or authority whether of the first instance or of appeal, reference or revision, shall, on an order being passed in that behalf by the Court or authority before whom such suit or proceeding is pending stand abated."

On a perusal of this section, it is clear that the abatement takes place in respect of a proceeding or a suit, pending before the Court with respect to declaration of title or interest in any land where consolidation proceeding is going on. Section 4 (c) of the Act also provides that suit, appeal or revision will abate. On a perusal of this section, it is clear that neither the decree or preliminary decree nor final decree will abate as there is no such provision under Section 4 (c) of the Act. Section 4 (c) of the Act envisages abatement of a suit, appeal, reference or revision. Section 4 (c) of the Act does not state about the abatement of decree or preliminary decree or final decree. This view has been upheld by a decision of the Division Bench of this Court in the case of Jagdish Prasad v. Satya Narain Singh, 1982 BBCJ (HC) 1 : (AIR 1982 Pat 37). As a single Judge, I am bound to follow the decision of the Division Bench.

4. Learned counsel for the appellants has relied on a decision in *Ram Adhar Singh v. Ramroop Singh* (AIR 1968 SC 714). It is stated in this decision that under S. 4 (c) of the Act, the suit or appeal will abate. This decision does not help the learned counsel for the appellants. Learned counsel for the appellants has also relied on a decision of the Supreme Court in *Gorakh Nath Dubey v. Hari Narain Singh* (AIR 1973 SC 2451). In this case, their Lordships were pleased to set aside the decree of the High Court in view of the application of the principle of abatement. This is a judgment of two Hon'ble Judges, namely, the Hon'ble Mr. Justice K. K. Mathew and the Hon'ble Mr. Justice M. H. Beg. The views of these two Hon'ble Judges were not followed by the three Hon'ble Judges in *Satyanarayan Prasad v. State of Bihar* (AIR 1980 SC 2051). Their Lordships quoted in para 2 of the judgment as follows:—

“True, the petitioner is right in saying that the High Court should not have “nullified” the decree of the trial Court but should have merely declared that the proceeding stood abated, which of course, means that the civil proceeding comes to nought.”

Therefore, the judgment of the three Hon'ble Judges of the Supreme Court were of the opinion that the decree passed by the trial Court is not nullified under Section 4 (c) of the Act I am bound to follow the decision of the three Hon'ble Judges of the Supreme Court.

5. I am, therefore, of the opinion that under Section 4 (c) of the Act, the suit, appeal, reference or revision abates and not the decree or preliminary or final decree abates.

6. In the result, suits and both these appeals, viz., Second Appeals Nos. 289 and 290 of 1976, have abated before this Court. The decree or preliminary decree passed in suits and in both the appeals have not abated.

Order accordingly.

AIR 1982 PATNA 236

(RANCHI BENCH)

LALIT MOHAN SHARMA AND

S. ROY, JJ.

Temu Aspi Gabba and others, Petitioners v. State of Bihar and others, Respondents.

Civil Writ Jurn. Case No. 1018 of 1981 (R), D/- 5-4-1982.

IZ/IZ/D912/82/VVG

Evidence Act (1 of 1872), Ss. 101-104; 114 — Petitioners settlees of a colony of Housing Board — Writ for direction to Board to maintain the open space described in the site plan as “reserved for other utility” and not to construct buildings thereon — Petitioners relying solely on the site plan and description given therein — From the mere description of the disputed area as “reserved for other utility” no presumption that the same was for common use of the settlees could be raised — No other material produced to support claim — Petition liable to be dismissed. (Constitution of India, Art. 226). (Para 7)

Cases Referred :	Chronological	Paras
AIR 1979 SC 621 :	1979 All LJ 368	4
AIR 1968 SC 718		4

S. N. Roy and Narayan Roy, for Petitioners; Prabha Shankar Mishra, V. P. Singh (for Nos. 4 and 5), Debi Prasad, A. Sahay (for Nos. 2 and 3), T. Bodra and M. M. Pal (for Nos. 1 and 2), for Respondents.

LALIT MOHAN SHARMA, J.:— The petitioners claim to be settlees of some of the quarters in a colony in Adityapur, Jamshedpur of the Bihar State Housing Board (hereinafter referred to as ‘the Board’) (respondent No. 2) and pray by this writ application for issuing a direction to the Board to maintain the open space, as shown in the site plan, Annexure ‘1’ to the writ application, and not to settle it for constructing buildings thereon. The Board is a statutory body formed for the purpose of making provision for housing facilities. According to the petitioners’ case, a prospectus had been issued giving out the terms and conditions for allotment of houses and house plots in detail and the petitioners in response thereto made applications and have been granted settlements. The settlements were proposed to be made by reference to a site plan, a photostat copy whereof has been annexed to the writ application as Annexure ‘1’. On the north-western side of the plan, a piece of land running from east to west has been described as “reserved for other utility”. This space has been marked out by the petitioners by red lines and is the subject-matter of the present case. According to their case, the open space was exclusively meant for the common benefit of about 70 settlees including the petitioners and they utilized the same by holding social functions and using it as children’s play ground. A public water tap also was installed there by authorities. The space was not intended for putting up dwelling houses, but the respondents 2 and 3 attempted to settle the same with strangers.

which led to several disputes. In the circumstances, the writ application has been filed.

2. The petitioners' allegations regarding the nature of the space in dispute were denied on behalf of the Board and its Executive Engineer (respondent No. 3) and it was stated in their counter-affidavit that it had already been settled under registered deeds in favour of three persons. The fact that a water tap was fitted by the P. H. E. D. was admitted but it was said that it was at a corner of the plot and the P. H. E. D. people did not and could not by installing the tap determine the nature of the land. The respondents also challenged the claim of the petitioners as settlees. Annexure '1' is not accepted as the correct plan. According to their case, the correct plan is Annexure 'A' to the counter-affidavit.

3. The respondents 4 and 5 were added as respondents as they are claiming their right to build on the disputed space.

4. Mr. Narayan Roy, appearing in support of the application, has contended that the petitioners are entitled to the relief claimed on the basis of the principle of promissory estoppel. He relied upon the decisions in *Union of India v. Anglo Afghan Agencies* (AIR 1968 SC 718) and *Motilal Padampat Sugar Mills Co. v. State of U. P.* (AIR 1979 SC 621).

5. So far as the respondents' challenge to the petitioners' right as settlees is concerned, I do not find sufficient support in favour of the respondents' case. Even if the plea against the petitioner No. 4 be assumed to be well founded, the writ application must be held to be maintainable at the instance of the other petitioners or at least on behalf of petitioners 2 and 3. But, as will be discussed below, the writ application has to be dismissed on merits itself.

6. The burden to prove that the area in dispute was reserved for other uses of the settlees including the petitioners is on the petitioners. They have not been able to produce any material to sustain their claim excepting the site plan (Annexure 1). Ignoring the denial of the respondents, I will assume in favour of the petitioners that Annexure '1' is the correct site plan. Mr. Narayan Roy argued that the description of the disputed area as 'reserved for other utility' establishes that the same was for common

use of the settlees of the flats. As in the case of the roads shown in the plan, the learned counsel argued, a presumption arises in favour of the petitioners. Apart from Annexure '1', Mr. Roy has not relied either on the prospectus or any other material. On the first impression the argument appeared to be convincing, but on a close scrutiny, it is not possible to uphold it.

7. Mr. Prabha Shanker Mishra, appearing for the respondents 4 and 5, emphasised the inherent difference between a road running through the colony and the open land. The right of passage of the residents to get out of the colony has necessarily to be presumed and, therefore, their right to use the roads cannot be denied. A similar presumption may be raised in favour of a park which must be presumed to be there for the use of the inhabitants. So far as the area in dispute is concerned, it is not possible to raise any presumption as the description is too vague and from its position in the plan, it is not possible to draw any inference. The petitioners have emphasised the words "other utility" for which it is indicated as reserved. Mr. Mishra said that it is not indicated that the description is connected with the utility of the settlees of the quarters. It is said that the beneficiary of the 'utility' is the Board itself of the general public and by permitting the respondents 4 and 5 to build thereon by getting a settlement of the open land, the purpose for which it was reserved has been allotted built up flats and so Mr. Roy suggested that settlement of land for erecting buildings by settlees is not in contemplation in regard to this colony. There is no support for such an assumption. On the other hand, in paragraph 6 of the writ petition itself, the settlement of house plots is mentioned apart from allotment of houses. There appears to be considerable force in the submission of Mr. Mishra. Even assuming that a final conclusion as to the nature of the utility for which the area was reserved is not possible to be reached, still the petitioners cannot succeed as they have failed to establish their case in this regard.

8. In the result, the writ application is dismissed, but without costs.

S. ROY, J.:— I agree with the order proposed.

Application dismissed.

AIR 1982 PATNA 238

(RANCHI BENCH)

SATYESHWAR ROY AND**UMESH CHANDRA SHARMA, JJ.**

Union of India, Appellant v. Narinder Singh Kanwar, Respondent.

A. F. O. O. Nos. 143 and 168 of 1977 (R),
D/- 23-12-1981.*

(A) Arbitration Act (10 of 1940), S. 30 — Award — Setting aside of — Arbitrator not required to give reasons for award under arbitration agreement — Order setting aside award for not giving reasons by arbitrator, cannot be sustained. (Para 4)

(B) Arbitration Act (10 of 1940), S. 30 — Award — Setting aside of — Invalidity of reference may be a ground for challenging the award. AIR 1957 Pat 417, AIR 1975 Pat 63, AIR 1981 NOC 68 (Pat), AIR 1960 Pat 201 and AIR 1969 Pat 114. Held not good law in view of AIR 1976 SC 1745. (Para 6)

(C) Arbitration Act (10 of 1940), Ss. 30, 20 — Arbitrator not referring all dispute under arbitration agreement — Award — Validity.

Where the person competent to refer the disputes to the arbitrator had not referred all the dispute among parties to the arbitrator as provided by the arbitration agreement and the respondent had not filed an objection to it under Section 20 and he accepted and participated in the proceeding and no objections were taken against it in the lower Court, the reference could not be said to be invalid and the award made in such case would not be invalid. (Para 9)

(D) Arbitration Act (10 of 1940), S. 30 — Award — Setting aside of — Misconduct of arbitrator — Arbitrator not deciding the dispute not referred to him in spite of request of party to arbitration agreement — Arbitrator cannot be said to have miscondacted himself in not deciding it. (Para 10)

Cases Referred: Chronological Paras

AIR 1981 NOC 68 : 1980 BBCJ (HC) 457	5
AIR 1976 SC 1745	6
AIR 1975 Pat 63	5
AIR 1969 Pat 114	5
AIR 1960 Pat 201	5
AIR 1957 Pat 417	5

* Against judgment and decree of Tarakeshwar Narain, 3rd Addl. Sub Judge, Dhanbad, D- 9-4-1977.

IZ/IZ/D913/82/VNP/MVJ

Debi Prasad, Sr. Standing Counsel and A. Sahay, Jr. Counsel to Standing Counsel, for Appellant; Kameshwar Prasad, Pradeep Kumar and Sunil Kumar, for Respondent.

SATYESHWAR ROY, J.:— The defendants are the appellants. On a reference made under an arbitration agreement, the arbitrator gave an award. After the award was filed in Court, the contractor filed an application under Section 30 of the Arbitration Act (the Act) for setting aside the award and the same was registered as Title Suit No. 11 of 1976. Union of India filed an application for making the award rule of the Court and that was registered as Title Suit No. 56 of 1975. By the impugned order the Court below has set aside the award. As two title suits arose out of the same award, Union of India have filed two appeals, Miscellaneous Appeal No. 168 of 1977 (R) arising out of Title Suit No. 11 of 1976 and Miscellaneous Appeal No. 143 of 1977 (R) arising out of Title Suit No. 56 of 1975.

2. Admitted facts are that the respondent and appellant entered into written agreement by and under which the former agreed to execute certain civil engineering works. There was clause for referring all disputes to sole arbitration of persons appointed by the Chief Engineer (C. E.) C. P. W. D. in charge of the work at the time of dispute. Disputes arose between the parties and by letter dated 15-11-1971 the contractor (respondent) submitted his claim and requested the C. E. to refer the same to arbitrator. The C. E. by letter dated 4-2-1972 referred some of the claims of the contractor and the claims of the department to the sole arbitrator of Shri M. D. Iyengar. By letter dated 5-7-1972 Shri Iyengar resigned from the case and the C. E. by letter dated 19/21-7-1972 appointed Shri B. S. Sekhon as the sole arbitrator. Shri Sekhon in his award held that the appellant was entitled to Rs. 68,453/- from the respondent. By the impugned order the Court below has set aside the award.

3. Three points were urged on behalf of the appellants in challenging the order:— (i) not giving any reasons by the arbitrator did not vitiate the award; (ii) objection regarding invalidity of reference cannot be subject-matter of an application under Section 30 of the Act; (iii) an award cannot be set aside under Section 30 of the Act on the ground that all claims of the respondent were not referred to arbitrator, particularly when the respondent took part in the arbitration proceeding without any objection.

4. With regard to point No. (i) it appears from the arbitration agreement that the arbitrators was not required to give reasons for his award. Mr. K. Prasad, learned counsel appearing on behalf of the respondent fairly conceded that the Court below could not have set aside award on this ground. We, therefore, hold that the order of the Court below in setting aside the award for not giving reasons by the arbitrator cannot be sustained.

5. On point No. (ii) it was submitted by Shri D. Prasad appearing on behalf of the appellants that for challenging the award on the ground of invalidity of reference, application under Section 30 of the Act was not maintainable. According to him the respondent ought to have filed the application under S. 33 of the Act. He urged that Court below, therefore, could not have set aside the award on the ground of invalidity of reference. Reliance was placed in *Basant Lal v. Surendra Prasad* (AIR 1957 Pat 417); *B. S. Co-op. Bank v. Phosphate Company* (AIR 1975 Pat 63) and *Ashlok Singh v. Jugeshwar Singh* (1980 BB-J (HC) 457) : (AIR 1981 NOC 68). In *Basant Lal's* case a Bench of this Court held that Section 30 of the Act speaks only of invalidity in making the award and invalidity of an arbitration reference is neither contemplated by nor included in the words of Sec. 30 (c) "or is otherwise invalid". In *B. S. Co-op. Bank's* case a Bench of this Court agreed with that interpretation of "or is otherwise invalid" and held that invalidity of reference can be subject matter of an application under S. 33 of the Act but not Section 30 of the Act. *Basant Lal's* case was again referred in *Ashlok Singh's* case and the Bench held that the words "or is otherwise invalid" do not include invalidity of reference. In *Deep Narain Singh v. Mt. Dhaneshwari* (AIR 1960 Pat 201) and *Bahadur Singh v. Fuleshwar Singh* (AIR 1969 Pat 114) also it was held that invalidity of reference cannot be challenged under S. 30 of the Act.

6. With respect, if I may say so, the law laid down in those cases on that point can no longer be held to be good law. In *Union of India v. Om Prakash* (AIR 1976 SC 1745) the Supreme Court interpreted the words "or is otherwise invalid" and held that the words "are wide enough to cover all forms of invalidity including invalidity of the reference". The cases of *Surendra Prasad*, *B. S. Co-op. Bank*, *Deep Narain Singh* and *Bahadur Singh* were decided be-

fore the case of Supreme Court. But unfortunately the Supreme Court case was not brought to the notice of the Bench hearing the case of *Ashlok Singh*. In view of the decision of the Supreme Court it must be held that under S. 30 of the Act, invalidity of reference may be a ground for challenging the award.

7. This leaves us with point No. (iii). It is admitted case that the respondent made a number of claims and requested for referring all the claims. The C. E. referred only some of the claims. It was submitted on behalf of the respondent that according to clause 25 of the agreement the C. E. was required only to appoint the arbitrator and he was not required to specify the claims which the arbitrator was required to go into. It was further submitted that the C. E. was bound to refer all claims of the respondent and he had no jurisdiction to withhold from reference some of the claims. On these two grounds it was urged that the reference was invalid and the Court below was correct in setting aside the award. The Court below has held that the C. E. had no option but to refer all the claims. Since the reference was in respect of part of the claims of the respondent, the reference was a nullity; consequently the award was liable to be set aside.

8. It is true that the C. E. referred part of the claims. Clause 25 of the agreement is in a very wide term. It provides that all disputes arising out of or relating to the contract, except where otherwise provided, shall be referred to arbitration by the C. E. It was urged on behalf of the respondent that since there was no provision in the agreement for settling the disputes not referred otherwise than by arbitration, the reference was a nullity. It was submitted on behalf of the appellant that reference of part of disputes will not make the reference invalid. To my mind invalidity of reference may arise out of invalidity in the agreement itself or invalidity in the arbitration clause of the agreement. Invalidity of reference may arise if the reference made was without jurisdiction or if made by a person not competent to do or if not to the person named in the arbitration clause. What I have stated above may not be exhaustive of cases where the reference may be held to be invalid. But in this case there is no dispute with the jurisdiction of the person, namely, the C. E. who had made the reference. Therefore, there is no question that the person who referred the disputes had jurisdic-

tion to do it. But it cannot be said that as the C. E. did not refer all disputes, the reference was without jurisdiction. Consequently, the reference in this case cannot be held to be invalid. When the respondent found that the C. E. had not referred some of the disputes, it was open to him to file an application under Sec. 20 of the Act for appropriate relief with regard to those disputes.

9. There is another difficulty for the respondent. He cannot be allowed to argue that the reference was invalid when he accepted it and participated in the proceeding. No objection in this regard was taken in the Court below. The Court below, therefore, was not called upon to decide an issue not raised by the parties. It was, therefore, not required to go into the question of invalidity of the reference. For all the reasons aforesaid the finding of the Court below that the reference was invalid, and consequently the award was bad cannot be sustained.

10. Mr. K. Prasad submitted that when the respondent had in his statement requested the arbitrator to decide the claim not re-

ferred to him, the arbitrator was bound to give its finding on the same. This according to him was a misconduct on the part of the arbitrator. It is true that in this statement the respondent had requested the arbitrator to decide that claim, but the arbitrator in his award did not decide it on the ground that the same had not been referred to him. In my opinion the arbitrator was correct in not deciding that claim. An arbitrator must act within the scope of his authority, he cannot go beyond the reference. It cannot, therefore, be held that the arbitrator misconducted himself in not deciding the dispute raised by the respondent before him, but not referred by the C. E.

11. For the reasons aforesaid the appeal is allowed, the order of the Court below is set aside and the award is made rule of the Court.

UMESH CHANDRA SHARMA, J.:— I agree.

Appeal allowed.

E N D

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PUNJAB AND HARYANA HIGH COURT

1982

CHIEF JUSTICE

The Hon'ble Mr. Justice S. S. Sandhawalia.

PUISNE JUDGES

The Hon'ble Mr. Justice Premchand Jain.

"	"	Satish Chander Mital.
"	"	Debi Singh Tewatia.
"	"	Mela Ram Sharma.
"	"	R. N. Mittal.
"	"	Ajit Singh Bains.
"	"	Kulwant Singh Tiwana.
"	"	Surinder Singh.
"	"	Satya Prakash Goyal.
"	"	Charan Singh Tiwana.
"	"	Jagmohan Lal Tandon.
"	"	Shanti Sarup Dewan.
"	"	J. V. Gupta.
"	"	S. S. Kang.
"	"	G. C. Mittal.
"	"	I. S. Tiwana.
"	"	M. M. Panchhi.
"	"	B. S. Yadav.
"	"	S. S. Sodhi (From 18-6-82).

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	" S. Dalip Singh Brar (Asst.).

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THE All India Reporter 1982

Punjab & Haryana High Court

**AIR 1982 PUNJAB AND HARYANA 1
FULL BENCH**

**S. S. SANDHAWALIA, C. J., B. S.
DHILLON AND J. V. GUPTA, JJ.**

Commissioner of Income-tax, Patiala, Ap-
plicant v. M/s. Patram Dass Raja Ram Beri,
Rehtak, Respondent.

Income Tax References Nos. 56 and 57
of 1976, D/- 28-7-1981.

**(A) Penal Code (45 of 1860), S. 52 —
Mens rea — Doctrine of — Ingredients —
Doctrine not applicable to crimes of abso-
lute liability and in economic offences etc.
(Words & Phrases — Mens rea).**

The doctrine of mens rea epitomised the twin premises of English criminal jurisprudence that in order to constitute a crime, there must be an actus rea accompanied by the requisite mens rea. A completed offence requires both a physical overt act as also a guilty state of mind. In crimes requiring mens rea as well as actus rea the physical act must be contemporaneous with the guilty mind, it is not enough that a mentally innocent act is subsequently followed by mens rea. The doctrine of mens rea, in essence, has application to the law of crimes and in its later day development is a rule of construction of criminal statutes. Even in the realm of criminal offences mens rea may be excluded either expressly or impliedly by legislative mandate. Classic example of such exclusions are sometimes in crimes of strict or absolute liability and in offences of economic or anti-social nature. (1798) 101 ER 1103; (1895) 1 QB 918; AIR 1951 SC

204; AIR 1965 SC 722 and AIR 1977 SC 2279, Rel. on. (Paras 12, 13)

**(B) Penal Code (45 of 1860), S. 52 —
Mens rea — Taxing statute — Imposition of
penalty — Coercive civil sanction in nature
— Mens rea not normally attracted. (Tax-
ing Statute — Mens rea — Applicability to
penalty proceedings).**

The doctrine of mens rea, which in es-
sence pertains to the realm of criminal law
would normally be not attracted to the im-
position of penalties in taxing statutes which
in essence are coercive civil sanctions and
remedies for the speedy collection of
revenue. (Para 19)

Penalty proceedings in a taxing statute
are civil proceedings of remedial or coercive
nature imposing an additional tax as a
sanction for the speedy collection of revenue.
Therefore, the imposition of penalty for a
tax delinquency cannot possibly be equated
with the conviction and sentence for a cri-
minal offence. Penalty proceedings in a
taxing statute are, in essence, of a civil
nature, and therefore the doctrine of mens
rea, which is essentially applicable in the
arena of crimes alone cannot be possibly
attracted to such proceedings and in any
case should not be easily invoked in a field
altogether different. Penalty proceedings of
a civil nature for a tax delinquency and
punishment for a crime *stricto sensu* are
things poles apart, bringing considerations
which are applicable basically as the essen-
tial ingredients of an offence, or as a rule
of construction of criminal statutes, into
the field of penalty proceedings in a taxing
statute, which in essence are a coercive civil
sanction for the speedy collection of revenue

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would thus on larger principles be wholly unwarranted. (1942) 317 US 492; AIR 1961 SC 609; (1967) 64 ITR 669 (Ker) and (1977) 107 ITR 832 (Andh Pra), Rel. on.

(Paras 17, 18)

(C) Income-tax Act (43 of 1961), S. 271 (1) (a) (i) — Penalty proceedings under Cl. (a) of S. 271 (1) (i) — Doctrine of mens rea not attracted — Only requirement for imposing penalty is presence or absence of reasonable cause. 1979 Tax LR 211 (Guj) (FB); (1980) 125 ITR 436 (Gau); 1974 Tax LR 437 (Mys) and (1979) 120 ITR 65 (Raj), Dissented from. (i) Interpretation of Statutes — Taxing statutes; (ii) Taxing Statute — Mens rea — Applicability; (iii) Penal Code (1860), S. 52; Words and Phrases — Mens rea).

The doctrine of mens rea is not attracted to the penalty proceedings within the four corners of S. 271 (1) (a). The only requirement of the statute thereunder is the presence or absence of reasonable cause for the tax delinquency and no other. Therefore, inducing the requirements of a deliberate defiance of law, or contumacious conduct, or dishonest intention, or acting in conscious disregard of the statutory obligations, is unwarranted under S. 271 (1) (a). 1979 Tax LR 211 (Guj) (FB); (1980) 125 ITR 436 (Gau); 1974 Tax LR 437 (Mys) and (1979) 120 ITR 65 (Raj), Dissented from.

(Para 39)

The basic question whether mens rea is attracted in penalty proceedings under Cl. (a) of Sec. 271 (1) can be truly answered only when viewed against the larger perspective of the scheme and the provisions of the I. T. Act, 1961. It is manifest that the Act first prescribes the duty of filing the Income-tax return within the prescribed time and then postulates three distinct sanctions for the enforcement of that statutory obligation. These are, by levying interest under S. 139, by imposing penalty if the delay has been occasioned without reasonable cause under Section 271 (1) (a), and by convicting and sentencing the assessee by treating such failure to file the returns as an offence, if it was proved that this was wilful. These are three distinct and varying degrees of non-filing of returns or doing so beyond the prescribed time and the statute clearly keeps up the distinctions at all stages, between the three modes. While the legislature has been content by imposing only a financial penalty on reaching satisfaction as to the absence of reasonable cause, it has prescribed the presence of wilful failure to furnish returns in due time to make it an offence punish-

able with a minimum imprisonment added with fine. Equally significant is the distinction between the word 'penalty' as contemplated by S. 271 (1) (a) and the stringent punishment provided by S. 276-CC. Reference to S. 271 (1) (a) (i) would indicate that the legislature itself viewed this 'penalty' as an addition to the amount of tax, if any, payable by the assessee and same is calculated in relation to the amount of the assessed tax. It would be thus obvious that the penalty imposed here is in a way related to tax and is part of the assessment proceedings. Now what is imposed under Section 276-CC is altogether different in nature. The proceedings therein are neither part of the assessment proceedings nor are they directly proportionate to the amount of tax leviable. The offender under Cls. (i) and (ii) thereof can be visited with rigorous imprisonment which may extend to seven years or three years respectively with an addition of fine as well. The difference which the statute maintains between the penalty leviable under S. 271 (1) (a) and the punishment imposable under S. 276-CC is demonstratively patent. Whilst for levying penalty, absence of reasonable cause has to be shown for imposing punishment, wilful failure has to be established and as a settled canon of criminal law, the burden to do so rests on the prosecution. Wilfulness certainly brings in the element of guilty mind and thus the requirement of a mens rea but the presence or absence of reasonable cause can be something wholly objective and/or removed therefrom. Thus from the provisions of the Act itself, it irresistibly emerges that the element of mens rea is made an ingredient for the offence under S. 276-CC of the Act and not for the mere penalty proceedings under S. 271 (1) (a). Case law discussed.

(Paras 28, 30, 33, 37, 38)

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D. N. Awasthy with E. K. Jhingan, for Applicant; S. S. Mahajan, for Respondent.

S. S. SANDHAWALIA, C. J.:— A sharp cleavage of judicial opinion on the spinal issue — whether the doctrine of *actus non facit reum nisi mens sit rea*, is attracted to the penalty proceedings strictly within the four corners of S. 271 (1) (a) of the Income-tax Act, 1961 — has necessitated this reference to the Full Bench.*

2. The factual matrix is brief. The respondent-assessee was a partnership firm. A notice under S. 22 (2) of the Indian Income-tax Act, 1922, was served on the assessee for the assessment year 1961-62. In compliance therewith the return was furnished by the assessee on 15-6-1962, though the due date therefor was 23-6-1961. Admittedly, there was thus a delay of a little more than eleven months in filing the return.

* (Order of reference by Division Bench now reported as (1981) 10 Tax Law Rev 193 (P & H) Ed.)

The Income-tax Officer consequently initiated penalty proceedings against the assessee for the late furnishing of the return.

3. The assessee-firm duly furnished a written explanation and one of the contentions raised on its behalf was that the said firm, as also the partners thereof, individually has paid not only the advance tax as due under Sec. 18-A of the Indian Income-tax Act, 1922 but also the tax that fell due on the completion of the provisional assessment under S. 23-B thereof. The Income-tax Officer rejected the explanation and came to the conclusion that there was no reasonable cause for the delay in filing the return and consequently a penalty of Rs. 63,602/- was imposed by him under S. 271 (1) (a) of the Indian Income-tax Act, 1961 which by that time had come into force and is hereafter called 'the Act'.

4. The assessee then preferred an appeal before the Appellate Assistant Commissioner. He also took the view that delay of eleven months in filing the return was without reasonable cause and therefore, the penalty under Sec. 271 (1) (a) of the Act, was exigible. However, he reduced the penalty by Rs. 6,358/- because the assessee had paid before the date of assessment Rs. 23,590/- under Sec. 23-B of the Income-tax Act, 1922 and Rs. 5,323/- had been paid by way of tax deducted at source and these two payments had not been taken into account by the Income-tax Officer for working out the amount of tax that would have been payable by the assessee-firm treating it as an unregistered firm.

5. Apparently dissatisfied with the small reduction in the quantum of penalty, the assessee then preferred the second appeal before the Income-tax Appellate Tribunal, Chandigarh. On his behalf the issue was pointedly raised that because no finding of existence of any *mens rea* had been recorded against the assessee, therefore, the order imposing penalty was bad in law. It was also urged that the assessee had a reasonable cause for not filing the returns within the prescribed time and lastly, no tax was payable by the assessee-firm and therefore, no question of levying any penalty could arise.

6. The Tribunal came to the conclusion that since factually no tax was payable by the assessee and indeed on the other hand, some refund was actually due to it, no penalty would be exigible in this case. However, with regard to the reasonable cause sought to be shown on behalf of the

assessee for the delayed filing of the returns, the Tribunal rejected the same and declined to entertain an altogether a fresh plea by the assessee that they were misled by their Income-tax Advisors in the matter of not filing the returns for the two assessment years simultaneously, because this ground was new and would involve an investigation into fresh facts.

7. On the crucial issue of the existence or otherwise of a mens rea on the part of the assessee, the Tribunal concluded as follows:

"The said observation to our mind suggests that the payment of tax by the partners on their share income is a relevant consideration to determine the question of levy of penalty under Sec. 271 (1) (a). In these circumstances, we are inclined to agree with the assessee that there was on its part no contumacious or deliberate disregard of its statutory obligation."

On the aforesaid findings, the Tribunal held that no penalty under S. 271 (1) (a) of the Act was exigible and allowed the assessee's appeal.

8. The Commissioner of Income-tax then applied for a reference of the questions of law arising from the appellate order. The Tribunal, in stating the case, referred the following two questions for the opinion of the High Court:

(1) Whether, on the facts of the case, the Tribunal was right, in law, in holding that the penalty leviable under Sec. 271 (1) (a) of the Income-tax Act, 1961 had to be worked out with reference to the tax that remained payable by the assessee after being allowed credit for the tax paid under Section 23-B of the Indian Income-tax Act, 1922?

(2) Whether, on the facts and in the circumstances of the case, while holding that the assessee-firm had no reasonable cause for not filing the return in time, the Appellate Tribunal was right, in law, in holding that penalty under S. 271 (1) (a) of Income-tax Act, 1961 was not exigible?

9. When the matter came up before the Division Bench*, a number of judgments holding that the doctrine of mens rea was equally attracted to the tax field even under Section 271 (1) (a) of the Act were relied upon with regard to question No. 2 aforesaid. A firm stand to the contrary was taken on behalf of the revenue. The Division Bench noticed the head-long conflict

of judicial opinion on the point and also observed that the same was one of substantial importance and was likely to arise in a large number of cases. It has, therefore, referred the larger question — whether mens rea is one of the relevant considerations for the levy of penalty under S. 271 (1) (a) of the Act or not — for decision by a larger Bench and that is how the matter is before us.

10. As has been said at the outset, it is even more manifest from the reference order, there undoubtedly exist a sharp divergence of judicial opinion on the basic issue before us. Therefore, before one inevitably enters the thicket of the case law — and it is indeed a deep one — it becomes apt and indeed necessary to examine the issue on larger principle and with regard to both the scheme and the particular language of the statutory provisions.

11. Now the maxim *actus non facit reum nisi mens sit rea* is rooted in the antiquity of English legal history. However, for our purposes, it is unnecessary to delve into its remote origins and it suffices to mention that the requirement of a guilty state of mind at least for the more serious crimes had come to be developed even by the time of Coke, which indeed is as far back as the modern lawyer need go. In his institutes, Coke categorically states the law as follows:

"..... If one shoot at any wild fowl upon a tree, and the arrow killeth any reasonable creature afar off, without any evil intent in him, this is per infortunium."

12. It would thus appear that even from the time of Coke onwards, it was well-settled that the doctrine of mens rea epitomised the twin premise of English criminal jurisprudence that in order to constitute a crime, there must be an *actus rea* accompanied by the requisite mens rea. To put it in simple language, a completed offence requires both physical overt act as also a guilty state of mind. In crimes, requiring mens rea as well as *actus rea*, the physical act must be contemporaneous with the guilty mind, it is not enough that a mentally innocent act is subsequently followed by mens rea. To put it in the classic words of Lord Kenyon, C. J. in *Fowler v. Pedit*, (1798) 101 ER 1103 at p. 1106, "The intent and the act must both concur to constitute the crime".

13. Now it is well-settled that the maxim and the doctrine of mens rea, in its pristine essence was one of criminal law applicable to the common law offences originally.

*[Since reported as (1981) 10 Tax Law Rev 193 (P & H) — Ed.]

However, later it came to have its application as a rule of construction in interpreting statutory crimes as well. Herein it signifies the rule that a guilty mind was an essential ingredient of a crime and if there was a conflict between the common law and the statute law, it was held to be a sound rule to construe the criminal statute in conformity with the common law. However, this presumption of a guilty mind to constitute a crime in statutory offences was neither inflexible nor irrebuttable. Even in the strict realm of crimes this presumption of a guilty mind could be displaced by the language of the statute expressly or by its necessary intendment. This principle is well highlighted in the oft quoted words of Lord Wright in the celebrated case of *Sherras v. De Rutzen*, (1895) 1 QB 918, as under :

"There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence, but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered."

The aforesaid view has the stamp of approval by, their Lordships of the Supreme Court in *Ravula Hariprasada Rao v. State*, AIR 1951 SC 204, and *State of Maharashtra v. M. H. George*, AIR 1965 SC 722. However, the more meaningful authoritative enunciation in this context is that by Krishna Iyer, J. in *R. S. Joshi v. Ajit Mills Ltd.*, AIR 1977 SC 2279, in the following terms (at pp. 2287, 2288) :

"..... Even here we may reject the notion that a penalty or a punishment cannot be cast in the form of an absolute or no-fault liability but must be preceded by mens rea. The classical view that 'no mens rea, no crime' has long ago been eroded and "several laws in India and abroad, especially regarding economic crimes and departmental penalties, have created severe punishments even where the offences have been defined to exclude mens rea. Therefore, the contention that Sec. 37 (1) fastens a heavy liability regardless of fault has no force in depriving the forfeiture of the character of penalty."

It would thus be plain that the doctrine of mens rea, in essence, has application to the law of crimes and in its later day development is a rule of construction of criminal statutes. Even in the realm of criminal offences mens rea may be excluded either expressly or impliedly by legislative mandate. Classic examples of such exclusions are

sometimes in crimes of strict or absolute liability and as has been noticed above by Krishna Iyer, J. in offences of economic or anti-social nature.

14. Having seen that mens rea is in essence a doctrine pertaining to the criminal law, it becomes vital to determine the precise nature of the penalty proceedings in a taxing statute. Can they be termed as necessarily criminal proceedings or are they civil obligations of a coercive and remedial nature? Is it possible to infer simply from the word 'penalty' used in the statute that these proceedings are either offences per se or analogous thereto? It is common place to say that when a statute provides for imposition of penalty, it will have to be found out from the scheme of the Act and the particular provision under which a penalty has been imposed whether it is necessarily a punishment for an offence or a civil liability imposed as a sanction for the collection of revenue. The obvious purpose of a taxation statute is to collect revenue and invariably they take great care in making provisions for the collection of taxes as speedily as possible. Indeed tax arrears are the bane of public revenue which it is the concern of the legislature to remedy.

15. It appears to me that it will be rather wasteful to elaborate on the issue of the nature of penalty proceedings in a taxing statute, on principle, because it seems to be well-settled by authority. In *Corpus Juris Secundum*, Vol. 85 at page 580, the legal position is authoritatively stated thus :

"A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws; and; that the penalty becomes, by operation of the statute imposing it, a part and parcel of the taxes due, and in other jurisdictions penalties are a type of tax. In still other jurisdictions, however, it is held that the penalty is not a part of the tax, and that will not be regarded as a legal incident to a tax. It is merely a method of enforcing payment of the tax."

This issue came up for pointed consideration before the Supreme Court of the United States in *Murray R. Spies v. United States*, (1942) 317 US 492 at p. 495, and it was held as follows :

"The penalties imposed by Congress to enforce the tax laws embrace both civil and criminal sanctions. The former consist

of additions to the tax upon determination of fact made by an administrative agency and with no burden on the Government to prove its case beyond a reasonable doubt. The latter consist of penal offences enforced by the criminal process in the familiar manner. Invocation of one does not exclude resort to the other The failure in a duty to make a timely return unless it is shown that such failure is due to reasonable cause and not due to wilful neglect, is punishable by an addition to the tax of 5 to 25 per cent, thereof depending on the duration of the default The offence may be more grievous than a case for civil penalty. Hence, the wilful failure to make a return, keep records, or supply information when required, is made a misdemeanour, with regard to existence of a tax liability."

Now it appears that the identical view has been taken by their Lordships of the Supreme Court themselves in *C. A. Abraham v. Income-tax Officer, Kottayam*, (1961) 41 ITR 425 : (AIR 1961 SC 609). Shah, J. speaking for the Court observed as follows (at p. 612):

"..... By Section 28, the liability to pay additional tax which is designated penalty is imposed in view of the dishonest contumacious conduct of the assessee. It is true that this liability arises only if the Income-tax Officer is satisfied about the existence of the conditions which give him jurisdiction and the quantum thereof depends upon the circumstances of the case. The penalty is not uniform and its imposition depends upon the exercise of discretion by the taxing authority; but it is imposed as a part of the machinery for assessment of tax liability"

It appears plain from the above that their Lordships have viewed penalty only as a liability to pay an additional tax and penalty proceedings have been construed equally as part of the machinery for the assessment of tax liability.

16. Having a more direct bearing on the point are the following observations of Mathew, J. in *P. Ummali Umma v. Inspecting Asstt. Commr. of Income-tax*, (1967) 64 ITR 669 :—

"No conviction for any offence is involved in the imposition of a penalty. Article 20 (1) of the Constitution will have application only when a person is subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. This would indicate that commission

of an offence and a conviction thereof are necessary in order that the provisions of the article may be attracted A penalty, therefore, would come within the purview of Art. 20 (1) only if the earlier part of the clause is attracted, i.e., there must have been a conviction for an offence. Unless there is a conviction, no question of the latter part of the article applying will arise The imposition of penalty on the basis of an act or omission by an assessee is not because the act or omission constitutes an offence, but because that act or omission would constitute an attempt at evasion. Therefore, penalty is exacted not because an act or omission is an offence but because it is an attempt at evasion of tax on the part of the assessee"

Similar view has again been expressed by the Division Bench in *Commissioner of Income-tax, Andh. Pra. v. Maduri Rajeshwar*, (1977) 107 ITR 832 (Andh Pra.).

17. In view of the aforesaid authoritative enunciations, it is unnecessary to elaborate the matter further and it would be evident that generally penalty proceedings in a taxing statute are civil proceedings of remedial or coercive nature imposing an additional tax as a sanction for the speedy collection of revenue. Therefore, the imposition of penalty for a tax delinquency cannot possibly be equated with the conviction and sentence for a criminal offence.

18. Once it is found that penalty proceedings in a taxing statute are, in essence, of a civil nature, it would follow that the doctrine of mens rea, which is essentially applicable in the arena of crimes alone cannot be possibly attracted to such proceedings and in any case should not be easily invoked in a field altogether different. Penalty proceedings of a civil nature for a tax delinquency and punishment for a crime *stricto sensu* are things poles apart. Bringing considerations which are applicable basically as the essential ingredients of an offence, or as a rule of construction of criminal statutes, into the field of penalty proceedings in a taxing statute, which in essence are a coercive civil sanction for the speedy collection of revenue would thus on larger principles be wholly unwarranted. If authority was needed for this plain proposition, it is directly available in the following observations of the Supreme Court of United States in *Guy T. Helvering v. Charles E. Mitchell*, (1937) 303 US 391 :

"Where civil procedure is prescribed for the enforcement of remedial sanction, the accepted rules and constitutional guarantees

governing the trial of criminal prosecutions do not apply."

19. We have so far viewed the matter against a larger canvas to conclude that the doctrine of mens rea, which in essence pertains to the realm of criminal law would normally be not attracted to the imposition of penalties in taxing statutes which in essence are coercive civil sanctions and remedies for the speedy collection of revenue. With this background, one may now turn to the relevant provisions of the Income-tax Act, 1961 with regard to the non-filing or the delayed furnishing of income-tax returns. However, at the very outset, a note of caution may be sounded to highlight the fact that we propose to confine ourselves only to the issue of such penalty as is provided under Sec. 271 (1) (a). We would wish to make it crystal clear that it is not our intent here to dilate on the imposition of penalties generally in abstract or even specifically in the other sub-sections of Section 271 itself. Indeed it is evident that even under Cl. (c) of sub-section (1) of Section 271, different considerations might well apply because it deals with concealment of income or furnishing inaccurate particulars thereof. It appears to us that any abstract generalization of penalty proceedings is a wasteful attempt at over-simplification of a complicated issue which in view of the varying language of the statutes cannot but be an exercise in futility. To reiterate, we confine ourselves strictly to the four concerns of S. 271 (1) (a) (i) of the Act.

20. Now, the question posed before this Full Bench has been rightly formulated in erudite language but when focussed specifically on S. 271 (1) (a) in particular terms, the core of the matter is whether consummation of conduct, dishonest intention, deliberate defiance of law or acting in conscious disregard of the statutory obligation with regard to the furnishing of income-tax returns, are jointly or severally the necessary mental pre-requisites before penalty under this section can be levelled for a tax delinquency. It is to this pointed issue that we now propose to address ourselves.

21. The larger argument on behalf of the revenue ably projected by Mr. D. N. Awasthy and which appears to us as having patent merit is that the scheme of the Act visualised three distinct kinds of sanctions against any infraction of its provisions with regard to the non-filing or the delayed filing of income-tax returns. The first amongst these is spelt out by the rel-

evant provisions of Sec. 139 which may be read at the very outset:

"139. Return of Income.

(1) Every person, if his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax, shall furnish a return of his income or the income of such other person during the previous year in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed:

(a) In the case of every person whose total income, or the total income of any other person in respect of which he is assessable under this Act, includes any income from business or profession, before the expiry of four months from the end of the previous year or where there is more than one previous year, from the end of the previous year which expired last before the commencement of the assessment year, or before the 30th day of June of the assessment year whichever is later;

(b) in the case of every other person, before the 30th of June of the assessment year "provided that, on an application made in the prescribed manner, the Income-tax Officer may, in his discretion, extend the date for furnishing the return and notwithstanding that the date is so extended, interest shall be chargeable in accordance with the provisions of sub-section (8)."

... ..

(8) (a). Where the return under sub-section (1) or sub-section (2) or, sub-section (4) for an assessment year is furnished after the specified date, or is not furnished, then whether or not the Income-tax Officer has extended the date for furnishing the return under sub-section (1) or sub-section (2), the assessee shall be liable to pay simple interest at twelve per cent, per annum, reckoned from the day immediately following the specified date to the date of the furnishing of the return or, where no return has been furnished, the date of completion of the assessment under Sec. 144, on the amount of the tax payable on the total income as determined on regular assessment, as reduced by the advance tax, if any, paid, and any tax deducted at source;

Provided that the Income-tax Officer may, in such cases and under such circumstances as may be prescribed, reduced or waive the interest payable by any assessee under this sub-section.

Explanation 1.— For the purposes of this sub-section, "specified date", in relation to a return for an assessment year, means —

"(a) In the case of every assessee whose total income, or the total income of any person in respect of which he is assessable under this Act, includes any income from business or profession, the date of the expiry of four months from the end of the previous year or where there is more than one previous year, from the end of the previous year which expired last before the commencement of the assessment year, or the 30th day of June of the assessment year, whichever is later.

(b) In the case of every other assessee, the 30th day of June of the assessment year." Now the bare reading of the above-quoted provisions (without entering into the intricacies of the other sub-sections makes it plain that the law obliges the furnishing of the requisite income-tax returns on the assessee who come within its ambit and prescribes the date and time within which they are to be filed. Any introduction of this obligation is just provided for by sub-section (8). This sanction appears to be at the lowest pedestal and involves a liability to pay interest in the case of either non-filing or the delayed furnishing of income-tax returns. In a way, it is merely a commercial equivalent for the delayed payment of revenue which may well ensure as a necessary consequence of the delayed or non-filing of returns by a delinquent assessee. Reference in this connection may also be made to the statutory rules framed in this context and in particular to R. 117-A. These statutory rules again refer to and provide for the liability to pay interest in the contingency spelt out therein.

22. Proceeding further, it would appear that at a higher level than the liability to pay the commercial equivalent for the possibility of the loss to the public revenue, for the delayed or non-furnishing of income-tax return (under S. 139 and the relevant rules), are the provisions of penalties imposable under S. 271 (1) (a) of the Act which is contained in Chap. 21. The heading of the chapter is itself meaningful and is "Penalties imposable". This is in sharp contrast with the succeeding Chap. 22 which is titled as "Offence and Prosecutions". Before advertising to the relevant provisions in this latter chapter, it is necessary to quote in extenso the relevant provisions of S. 271 around which basically the whole controversy revolves:

"271. Failure to furnish returns, comply with notices, concealment of income, etc.

(1) If the Income-tax Officer or the Appellate Assistant Commissioner or the Commissioner (Appeals) in the course of any proceedings under this Act, is satisfied that any person —

(a) has without reasonable cause failed to furnish the return of total income which he was required to furnish under sub-sec. (1) of Sec. 139 or by notice given under sub-section (2) of S. 139 or Section 148 or has without reasonable cause failed to furnish it within the time allowed and in the manner required by sub-section (1) of S. 139 or by such notice, as the case may be, or

(b) has without reasonable cause failed to comply with a notice under sub-section (1) of S. 142 or sub-section (2) of S. 143, or fails to comply with a direction issued under sub-section (2A) of S. 142, or

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income, he may direct that such person shall pay by way of penalty,—

(i) in the cases referred to in Cl. (a),—

(a) in the case of a person referred to in sub-section (4A) of Section 139, where the total income in respect of which he is assessable as a representative assessee does not exceed the maximum amount which is not chargeable to income-tax, a sum not exceeding one per cent of the total income computed under this Act without giving effect to the provisions of Sections 11 and 12, for each year or part thereof during which the default continued;

(b) in any other case, in addition to the amount of the tax, if any, payable by him, a sum equal to two per cent of the assessed tax for every month during which the default continued.

Explanation.— In this clause, "assessed tax" means tax as reduced by the sum, if any, deducted at source under Chapter XVIIIB or paid in advance under Chapter XVIIC;

(ii) in the cases referred to in Clause (b), in addition to any tax payable by him, a sum which shall not be less than ten per cent but which shall not exceed fifty per cent of the amount of the tax, if any, which would have been avoided if the income returned by such person had been accepted as the correct income;

(iii) in the cases referred to in Cl. (c), in addition to any tax payable by him, a sum which shall not be less than, but which shall not exceed twice, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or the furnishing of inaccurate particulars of such income;

Provided that, if in a case falling under Cl. (c), the amount of income (as determined by the ITO on assessment) in respect of which the particulars have been concealed or inaccurate particulars have been furnished exceeds a sum of twenty-five thousand rupees, the ITO shall not issue any direction for payment by way of penalty without the previous approval of the IAC.

Explanation 1: xx xx xx"

23. Without attempting any close analysis of the aforesaid provision, at this stage, the heading of Section 271 itself calls for significant notice. This itself classifies the subjects with which it deals into (i) failure to furnish returns; (ii) failure to comply with notice, and (iii) concealment of income etc. Therefrom, it is manifest that Section 271 seeks to deal with three distinct situations and because some incidental matters are also included in the section, the word "etc." has been added at the end of its heading as well. Proceeding further it is equally manifest that the aforesaid three situations are then separately and distinctly provided for in Cls. (a), (b) and (c) of sub-section (1) of Section 271 of the Act. Thus even though the three varieties of the cases mentioned above are grouped together the section treats each one of them separately and distinctly. The language used for the relevant clauses is diverse and whilst the words 'without reasonable cause' occur in Clauses (a) and (b), they are conspicuous by their absence in Cl. (c). Furthermore, the three categories of delinquency in these clauses are separately dealt with. Consequently, sub-clause (i), which refers to the tax delinquency mentioned in Clause (a) provides for the least burdensome penalties. Sub-clause (ii) which refers to those in Clause (b) imposes a little heavier penalties whilst sub-clause (iii) which refers to cases in Clause (c) provides the highest penalties. Had the intention been to treat all these delinquencies equally, there was obviously no need for Parliament to prescribe these three varying degrees of penalties. It, therefore, follows identical considerations cannot and do not apply to Clauses (a), (b) and (c) of Section 271 (1) of the Act.

24. The aforesaid view receives further strength from the fact that sub-clause (i) has its own Explanation giving a distinct meaning to the words "assessed tax" used therein. It cannot be possibly postulated that the application of this Explanation can be extended to the other clauses as well. On parity of reasoning and also for other considerations which are too manifest to call for elaboration, it appears to be plain that the Explana-

tion to sub-clause (iii) would be limited in its scope only to the cases which come under Clause (c) alone, which finds specific mention therein. This Explanation, in our view, has no relevance whatsoever to Clause (a) of Section 271 (1).

25. Lastly it may be mentioned that some attempt to invoke the provisions of the earlier sub-section (4A) also in this context was made on behalf of the respondent-assessee. However, in view of the fact that sub-section (4A) and sub-section (4B) have been omitted by the Taxation Laws (Amendment) Act, 1975 with effect from 1-10-1975, it is now wholly unnecessary to advert thereto.

25A. Even from the aforesaid bird's eye view of the statutory provision, it is manifest that Section 271 (1) (a) read with sub-cl. (i) is separate and distinct from its other clauses and as said earlier, we intend to focus ourselves entirely therein. A reading of this provision would show that what is provided herein is a civil sanction far above the mere liability to pay interest as a commercial equivalent of delayed and non-filing of returns as stands earlier provided under Section 139 (8) of the Act. The differences between the mere imposition of the interest under S. 139 and the imposition of penalty under Section 271 (1) (a), are patent. The later provision goes a step further and deals with a somewhat graver situation. A penalty as provided in Clause (1) may be imposed only when the ITO or the AAC is satisfied that the delay has occurred without reasonable cause. The quantum of the penalty is heavier than the interest that is collectable under Section 139 (8). Under Section 271 (1) (a), both a power and discretion is vested in the authority to impose a heavy penalty by way of additional tax though the broad and the basic guidelines for its imposition are themselves spelt out by the statute.

26. Now, the last and the highest sanction provided by the Act for the non-filing or the delayed furnishing for the return has been spelt out under Section 276-CC of the Act. Only to highlight, it bears repetition that this section falls in Chapter 22, the very heading whereof indicates that it relates to offences and prosecutions. As a matter of legislative history, it may be noticed that Section 276-CC was substituted for the earlier Section 276-C by the Taxation Laws (Amendment) Act, 1975 with effect from 1-10-1975. Its stringent provisions deserve notice in extenso:

"Failure to furnish returns of income.

If a person wilfully fails to furnish in due time the return of income which he is re-

quired to furnish under sub-section (1) of Section 139 or by notice given under sub-section (2) of Section 139 or Section 148, he shall be punishable,—

(i) in a case where the amount of tax, which would have been evaded if the failure had not been discovered, exceeds one hundred thousand rupees, with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine :

(ii) in any other case, with imprisonment for a term which shall not be less than three months but which may extend to three years and with fine :

Provided that a person shall not be proceeded against under this section for failure to furnish in due time the return of income under sub-section (1) of Section 139."

It seems plain from the aforesaid provisions that herein the wilful failure to furnish returns of Income-tax is made a serious crime which, in its aggravated form is punishable with the minimum sentence of six months rigorous imprisonment which may extend to seven years and in any other case again with a minimum sentence of three months extending up to three years with fine. In this context, it deserves recalling that originally the word "wilfully" did not find place in the predecessor Section 276-C of the Act. It was only after the Joint Select Committee had forcefully opined that "in accordance with the accepted canons of criminal jurisprudence, failure to furnish return or produce documents etc. should be made punishable only when such failure is wilful", that the word 'wilful' was introduced in Section 276-C with effect from 1-4-1971 by Act No. 42 of 1970. It would thus be plain that the insertion of the word 'wilful' had been deliberately made to incorporate into this statutory offence, a clear requirement of guilty mind or mens rea. When Section 276-C came to be substituted by the present Section 276-CC, the same mens rea was incorporated in the successor provision as well.

27. Now it is against the aforesaid larger perspective of the basic scheme of the Income-tax Act, 1961 for providing three distinct sanctions for the non-filing or delayed filing of returns that Mr. D. N. Awasthy's contention on behalf of the revenue is to be tested. He had plausibly and forcefully contended that the doctrine of mens rea, which essentially is one from the realm of criminal law can be strictly and directly attracted only in the last and the highest sanction provided by Section 276-CC of the Act, which creates a

statutory offence for this tax delinquency. Herein, both because the legislature has chosen to make it a crime and also because in its wisdom, it has introduced the mental element of wilfulness in the section itself, a guilty state of mind, or to put it technically, mens rea is an essential ingredient of the offence under the aforesaid section. However, as regards the earlier two sanctions under Section 139 and Section 271 (1) (a), these are neither crimes stricto sensu nor has the legislature chosen to prescribe any mental element either identical or analogous to wilfulness in those provisions. The word 'wilfulness' or anything equivalent thereto is conspicuous by its absence in Section 271 (1) (a) of the Act. Therefore, firstly to invoke a doctrine derived entirely from the realm of criminal law into a provision for imposing penalties by way of civil and coercive sanctions would be unwarranted and secondly, to thrust an element of wilfulness or contumacious conduct in the same provision when the legislature has not employed any such word, (in sharp contrast to Section 276CC) would be patently doing violence to the plain language of the statute. It was submitted that to introduce the requirement of wilfulness, contumacious conduct, or dishonest intention, in Section 271 (1) (a), merely by a process of interpretation, when the legislature itself has advisedly avoided the use of any such terminology therein, would be an obvious infraction of the sound canons of interpretation. We find these submissions on behalf of the Revenue, to be patently meritorious.

28. We take the view that the basic issue before us can be truly answered only when viewed against the larger perspective of the scheme and the provisions of the Income-tax Act, 1961. It is manifest that the Act first prescribes the duty of filing the Income-tax return within the prescribed time and then postulates three distinct sanctions for the enforcement of that statutory obligation. These are, by levying interest under S. 139 by imposing penalty, if the delay has been occasioned without reasonable cause under Section 271 (1) (a), and by convicting and sentencing the assessee by treating such failure to file the returns as an offence, if it was proved that this was wilful. There are three distinct and varying degrees of non-filing of returns or doing so beyond the prescribed time and the statute clearly keeps up the distinctions at all stages, between the three modes. While the legislature has been content by imposing only a financial penalty on reaching satisfaction as to the absence of re-

asonable cause, it has prescribed the presence of wilful failure to furnish returns in due time to make it an offence punishable with a minimum imprisonment added with fine. Equally significant is the distinction between the word 'penalty' as contemplated by S. 271 (1) (a) and the stringent punishments provided by S. 276-CC. Reference to S. 271 (1) (a) (i) of the Act would indicate that the legislature itself viewed this 'penalty' as an addition to the amount of tax, if any, payable by the assessee and same is calculated in relation to the amount of the assessed tax. It would be thus obvious that the penalty imposed here is in a way related to tax and as was authoritatively said in C. A. Abraham's case (AIR 1961 SC 609) (supra) is part of the assessment proceedings. "Now what is imposed under Section 276-CC of the Act is altogether different in nature. The proceedings therein are neither part of the assessment proceedings nor are they directly proportionate to the amount of tax leviable. The offender under Clauses (i) and (ii) thereof can be visited with rigorous imprisonment which may extend to seven years or three years respectively with an addition of fine as well. It seems unnecessary to elaborate the point because the difference which the statute maintains between the penalty leviable under Section 271 (1) (a) and the punishment imposed under Section 276-CC of the Act, is demonstratively patent. Whilst for levying penalty, absence of reasonable cause has to be shown for imposing punishment, wilful failure has to be established and as a settled canon of criminal law, the burden to do so rests on the prosecution. Wilfulness certainly brings in the element of guilty mind and thus the requirement of a mens rea. But the presence or absence of reasonable cause can be something wholly objective and far removed therefrom. Thus from the provisions of the Act itself, it irresistibly emerges that the element of mens rea is made an ingredient for the offence under Section 276-CC of the Act and not for the mere penalty proceedings under Section 271 (1) (a).

29. Concluding the aforesaid discussion in the light of the larger principle, its legislative history, the broad scheme of the Act, and its specific provisions, the stage is now set for the consideration of the mass of precedent on the point. As has been repeatedly noticed, there undoubtedly exists a headlong conflict of judicial opinion in the various High Courts, but before adverting thereto it becomes necessary to notice a trilogy of Supreme Court cases which by way of analogy appear to be the sheet-anchor for the con-

trary view. It would appear that the fountain head for inducing the requirement of mens rea, even in the field of the levy of pecuniary penalties for a tax delinquency under the Income-tax Act, 1961, are certain broad and general observations first made in *Hindustan Steel Ltd. v. State of Orissa*, (1972) 83 ITR 26 : (AIR 1970 SC 253). These observations seem to have snow-balled in later High Court judgment to inject the requirement of mens rea even in the limited area covered by Section 271 (1) (a).

30. In *Hindustan Steel Ltd.* case (AIR 1970 SC 253) (supra) their Lordships were specifically construing the provisions of Ss. 9 (1) and 25 (1) (e) of Orissa Sales Tax Act (14 of 1947). Thereunder penalty had been levied on the delinquent company for its failure to register itself as a dealer. It would appear that in the context of the specific provisions of the Orissa Sales Tax Act, the following general observations were made by Shah, Actg. C. J., speaking for the Bench (at p. 256):

"Under the Act, penalty may be imposed for failure to register as a dealer: S. 9 (1), read with Section 25 (1) (a) of the Act. But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged, either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. Those in charge of the affairs of the company in failing to register the company as a dealer acted in the honest and genuine belief that the company was not a dealer. Granting that they erred, no case for imposing penalty was made out."

Even a plain reading of the judgment in *Hindustan Steel Ltd.* case (supra), makes it manifest that what fell for consideration there

was the Orissa Sales Tax Act and particularly the language of Sec. 9 (1) and Section 25 (1) (a) thereof and the penalty provided thereby. There is not the least reference to the Income-tax Act, 1961 in the whole of the judgment far from there being any consideration of the specific provisions of S. 271 (1) (a) or the larger scheme of the Act with regard to the non-filing or the late-filing of the income-tax returns. With the greatest respect, we are unable to see how the general observations made in the said case, in the context of an altogether different statute, whose language is admittedly not even remotely in *pari materia* with Section 271 (1) (a) of the Act can completely cover the issue in the present case. Equally it is manifest from the aforequoted observation that these are wholly general in nature. It may well be that certain penalties can be imposed only if the party acted deliberately in defiance of law or is guilty of contumacious conduct in view of the specific language of the particular statute. Simply because word 'penalty' is used, all the wide ranging requirements of contumacious conduct, deliberate defiance of law, dishonest intention, or conscious disregard of statutory obligations, cannot be automatically imported into every statute. As we have already noticed, *mens rea* is certainly an essential requirement of the offence under Section 276-CC of the Act, but is obviously not so in the entirely different context and language of Section 271 (1) (a). The observations in *Hindustan Steel Ltd. case* (supra) have, therefore, to be understood in the light of the specific provisions of the law therein and the facts with which the Court was dealing but to give it a universal application in all penalty cases, irrespective of the statutes or their language, would appear to be wholly untenable.

31. It calls for notice that judgment in *Hindustan Steel Ltd. case* (AIR 1970 SC 253) (supra) was rendered on 4-8-1969, but it came to be reported much later in the ITRs in the year 1972. Grover, J. who was a member of the Bench in *Hindustan Steel Ltd. case* (supra), had the occasion to refer to the same case in the later case of *CIT, West Bengal I v. Anwar Ali*, (1970) 76 ITR 696 : (AIR 1970 SC 1782) with the following observations (at p. 1785 of AIR):

"... It appears to have been taken as settled by now in the sales tax law that an order imposing penalty is the result of quasi-criminal proceedings (*Hindustan Steel Ltd. v. State of Orissa*, (AIR 1970 SC 253)). In England also it has never been doubted that such proceedings are penal in character.

Fattorini (Thomes) (Lancashire) Ltd. v. Inland Revenue Commrs., (1943-11 ITR (Sup) 50)."

Now a close reading of the judgment in *Anwar Ali's case* (supra) would show that their Lordships were therein construing the provisions of Sec. 28 (1) (c) of the Indian Income-tax Act, 1922, which is broadly equivalent to the present S. 271 (1) (c) though not being in *pari materia* therewith. To put it squarely under the said provision, it has to be a case of concealment of income. As has been already noticed in considerable detail, the provisions of Sec. 271 (1) (c) stand on an altogether different footing from those under Section 271 (1) (a) of the Act. The language of Clause (c) does mention concealment of the particulars of the income or furnishing inaccurate particulars thereof. It is obvious that concealment or deliberate furnishing of wrong particulars has a clear mental element which is laid down in the statute itself. One cannot conceal something unconsciously and therefore, concealment is inevitably a conscious mental act. It necessarily follows that in this context, the necessary mental requirement is provided by the statute itself and has not to be inducted therein by the invocation of any general doctrine. Therefore, to extend the ratio of *Anwar Ali's case* (supra) to an area where there is no question of any concealment and in a provision which does not specify any guilty mental pre-requisite, would again be doing violence both to the language of the statute and the sound canons of interpretation. As has already been pointed out the mere fact that penalty proceedings are penal in nature, would not necessarily bring in the doctrine of *mens rea* from the realm of crimes as an essential ingredient thereof. This has to be and must be decided on the basis of the specific language of the section and the larger scheme of the Act. *Anwar Ali's case*, therefore, must be held as plainly distinguishable.

31A. Lastly, in this context are the observations of Chief Justice Ray, speaking for the majority in *Khemka and Co. (Agencies) Pvt. Ltd. v. State of Maharashtra*, (1975) 35 STC 571 (at page 581) : (AIR 1975 SC 1549 at p. 1555) to the following effect:

"The Income-tax Act, 1961, imposes penalty under Ss. 270 and 271. These sections in the Income-tax Act, provide for imposition of penalty on contumacious or fraudulent assesses. Penalty is in addition to income-tax, if any, determined as payable by the assessee. Tax and penalty-like tax and interest are distinct and different concepts under the In-

come-tax Act. The word "assessment" could cover penalty proceedings if it is used to denote the whole procedure for imposing liability on the tax-payer as happened in Abraham's case (AIR 1961 SC 609). Penalty is within assessment proceedings just as tax is within assessment proceedings when the relevant Act by substantive charging provision levies tax as well as penalty.

Penalty is not merely sanction. It is not merely adjunct to assessment. It is not merely consequential to assessment. It is not merely machinery. Penalty is in addition to tax and is a liability under the Act. Reference may be made to S. 28 of the Indian Income-tax Act, 1922, where penalty is provided for concealment of income. Penalty is in addition to the amount of income-tax. This Court in Jain Brothers v. Union of India, (AIR 1970 SC 778) said that penalty is not a continuation of assessment proceedings and that penalty partakes of the character of additional tax."

What calls for pointed notice in Khemka's case (supra) is the fact that their Lordships were construing the specific provisions of Section 9 of the Central Sales Tax Act and the corresponding provisions of the Bombay Sales Tax Act and the Mysore Sales Tax Act, and in the context of invoking those provisions of the imposition of penalty. The specific issue of penalties under Section 271 (1) (a) did not remotely fall for consideration. Even as regards penalties under Clause (c), such cases of concealment of income may well stand on an entirely different footing. We are clearly of the view that the general observations made by way of analogy in Khemka's case (supra) are not even remotely attracted to the basic issue which falls for determination here.

32. Having individually distinguished the trilogy of the three Supreme Court cases, it deserves highlighting with regard to them collectively that the limited point before us specifically under Section 271 (1) (a) of the Act was never even remotely before their Lordships in any one of those cases. The strict ratio of all the three judgments admittedly does not cover the issue which falls for consideration here. The provisions, which their Lordships were considering in the aforesaid cases were undoubtedly different and their language is not even remotely in pari materia with that of Section 271 (1) (a). Therefore, to invoke these three judgments as either binding or conclusive on the specific point before us appear to me as rather unwarranted. The danger of construing precedent as if they were statutes and assuming

every passing observation therein as if it were the ratio thereof was first highlighted in the classic words of Earl of Halsbury, Lord Chancellor, in Quinn v. Lasthem, 1901 AC 495:

"Now, before discussing the case of Allen v. Flood, ((1898) 77 LT 717) and what was decided therein there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

The aforesaid observations have found express approval in State of Orissa v. Sudhansu Sekhar Misra, AIR 1968 SC 647, with the following added observations (at pp. 651, 652):

"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein not what logically follows from the various observations made in it.

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It is not a profitable task to extract a sentence here and there from a judgment and to build upon it."

The identical view has then been reiterated by the whole Court in Madhav Rao Jivaji Rao Scindia Bahadur v. Union of India, AIR 1971 SC 530 (at p. 578)—

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It is difficult to regard a word, a clause or a sentence occurring in a judgment of this Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment."

In the light of the above, it would appear that any overly reliance on the passing and general observations in Hindustan Steel Ltd.'s case (AIR 1970 SC 253) (supra), Anwar Ali (AIR 1970 SC 1782) and Khemka and Co.'s (AIR 1975 SC 1549) cases (supra), as being conclusive on the point before us is totally unwarranted.

33. Lastly, in this context, it is now plain that even in the realm of the precedents of the final Court, the death-knell to the theory that mens rea is a necessary ingredient of all penalty proceedings in taxing statutes, has now been sounded in the seven-Judge Bench judgment of their Lordships in *R. S. Joshi v. Ajit Mills Ltd.*, AIR 1977 SC 2279. Therein what fell for pointed consideration were the provisions of S. 37 of the Bombay Sales Tax Act, 1959 as applicable in the State of Gujarat. This provision provided that if any person or dealer collected tax under the Act or in contravention of the provisions of the section or in excess of the amounts provided therein, he would be liable to pay in addition to any tax, a penalty of an amount prescribed in sub-clauses (i) and (ii) of Cl. (b) of sub-section (1) of the aforesaid section. It was sought to be argued before the Bench that the penalty so imposed was by way of forfeiture and that penalty and forfeiture were distinct things and in any case no mens rea having been prescribed for a provision so gravely penal, the same was not sustainable. Reversing the judgment of the Gujarat High Court, Krishna Iyer, J., speaking for himself and five other members of the Bench concluded in this specific context of a penalty in a taxing statute in the following words which bear repetition (at pp. 2287, 2288):

“* * * The Criminal Procedure Code, Customs and Excise Laws and several other penal statutes in India have used diction which accepts forfeiture as a kind of penalty. When discussing the rulings of this Court, we will explore whether this true nature of ‘forfeiture’ is contradicted by anything we can find in Section 37 (1), 46 or 63.

Even here we may reject the motion that a penalty or a punishment cannot be cast in the form of an absolute or no-fault liability but must be preceded by mens rea. The classical view that ‘no mens rea, no crime’ has long ago been eroded and several laws in India and abroad, especially regarding economic crimes and departmental penalties, have created severe punishments even where the offences have been defined to exclude mens rea. Therefore, the contention that Section 37 (1) fastens a heavy liability regardless of fault has no force in depriving the forfeiture of the character of penalty.”

Again on this specific point Kailasam, J., in his concurring judgment observed as follows (at p. 2303):

“Mr. Kaji next submitted that forfeiture if it is to be penalty would be confined to acts

where there is a guilty mind. In other words, he submitted that the penalty would be confined only to wilful acts of omission and commission in contravention of the provisions of the enactment. ‘This plea cannot be accepted as penal consequences can be visited on acts which are committed with or without a guilty mind. For proper enforcement of various provisions of law, it is common knowledge that absolute liability is imposed and acts without mens rea are made punishable.’

It would be manifest from the aforesaid observations that any universal of blanket theory that mens rea or a guilty mind is a necessary pre-requisite before any penalty can be levied in a taxing statute, has now been authoritatively and conclusively negated by their Lordships of the Supreme Court themselves. Even if the trilogy of the earlier three cases in *Hindustan Steel Ltd.*, (AIR 1970 SC 253), *Anwar Ali* (AIR 1970 SC 1782) and *Khemka’s* (AIR 1975 SC 1549) (supra), had made any passing observation to the contrary, those must now give way to the categorical statement of the law by the larger Bench of seven-Judges in *R. S. Joshi’s* case (AIR 1977 SC 2279) (supra).

34. It remains now to advert to the streams of judicial opinion in various High Courts. As of today, the locus classicus for the view that the doctrine of mens rea is not attracted to the limited field under S. 271 (1) (a) of the Income-tax Act, 1961, is the exhaustive and illuminating judgment of the Full Bench of the Andhra High Court in *Addl. CIT, A. P. v. Durgapandinath Tuljappa & Co.*, (1977) 107 ITR 850 : (1977 Tax LR 258). In view of the already elaborate discussion of the issue, it would suffice to say that we are in respectful and total agreement with the lucid judgment recorded by Sambasiva Rao, J. therein. The Andhra Full Bench in turn has followed or is in agreement with the broad line of reasoning of the Kerala Full Bench in *CIT, Kerala v. Gujarat Travancore Agency*, (1976) 103 ITR 149 : (1975 Tax LR 922) which again is an authority directly on the point. The Full Bench of the Orissa High Court in *CIT, Orissa v. Gangaram Chapolia*, (1976) 103 ITR 613 : (1975 Tax LR 775) has again taken the similar view. In *Nemichand Ganeshmal v. CIT, M. P.*, (1980) 124 ITR 438 : (1979 Tax LR 193) a Division Bench of the M. P. High Court has arrived at an identical conclusion. Lastly, in this context are the terse but categorical observations of Chinnappa Reddy, Actg. C. J., in *Smt. Kamala Vati v. CIT (Central) Patiala*, (1978) 111 ITR 248 :

(1977 Tax LR 972 at p. 973 (Punj & Har), as under :

"On the first question, Shri Bhagirath Dass, learned counsel for the assessee submitted that the revenue had failed to establish any mens rea on the part of the assessee and, therefore, no penalty could be levied on her. There is no substance in the submission. On her own showing, the assessee has failed to furnish a return of her income for the assessment year 1961-62 without reasonable excuse. That was sufficient to attract Section 271 (1) (a). The doctrine of mens rea has no application to such situations under taxing statutes. The decision of the A. P. High Court in *Addl. CIT v. Narayanadas Ram Kshan*, (1975) 100 ITR 18 : (1975 Tax LR 625) has since been overruled by a Full Bench. (See *Addl. CIT v. Durgapandarinath Tuljappa & Co.*, (1977) 107 ITR 850 : (1977 Tax LR 258) (AP) (FB)."

In consonance with the detailed consideration of the issue earlier, we would unhesitatingly re-affirm the aforesaid view.

35. It would be manifest from the above that there is an overwhelming weight of precedent for the view which we are inclined to take, but equally there is no gainsaying that authority is not lacking for the contrary view as well. This stream of thought is epitomised by the detailed judgment of a Full Bench of the Gujarat High Court in *Addl. CIT v. I. M. Patel and Co.*, (1977) 107 ITR 214 : (1979 Tax LR 211). Therein it has been held in effect that mens rea is a necessary ingredient under Section 271 (1) (a) and therefore, it provides for penalty only in cases where the assessee has either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of the statutory obligation.

36. Since the aforesaid view of the Full Bench of the Gujarat High Court in *I. M. Patel's case* (1979 Tax LR 211) (supra) symbolises the case for the other side, some detailed reference to the said judgment becomes inevitable. With the greatest respect it appears to us that the basic approach which seems to have been assumed as axiomatic is not necessarily warranted in the penalty proceeding under Section 271 (1) (a) of the Act. The conclusions of the Bench stem from the following assumption (at p. 217) :

"... In the penalty proceedings under Section 271 (1) (a), the assessee upon whom the penalty is sought to be imposed, is in the position of an accused in a criminal trial and, therefore, all the ingredients of the offence for which the penalty can be imposed

must be established by the department. It is from this aspect that one has to consider the question whether these words "failure without reasonable cause" constitute an ingredient of the offence or not. Since the gravamen of the offence is failure without reasonable cause to file one or the other of the returns mentioned in Section 271 (1) (a), the prosecutor, that is, the department, must establish the absence of the reasonable cause. It is not for the assessee to show in the first instance that there was reasonable cause on his part. It is for the department to show the absence of reasonable cause."

With respect, the assumption, in the above line of reasoning stems from the premise that every sanction against the violation of a provision of taxing statute is a criminal offence and then to proceed to import therefrom all the ingredients and pre-requisites which are applicable directly in the field of criminal law alone. The judgment seems to view the public revenue as the public prosecutor and all assesseees as persons accused of offences. That indeed is not so except in the limited field when prosecutions for offences are launched under the provisions of Chap. 22. It is then alone that the Revenue is the prosecutor and the delinquent assessee is an accused. In all other fields, including those of penalties or levying of penal interest, the correct perspective would be that of the revenue on the one side and the assessee on the other. It is too extreme and untenable to equate the revenue collecting agency as always in the role of a prosecutor or the honest assessee necessarily in the position of an accused person. It has been said on high authority that taxes are the price which the citizen pay for organising society and civilization and it is not necessary to create this endemic hostile confrontation between the tax payer and the tax collector.

37. Again the other rationale of the *I. M. Patel's case*, (1979 Tax LR 211) (supra) is that the proceedings being in the nature of a penalty, they are at least quasi-criminal. We have shown on high authority that penalty proceedings for a tax delinquency are, in essence, civil in nature being a coercive and remedial process to ensure speedy collection of taxes. However, even assuming entirely for the sake of argument that they partake of a penal nature even then the doctrine of mens rea would not be automatically attracted irrespective of the specific language of the provision and the larger scheme of the statute. As has been forcefully pointed out in *R. S. Joshi's case*, (AIR 1979 SC 2279) (supra), even in the strict field

of crime, it is possible to exclude the element of mens rea altogether and much water seems to have flown under the bridges since the sixteenth century, whenever classic concept of "no mens rea, no offence" was developed in the common law. That view no longer holds the field. If mens rea may be excluded either expressly or by necessary intentment from the strict field of criminal law itself, then it cannot be necessarily attracted in ordinary departmental proceedings for the imposition of penalties for a tax delinquency. The issue must turn on the broad language of the provisions and not on abstract generalization. Even if it be said that proceedings are penal in nature, it does not follow logically therefrom that the doctrine of mens rea with regard to criminal offences must be inducted therein even when the language of the statute is specific and objective and rules out any subjective or mental element therein.

37-A. Lastly with the greatest deference it appears, that I. M. Patel's case (1979 Tax LR 211) (Guj) (FB) (supra), seems to proceed on abstract generalization of all penalty proceedings. To us, it appears to be not possible to apply a common yard-stick in the wide variety of tax delinquency which may attract a penalty provision. For example, there may be an innocuous and wholly excusable delay of a day or two in furnishing an income-tax return after the prescribed date. As against this, there may be a designed and fraudulent concealment of millions of rupees of income. Both such tax delinquencies may attract a penalty by separate provisions but to say that identical consideration would apply to both is with respect an over-simplification. The matter obviously has to be construed in the context of the language of the particular provision applicable and the larger purpose and intent of the statute in effect and enforcing the sanctions. In any case there is a sharp line of distinction betwixt merely departmental proceedings for the collection of a pecuniary penalty and the creation of a statutory tax offence and prosecution and conviction therefore, whilst in the later case, the doctrine of mens rea may well have and would normally be given full play, it is not necessarily so in the former one.

38. In view of the above and also in the light of the larger discussion in the earlier part of this judgment, we must respectfully record our dissent with the view of the Full Bench in I. M. Patel's case (supra). Once it is so, it is unnecessary and wasteful to individually notice and dissent from other authorities which either follow this view or pro-

ceed on an identical line of reasoning. It suffices to mention that the line of reasoning in I. M. Patel's case (supra), has found acceptance with the Division Bench of the Gauhati High Court reported in Smt. Indu Barua v. CWT, North Eastern Region, (1980) 125 ITR 436 in the context of the analogous provisions of the Wealth-tax Act and the Division Bench of the Mysore High Court in All India Sewing Machine Co. v. CIT, Mysore, (1974) 96 ITR 206 : (1974 Tax LR 437) and a Division Bench of the Madras High Court in S. Loonkaran and Sons v. CIT, Madras, (1977) 108 ITR 92 and a Division Bench of the Rajasthan High Court in CIT, Rajasthan v. Rawat Singh and Sons, (1979) 120 ITR 65. For the identical reasons recorded earlier, we would respectfully dissent from all these judgments as well.

39. We must, therefore, conclude on larger principle in the light of the broader scheme of the Income-tax Act, 1961, the specific language of Sec. 271 (1) (a) and the weight of precedent; that the doctrine of mens rea is not attracted to the penalty proceedings within the four-corners of the aforesaid section. The only requirements of the statute thereunder is the presence or absence of reasonable cause for the tax delinquency and no other. Therefore, inducting the requirement of a deliberate defiance of law, or contumacious conduct, or dishonest intention, or acting in conscious disregard of the statutory obligations, is unwarranted under Section 271 (1) (a) of the Act.

40. Having answered the meaningful question referred to us in the above terms, we direct that the case be now placed before the Division Bench for answering the relevant questions in accordance therewith.

BHOPINDER SINGH DHILLON, J.:— I agree.

J. V. GUPTA, J.:— I agree.

Reference answered accordingly.

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S. S. SANDHAWALIA, C. J. AND
SURINDER SINGH, J.

Jathedar Jagdev Singh and others, Petitioners v. The State of Punjab, Respondent.

Letters Patent Appeal No. 514 of 1980,
D/- 15-7-1981.*

Punjab Agricultural Produce Markets Act (23 of 1961), S. 3 (8) — Suspension of State

* From judgment of I. S. Tiwana, J. in
C. W. P. No. 1069 of 1980, D/- 30-5-1980.

HY/IY/D818/81/GDR

Agricultural Marketing Board entails civil consequences to the Board itself — Rule of audi alteram partem is attracted — Applicability of rule is also not excluded by intentment. C. W. P. No. 1069 of 1980, D/- 30-5-1980 (Punjab & Har), Reversed. (Constitution of India, Art. 226; Administrative law — Natural justice).

The suspension of State Agricultural Marketing Board by the State Government under Section 3 (8) of the Punjab State Agricultural Produce Markets Act (1961), entails civil consequences to the Board itself and at once attract the principles of natural justice to the situation. Neither the factum of the Chairman and other members being nominated members of the Board nor the distinction between a corporate body and its individual members is relevant to the issue of civil consequences ensuing to such a legal body or for the purposes of exclusion of principles of natural justice on these grounds. (Paras 12, 13)

It is not easy to infer a clear implied prohibition of the rules of natural justice from the other provisions of the Act. Merely because an opportunity to show cause is provided under Section 3 (7) and not so expressly provided under Section 3 (8) would not raise an irrebuttable inference that the principles of natural justice are deliberately excluded from the later provision. It may be a weighty consideration to be taken into account but the weightier consideration is whether the administrative action entails civil consequences. (Paras 19, 20)

Action under Section 3 (8) undoubtedly entails civil consequences of the most serious nature and indeed they may be termed as both penal and evil consequences in so far as an inference of either corruption or grave mis-management would arise and cannot be easily separated from an order of the supersession of the whole Board. Therefore it is the later and the weightier consideration that has to be given pre-eminence and a right of natural justice has to be read into S. 3 (8) and is not to be easily displaced by any possible inference of the exclusory rule. C.W.P. No. 1069 of 1980, D/- 30-5-1980 (Punjab & Har), Reversed; AIR 1981 SC 136 and (1971) 2 All ER 552, Followed; AIR 1967 Punjab 430, Referred; AIR 1979 Punjab 61 and 1979 Punjab LJ 129, Distinguished; C.W.P. No. 2211 of 1977, D/- 2-12-1977 (Punjab & Har), Explained. (Para 20)

Cases Referred : Chronological Paras
AIR 1981 SC 136 6, 7, 10, 12, 15-A, 18,
19, 21, 22, 23, 24

AIR 1979 Punjab 61 : 81 Punjab LR 170 (FB) 23
1979 Punjab LJ 129 (FB) 24
(1977) C. W. P. No. 2211 of 1977, D/- 2-12-1977 (Punjab & Har), S. Ajaib Singh Machaki v. State of Punjab 24
(1971) 2 All ER 552 : (1971) 1 WLR 728 : 115 SJ 388, Pearlberg v. Varty 16
AIR 1967 Punjab 430 22

Kuldip Singh with R. S. Mangia and T. S. Doabia, for Petitioner; J. L. Gupta with Jagdish Singh and G. C. Gupta, for the State.

S. S. SANDHAWALIA, C. J.:— Whether the principle of audi alteram partem is attracted in the event of the suspension of the State Agricultural Marketing Board by the State Government under S. 3 (8) of the Punjab State Agricultural Produce Markets Act, 1961, has come to be the spinal issue in this appeal under Clause 'X' of the Letters Patent.

2. In exercise of the powers under Section 3 (1) of the Punjab State Agrl. Produce Markets Act, 1961 (hereinafter referred to as 'the Act') the State Government constituted the Punjab Agricultural Marketing Board (hereinafter referred to as 'the Board'), consisting of the six appellants, that is, appellant No. 1, Jathedar Jagdev Singh Khudian as the Chairman and the other five as non-official members thereof, besides six official members, through a notification dated May 12th, 1978. However, on March 18, 1980, this Board was suspended by the State Government in exercise of its powers under Section 3 (8) of the Act by a notification in the following terms:—

"Whereas it has come to the notice of the Government of the State of Punjab that the Punjab State Agricultural Marketing Board (hereinafter referred to as 'the Board') has incurred financial expenditure without detailed examination of the implications involved, has neglected the duties imposed upon it under the Punjab Agricultural Produce Markets Act, 1961, and has failed to execute development work to any significant extent and, therefore, it is satisfied that the Board is not functioning properly;

Now, therefore, in exercise of powers conferred upon him under sub-sec. (8) of Sec. 3 of the Punjab Agrl. Produce Markets Act, 1961, the President of India is pleased to suspend the Board with immediate effect.

2. The President of India is further pleased to appoint Sardar Paramjit Singh, IAS, Financial Commissioner, Development and

Secretary to Government of Punjab, Department of Agricultural to exercise the functions of the Board and its Chairman till such time as a new Board is constituted."

PARAMJIT SINGH

Financial Commissioner Development and Secretary to Govt. Punjab, Agriculture and Forest Departments."

3. The present appellants preferred a writ petition impugning the aforesaid suspension primarily on the ground that no show cause notice whatsoever was given to the Board itself or to the petitioners individually before passing the order of suspension. This was alleged to be in flagrant violation of the well known principles of natural justice or the rule of audi alteram partem. Further it was the stand of the petitioner-appellants that there was no material with the State Government at the time of the passing of the impugned order for reaching any objective satisfaction about the non-functioning of the Board.

4. The petitioner-appellant's stand was controverted on behalf of the State Government by a firm stand that neither the Act itself nor the principles of natural justice call for any show cause notice to the Board or to the petitioners individually and further there was more than ample material before the respondent State to justify the passing of the order of suspension.

5. In an elaborate judgment the learned single Judge came to the conclusion that neither the provisions of the Act, (so far as these relate to the suspension of the board as such), envisage the issuance of any prior notice to the Board, nor the rules of natural justice or the principle of audi alteram partem is attracted to the facts of this case. He further held that in fact the applicability of such a rule is excluded by necessary intention by provisions of sub-sections (7) and (8) of Section 3 and Sections 15 and 35 of the Act. On the factual aspect he took the view that there was adequate material on the record before the respondent State for recording its satisfaction which ultimately led to the passing of the order of suspension of the Board.

6. Now the very sheet-anchor of the learned counsel for the appellant's case is the recent judgment of their Lordships of the Supreme Court in regard to the supersession of the New Delhi Municipal Committee reported as *S. L. Kapoor v. Jagmohan*, AIR 1981 SC 136. Mr. Kuldip Singh in substance submitted that this judgment concludes, the matter in his favour and is in terms on all fours with the present case.

7. We are of the view that there is substantial, if not total, merit in the aforesaid submission. Indeed Mr. J. L. Gupta, learned counsel for the respondent was fair enough to concede that on some aspects of the present case *S. L. Kapoor's case* (supra) is conclusively in favour of the appellants. It is, therefore, apt at the outset to deal with that aspect of the case which is covered by the aforesaid binding precedent.

8. Now a close analysis of the learned single Judge's lucid judgment would indicate that he rightly spelled out that the basic issue was whether any explanation or hearing to the Board or its individual members was a pre-requisite before the impugned action of suspension of the Board could be taken by the State Government. In rendering an answer in the negative to this issue, the learned single Judge rested himself on two basic premises, which may best be recalled in his own words:—

"Here the petitioners were nominated as members of the Board by the Government in its absolute discretion. It is not a case of their assuming of their office through election or selection." and secondly:

"The learned counsel for the petitioners has not been able to point out as to what civil consequences or the civil rights of the Board were infringed when the impugned order suspending the Board as such was passed. The Board as such, to my mind has no rights about the breach of which it can possibly complain. I asked Mr. Kuldip Singh to refer to any judgment wherein it might have been held that by the suspension or supersession of a nominated statutory body in exercise of an administrative power by the State Government, the civil rights of the said body stood infringed or violated."

9. It is manifest from the above that the twin considerations that weighed heavily, if not overwhelmingly with the learned single Judge was the status of the appellants, being merely nominated members of the Board, and the premise that the Board being a legal entity different from the individual members and the Chairman could itself suffer no civil or evil consequences through its suspension or supersession.

10. It would appear that when the matter was debated before the learned single Judge, the aforesaid two issues were obviously not free from difficulty. However the controversy appears to us as now having been set at rest and put beyond the pale of any doubt by the judgment of their Lordships in *S. L. Kapoor's case* (AIR 1981 SC 136) (supra).

Therein also the Lt. Governor of the Union Territory of Delhi had appointed nine non-official members and four ex-officio members to the New Delhi Municipal Committee to hold office for a period of one year. However, well before the expiry of the aforesaid term the Lt. Governor exercising powers under Section 238 (1) of the Punjab Municipal Act superseded the New Delhi Municipal Committee with immediate effect. Two of the non-official nominated members of the superseded New Delhi Municipal Committee, namely, Shri S. L. Kapoor and another preferred a civil writ petition in the Delhi High Court for quashing the order of supersession, but the same was dismissed by a Full Bench of five Judges. In the appeal before their Lordships of the Supreme Court it was forcefully contended by the learned Attorney General that neither the Committee nor its members had any beneficial interests in the continuance of the Committee, and, therefore, the supersession of the Committee did not involve any civil consequences, and the rule of *audi alteram partem* would not be attracted.

11. Categorically repelling the aforesaid contention after a full examination both on principle and a number of precedents including those of the Privy Council and the House of Lords, their Lordships have concluded as follows (at p. 142):—

"We have already referred to some of the relevant provisions of the Punjab Municipal Act, to indicate some of the rights and duties of the Committee under the Act. A Committee as soon as it is constituted at once, assumes a certain office and status, is endowed with certain rights and burdened with certain responsibilities, all of a nature commanding respectful regard from the public. To be stripped of the office and status, to be deprived of the rights, to be removed from the responsibilities, in an unceremonious way as to suffer in public esteem is certainly to visit the Committee with civil consequences. In our opinion the status and office and the rights and responsibilities to which we have referred and the expectation of the Committee to serve its full term of office, would certainly create sufficient interest in the Municipal Committee and their loss, if superseded, would entail civil consequences so as to justify an insistence upon the observance of the principles of natural justice before an order of supersession is passed."

12. It would be evident from the above that neither the factum of being a nominated member of the Committee nor the distinction between a corporate body and its in-

dividual members was held to be at all relevant to the issue of civil consequences ensuing to such a legal body or for the purposes of exclusion of principles of natural justice on these grounds. With great respect, therefore, it appears to us that the twin premise which underlies the judgment of the learned single Judge is now unsustainable in view of the binding observation in *S. L. Kapoor's case* (supra). Inevitably, therefore, the finding on both these points has to be and is hereby reversed.

13. Once it is so, it necessarily follows that the impugned action herein would entail civil consequences to the Board itself and at once attract the principles of natural justice to the situation. It is in this context that one has now to examine the additional finding of the learned single Judge that the applicability of the rule of *audi alteram partem* is excluded by necessary intendment by the provisions of sub-sections (7) and (8) of Section 3 and Ss. 15 and 35 of the Act.

14. Inevitably the controversy in the context must revolve around the relevant provisions of the statute. It, therefore, becomes necessary to read the relevant provisions thereof:—

S. 3 (7): The State Government may, by notification remove any member of the Board other than an official member,—

(a) if he has become subject of any of the disqualifications specified in sub-sec. (5); or

(b) if he is, in its opinion, remiss in the discharge of his duties; or

(c) if he has without the permission of the Chairman of the Board and in the opinion of the State Government without sufficient cause absented himself for not less than three consecutive meetings of the Board; and may appoint another member in his place in the manner provided in Cl. (b) of sub-sec. (1) from the category to which the removed member belongs;

Provided that before removing a member the reasons for the proposed action shall be conveyed to him and his reply invited within a specified period and duly considered;

Provided further that the term of office of the member so appointed shall expire on the same date as the term of office of the vacating member would have expired had the latter held office for the full period allowed under sub-section (4) unless there be delay in appointing a new member who succeeds the member first mentioned above in which case it shall expire on the date on which his successor is appointed by the State Government.

(8) The State Government shall exercise superintendence and control over the Board and its officers and may call for such information as it may deem necessary and, in the event of its being satisfied that the Board is not functioning properly or is abusing its powers or is guilty of corruption or mismanagement it may suspend the Board and, till such time as a new Board is constituted, make such arrangements for the exercise of the functions of the Board and of its Chairman as it may think fit;

Provided that the Board shall be constituted within six months from the date of its suspension.

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Removal of members:

15. The State Government may by notification remove any member if, in its opinion, he has been guilty of misconduct or neglect of duty or has lost the qualification on the strength of which he was appointed:

Provided that before the State Government notify the removal of a member under this section, the reasons for this proposed removal shall be communicated to the member concerned and he shall be given an opportunity of tendering an explanation in writing.

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35. Supersession of Committees:

(i) If in the opinion of the State Government a Committee is incompetent to perform or persistently make defaults in performing the duties imposed on it by or under this Act or abuses its powers, the State Government may, by notification supersede the Committee;

Provided, that before issuing a notification under this sub-section the State Government shall give a reasonable opportunity to the Committee for showing cause against the proposed supersession and shall consider the explanations and objections, if any, of the Committee."

15-A. Ere I proceed to closely examine to interpret the aforesaid provisions, it deserves highlighting that this has to be done against the background of two salient features; the first is, that words 'suspend the Board' employed in S. 3 (8) of the Act have a very peculiar connotation in this context and if one may say so can be slightly misleading if superficially viewed. The word 'suspend' used herein has not been employed in its ordinary sense of a temporary or interlocutory order of suspension which may necessarily be followed by a regular order of suspension or removal. It is virtually

the common case that the suspension of the Board under S. 3 (8) of the Act is in essence, its supersession or removal as such. The relevant provisions of the Act do not at all contemplate the passing of any subsequent order of removal or supersession. Indeed such a suspension is to be followed by the constitution of the Board within six months from the date of its suspension in view of the proviso to S. 3 (8) of the Act. The end result is that the first Board is virtually obliterated. It, therefore, appears to be plain that the impugned action of suspending the Board is tantamount to and in its real sense is equivalent to its supersession or removal, followed by the constitution of a new Board later. One has, therefore, to disabuse one's mind from any misleading inference that the suspension of the Board herein is either interlocutory or of a temporary nature. Indeed, Mr. J. L. Gupta, learned counsel for the respondent-State did not controvert this proposition. It is therefore in these very terms that the learned single Judge did construe the action as is evident from a close reading of his judgment. I, therefore, proceed on the hypothesis that despite the ambivalent language used in S. 3 (8) the essence of the action there is the supersession of the Board itself. Secondly a new dimension has now been given to the whole matter by the binding precedent in New Delhi Municipal Committee's case (AIR 1981 SC 136) (supra). As already stands noticed, the learned single Judge viewed this aspect of the exclusion of the principle of natural justice on the broad assumption that no civil consequences ensued to the Board as such or in any case if they did they were too indirect and marginal in nature to be taken notice of. Their Lordships of the Supreme Court in the abovementioned case have now held to the contrary by observing that grave civil consequences positively ensue to a legal corporate body as such in the event of its supersession or removal. In view of this binding precedent, the matter can now be examined only on the firm foundation that the action under S. 3 (8) of the Act of the supersession of the Board involves direct and grave civil consequences to the Board as such.

16. On the aforesaid twin premises it would indeed be well settled that the rule of audi alteram partem would be at once attracted in the case which entails civil consequences. Now it is the common case that the statute does not expressly or in terms exclude the principle of natural justice in the context of an action under Sec-

tion 3 (8) of the Act. The sole question that therefore, survives to be examined is—whether these principles which are otherwise pristinely and directly applicable are impliedly excluded by necessary intendment from the other provisions of the Act? To determine this question the true principle applicable has been succinctly formulated by Lord Sachs in *Pearlberg v. Varty* (Inspector of Taxes), (1971) 2 All ER 552, in the following words:—

“..... As I understand the principles laid down in the *Wiseman* case and in the others cited to us, the application of an otherwise appropriate rule of natural justice is only to be regarded as excluded if the legislature expressly so states or if there is a clear implication to that effect. In the instant case there is no express exclusion and accordingly the question is whether there has been manifested a clear implication.”

17. Now applying this principle of a clear implied exclusion of the rule of natural justice one must inevitably turn a little more closely to the provisions of S. 3 (8) of the Act. It is a sound canon of construction that such an implied exclusion has to be inferred from the language of the statute itself, its larger purpose and the juxtaposition and interplay of the various provisions of the Act itself. Now it is virtually the undisputed case that S. 3 (8) of the Act cannot be finically dissected into watertight compartments. Either the principles of natural justice are attracted in the event of the suspension of the Board with regard to all the grounds therein or they are not. A close analysis of the section would show that the suspension of the Board may be based on the following three distinct situations either individually or perhaps collectively as well:—

(i) On the satisfaction of the State Government that the Board is not functioning properly;

(ii) On the satisfaction of the State Government that the Board is guilty of corruption; and

(iii) On the satisfaction of the Government that the Board is guilty of mismanagement.

18. It would be evident from the above that three prescribed situations— the one about being guilty of corruption is gravely stigmatic and is not something which can be totally impersonal. A finding that the Board is guilty of corruption cannot, but brings inevitably a malicious taint of blame-

worthiness to the individual members who constitute the Board. Equally, it would directly and squarely attract the gravest disrepute to the Board collectively as well. Therefore, the gravest civil and if one may say so evil consequences would ensue from the order of suspension under S. 3 (8) of the Act both collectively to the Board and individually to the members thereof if the suspension is based on the finding of corruption. It would appear unimaginable that in such a situation a public finding of corruption be given collectively and individually without obtaining a hint of an explanation or affording any hearing to the persons, or the legal body stigmatically affected thereby. Again what is so said in the context of corruption would at a slightly lower level be equally applicable in a finding of grave mismanagement by the Board. It would thus be manifest that in both the situations, the principles of natural justice would normally be so sharply and clearly attracted that it can only be by the most unequivocal exclusion thereof that one could possibly arrive at a conclusion that they should not be applied. The graver the stigmatic nature of the order of suspension or the evil consequences ensuing therefrom, the greater would be the need for the accrual of the right of natural justice to meet a charge so serious and all pervading. In view of the reiteration and extension of the rule by their Lordships in *S. L. Kapoor's case* (AIR 1981 SC 136) (supra) now only a direct or a near direct implied prohibition by the statute itself can possibly bar the applicability of the rule of natural justice in the present situation.

19. With great respect to the learned single Judge it appears to us that it is not easy to infer a clear implied prohibition of the rules of natural justice from the other provisions of the Act. A similar argument of exclusion by necessary implication was also raised in *S. L. Kapoor's case* (supra); but categorically repelled with the following observations (at p. 142):—

“One of the submissions of the learned Attorney General was that when the question was one of disqualification of an individual member, Sec. 16 of the Punjab Municipal Act expressly provided for an opportunity being given to the member concerned whereas Sec. 238 (1) did not provide for such an opportunity and, so, by necessary implication, it must be considered that the principle *audi alteram partem* was excluded. We are unable to agree with the submission of the learned Attorney General.

It is not always a necessary inference that if opportunity is expressly provided in one provision and not so provided in another, opportunity is to be considered as excluded from that other provision. It may be a weighty consideration to be taken into account but the weightier consideration is whether the administrative action entails civil consequences.

20. Now applying the aforesaid authoritative enunciation, it would follow that merely because an opportunity to show cause is provided under S. 3 (7) of the Act and not so expressly provided under Section 3 (8) of the Act would not raise an irrebuttable inference that the principles of natural justice are deliberately excluded from the later provision. Undoubtedly this is a relevant consideration but by itself it is not conclusive on the point. Again the second consideration envisaged by their Lordships is — and what they have called the weightier one — whether the administrative action entails civil consequences. As I have highlighted earlier, action under S. 3 (8) undoubtedly entails civil consequences of the most serious nature and indeed they may be termed as both penal and evil consequences in so far as in inference of either corruption or grave mis-management would arise and cannot be easily separated from an order of the supersession of the whole Board. Therefore, it is the later and the weightier consideration that has to be given pre-eminence in view of the dictum of their Lordships of the Supreme Court and a right of natural justice has to be read into Section 3 (8) and is not to be easily displaced by any possible inference of the exclusory rule.

21. It appears to me that when the learned single Judge considered the matter there was undoubtedly much to be said for the view he had taken and we would have been loth to dislodge it, but for the fact that the binding precedent in *S. L. Kapoor's case* (AIR 1981 SC 136) has materially altered the situation. In our view the aforequoted observations from the said case virtually conclude the matter in favour of the appellants and with the greatest respect we have to hold that the finding of the learned single Judge that the principles of natural justice are inferentially excluded from S. 3 (8) of the Act is not now sustainable and has consequently to be reversed.

22. As is manifest from the above, the issue herein is now largely covered by *S. L. Kapoor's case* (AIR 1981 SC 136) (supra). However, it is of interest to note that this

High Court had earlier taken a similar view in the context of the unamended Section 238 of the Punjab Municipal Act in *The Municipal Committee, Kharar v. State of Punjab*, AIR 1967 Punj 430. Equally it is worthy of notice that the Legislature itself later has amended S. 238 vide Punjab Act No. 24 of 1973 whereby the principle of natural justice has been incorporated in the statute itself by sub-section (3) of the amended section.

23. In fairness to Mr. J. L. Gupta we must, however, advert to his attempted reliance first on the Full Bench judgment of this Court in *Gurcharan Singh v. State of Haryana*, 81 Pun LR 170 (AIR 1979 Punj 61). What fell for consideration there was the provision of S. 27 of the Punjab Co-op. Societies Act and the crucial issue raised was whether the principles of natural justice were equally attracted in the interlocutory suspension of an Executive Committee of a Co-operative Society under sub-sec. (1-A) of the aforesaid section. The statute therein had expressly provided for an opportunity to the Committee or any of its members prior to its supersession or the latter's removal under sub-section (1) but had pointedly excluded any such opportunity in the case of mere suspension under sub-sec. (1-A). A plain reading of the Full Bench judgment would show that it was held that suspension herein was obviously interlocutory as a prelude to supersession and by itself led to no permanent civil consequences. It was in that context that it was held that the exclusory rule was clearly attracted in the context of suspension alone under sub-section (1) (A). We are of the view that *Gurcharan Singh's case* (supra) is wholly distinguishable and further that its ratio is in no way affected by *S. L. Kapoor's case* (AIR 1981 SC 136) (supra).

24. Similar considerations seem to apply in case of the Full Bench judgment in *Mota Singh v. State of Punjab*, 1979 Pun LJ 129. What fell for consideration in the said judgments were the recently inserted provisions of sub-sections (8) to (12) of S. 13 of the Punjab Co-op. Societies Act, 1961. Construing the same it was held that it was not the requirement of natural justice that a copy of the proposed order of amalgamation should be sent under certificate of posting to every member of the society or societies concerned, when the legislature had not advisedly said so and had confined the provisions only to the society itself and its creditors. It deserves highlighting that the aforesaid provisions had themselves given a

right to a member of the society to prefer objections and also the option of withdrawing his share, deposits, or loan as the case may be. It was in this context that the Full Bench held that the requirement of the service of a copy of the proposed order of amalgamation under certificate of posting to every member of the society could not be inserted in the statute by a process of interpretation or a tortuous invocation of the rules of natural justice. It is thus plain that Mota Singh's case (supra) is plainly distinguishable. Lastly in this context Mr. Gupta had placed reliance on the single Bench judgment in *S. Ajaib Singh Machaki, Administrative Member, Punjab State Electricity Board, Patiala v. State of Punjab* (C. W. P. No. 2211 of 1977) decided on Dec. 2, 1977. Therein what fell for construction was S. 10 of the Electricity Supply Act, 1948 with particular reference to subsection (5) thereof with regard to the removal of the Chairman and the members of the Board constituted under the said Act. What calls for pointed notice in the context of this case is first the fact that the petitioner therein was only the administrative member of the Punjab State Electricity Board, Patiala and not the Board collectively or its members. A close reading of the said judgment would show that even though all the observations made therein may not now be tenable in view of the authoritative pronouncement in *S. L. Kapoor's case* (AIR 1981 SC 136) (supra), yet the learned Judge held it as a fact that the consideration of the entire matter in the high level meeting in which all the members of the Board participated was itself sufficient opportunity to explain and show cause even if the same could be deemed to be implicit under S. 10 (5) of the Act. That judgment would, therefore, be sustainable at least on that limited ground and its ratio on this point does not in any way conflict with the view we are inclined to take. Consequently, we do not propose to examine the correctness or otherwise of the ancillary observations made in *Ajaib Singh Machaki's case* (supra).

25. It would be thus plain that the aforesaid three authorities strenuously relied on behalf of the respondent State, do not in any way aid its stand. In the light of the aforesaid discussion we are constrained to allow this appeal and set aside the judgment of the learned single Judge. Annexure P/2 is consequently quashed. It was the common case of the parties that the three years' tenure of the appellants would

expire on May 12, 1981 and inevitably, therefore, they would not now be entitled to the reinstatement as members of the Board. However, the appellants would be plainly entitled to all the consequential reliefs flowing inevitably from the quashing of the impugned order. In the peculiar circumstances of the case, we leave the parties to bear their own costs.

SURINDER SINGH, J.:— I agree.

Appeal allowed.

AIR 1982 PUNJAB AND HARYANA 23

J. V. GUPTA, J.

Union of India and another, Petitioners
v. Jagwant Singh, Respondent.

Civil Revn. No. 1205 of 1980, D/- 19-8-1981.

(A) East Punjab Urban Rent Restriction Act (3 of 1949), S. 13 (2) (i) — Eviction — Failure of tenant to tender rent within time as contemplated under Section 13 (2) (i) — Arrears of rent not tendered on first date of hearing of suit — Eviction order, held, was proper.

Where the rent for the month of December, 1977 though sent by the tenant by money order within time, reached the landlord on Feb., 1978, and the same was refused by him, it could not be said to be a valid tender of rent as contemplated by S. 13 (2) (i). Failing to make the payment of the rent within time it was obligatory for the tenant to tender the arrears of rent together with costs and interest, on the first date of the hearing, in order to save his eviction. Since no arrears of rent were paid or tendered on the first date of hearing, the order of eviction passed by the courts below was proper. (Paras 4, 5)

(B) East Punjab Urban Rent Restriction Act (3 of 1949), S. 13 (2) (i) — Tenant tendering rent by money order — No evidence to show that there was any understanding or agreement between the parties that rent will be paid by money orders — Held, it could not be said that Post Office was the agent of landlord. 1981 (1) RLR 332; AIR 1960 All 747, Rel. on. (Post Office Act (1898), S. 44).

(Para 5)

Cases Referred: Chronological Paras
AIR 1980 NOC 175: (1981) 1 Rent LR 332
(Madh Pra)

*Against order of N. C. Khichi, Appellate
Authority, Bhatinda, D/- 6-3-1980.

IY/JY/E328/81/VCD

(1979) 2 Ren CR 81 (Pat) 3
AIR 1973 Madh Pra 268: 1974 Ren CJ 569 3

AIR 1960 All 747: 1960 All LJ 522 3, 5
Gopi Chand, for Petitioners; G. S. Grewal and K. C. Puri, for Respondent.

ORDER:— The tenant-petitioners have filed this revision petition against the order of the Appellate Authority, Bhatinda, dated March 6, 1980 whereby the order of the Rent Controller, Bhatinda, dated January 3, 1979, directing the ejectment of the tenant-petitioner was maintained.

2. Jagwant Singh, landlord-respondent, rented out the premises, in dispute, to the Union of India, the tenant-petitioner, through its Divisional Engineer, Telegraphs, Ferozepore, on March 25, 1970 at the rate of Rs. 150/- per month. The ejectment of the petitioners was sought inter alia on the ground of non-payment of rent since Oct, 1977. The application for ejectment was filed on May 11, 1978. In the written statement filed on behalf of the petitioners, it was pleaded that they made valid tender through money orders, but the landlord refused to accept the same without any reason. Consequently, no tender or payment was made on the first date of hearing which was June 13, 1978. On that date, the learned Rent Controller assessed Rs. 25 as costs of the application. Shri H. S. Sidhu, Government Pleader, then made a statement that the arrears of rent, as claimed, had already been tendered to the landlord. However, he tendered Rs. 25 as costs of the application. On the pleadings of the parties, the Rent Controller framed the following issues:—

1. Whether the applicant required the premises, in dispute, for his personal use and occupation, as alleged?

2. Whether the respondent is in arrears of rent?

3. Whether the application is bad due to non-joinder of necessary parties?

4. Whether the notice served by the applicant on the respondent under Section 106, Transfer of Property Act, is invalid? If so, to what effect?

5. Relief.

It is only, issue No. 2, on the finding of which, the Rent Controller directed the eviction of the petitioners as he came to the conclusion that the petitioners were in arrears of rent and that on the first date of the hearing, the arrears of rent, along with the interest were not tendered. In appeal, this finding of the Rent

Controller was affirmed. Feeling aggrieved against the same, the petitioners have come up in revision to this Court.

3. The learned counsel for the petitioners, vehemently contended that the petitioners did not tender the rent on the first date of the hearing because according to their written statement, the rent due had been tendered to the landlord by way of money orders, which were returned as refused by him. Under the circumstances, according to the learned counsel, there was no obligation on the part of the petitioners to make the tender or to make the payment on the first date of hearing except the costs of the application, before the Rent Controller. In support of this contention, he has drawn my attention to sub-sec. (2) (i) of S. 13 of the East Punjab Urban Rent Restriction Act, 1949 (hereinafter called the Act), which reads:—

"(2) A landlord who seeks to evict his tenant shall apply to the Controller for a direction in that behalf. If the Controller, after giving the tenant a reasonable opportunity of showing cause against the applicant, is satisfied:—

(i) that the tenant has not paid or tendered the rent due by him in respect of the building or rented land within fifteen days after the expiry of the time fixed in the agreement of tenancy with his landlord or in the absence of any such agreement, by the last date of the month next following that for which the rent is payable:

Provided that if the tenant on the first hearing of the application for ejectment after due service pays or tenders the arrears of rent and interest at six per cent per annum on such arrears together, with the cost of application assessed by the Controller, the tenant shall be deemed to have duly paid or tendered the rent within the time aforesaid."

He also placed reliance on *Rajaram v. Ganpatlal*, 1974 Ren CJ 569: (AIR 1973 Madh Pra 268) and *Narain Prasad v. Smt. Shobha Singh*, (1979) 2 Ren CR 81 (Pat). On the other hand, the learned counsel for the landlord submitted that from the admitted facts, as pleaded in the written statement, the rent for the month of December, 1977, was sent by money order on December 30, 1977, which reached the landlord on Feb. 23, 1978, when it is said to have been refused by him. According to the learned counsel, since the rent for the month of December, 1977, was payable up to the end

of January, 1978, the tender made on Feb. 23, 1978, vide Exhibit R-1, was no valid tender in the eye of the law and the landlord was within his right to refuse the same. He also submitted that the Post Office through which the money orders were sent, was (not?) the agent of the landlord and thus, the tender made by the petitioners through, Exhibit R-1, in these circumstances, will be deemed to have been made on Feb. 23, 1978, when it is said to have been refused by the landlord, in support of this contention, the learned counsel placed reliance on *Vishnudayal v. Anjori Bai*, (1981) 1 Rent LR 332: (AIR 1980 NOC 175) (Madh Pra) and *Raja Ram v. Bisran*, AIR 1960 All 747.

4. I have heard the learned counsel for the parties at a great length and have also gone through the record. It may be that the view taken by the Appellate Authority was not correct when it observed that the tenant was under the legal obligation to tender or to make the payment of the arrears of rent on the first date of hearing failing which the order of eviction was to be passed against the petitioners. In case, the tenant can show under cl. (i) of sub-sec. (2) of S. 13 of the Act, reproduced above, that the rent due was paid or tendered within the time prescribed therein, then the proviso to that clause, is not attracted. But in that case, the tenant must prove that the rent due was tendered or paid within the time, as fixed in the agreement of the tenancy with his landlord or in the absence of such an agreement, on the last date of the month next following that for which the rent is payable. In the present case, it is the case of the tenant himself that the rent for the month of December, 1977, though sent by money order within time, was refused by the tenant (landlord?) on Feb. 23, 1978, vide Exhibit R-1. Thus, this tender could not be said to be a valid tender, as contemplated under sub-cl. (i) of sub-sec. (2) of Sec. 13 of the Act. Failing to make the payment of the rent within time, it was obligatory for the tenant to tender the arrears of rent together with costs and interest, on the first date of the hearing, in order to save his eviction.

5. In *Raja Ram's case* (AIR 1960 All 747) (supra), it was held that the post office could not be held to be the agent of the Court in that case and consequently, the handing over of the money to the post office on April 26, 1956, failed to satisfy the re-

quirement of paying the amount into Court as was required by the decree. In any case, there is no evidence on the record in the present case, nor it is the case of the tenant, that there was any understanding or agreement between the parties, that the rent will be paid through money orders. In the absence of any such agreement or understanding, it could not be held that the post office was the agent of the landlord in the instant case.

Section 44 of the Post Office Act, 1898, provides:—

"44. (1) Subject to such conditions as the Central Government may, by rules made under Section 43, prescribe in respect of the levy of additional rates of commission or fees or any other matters, a person remitting money through the post office by means of money order may require that the amount of the order, if not paid to the payee, be repaid to him or be paid to such person other than the original payee as he may direct.

(2) If neither the payee nor the remitter of money order can be found, and if within the period of one year from the date of the issue of the order no claim is made by such payee or remitter, the amount of such order shall not be claimable from the Government."

In view of the provisions of this section, a person remitting money through the post office by means of a money order may, at any time till the amount is paid to the payee, require that the amount of the money order be re-paid to him or be paid to such person other than the original payee, as he may direct. In other words, the control over that money is that of the remitter till the money is actually paid to the payee, mentioned in the money order. Under the circumstances, the petitioners failed to make the tender, as contemplated under sub-cl. (i) of sub-sec. (2) of S. 13 of the Act, and, since no arrears of rent were paid or tendered on the first date of hearing, the eviction order was rightly passed by both the Courts below.

6. Consequently, this revision petition fails and is dismissed with costs. However, the petitioners are allowed three months' time to vacate the premises; provided all the arrears of rent, if any, and the advance rent for three months, are deposited with the Rent Controller within a month from this order.

Revision dismissed.

AIR, 1982 PUNJAB AND HARYANA 26

S. S. SANDHAWALIA, C. J.
AND G. C. MITAL, J.Rama Nand, Petitioner v. State of
Haryana and others, Respondents.Civil Writ Petn. No. 158 of 1980, D/-
9-2-1981.

Punjab Security of Land Tenures Act (10 of 1953), Ss. 6, 9 (1), 10-A (b), 16, 19 and 21 (1) — Interpretation of — Agricultural land acquired by State Government after 1-2-1955 by way of gift — Tenants thereon can claim protection by virtue of S. 16 read with S. 9 — (Interpretation of Statutes — Harmonious construction).

Where the State Government acquired the agricultural land in dispute by gift after 1-2-1955, the rights of the petitioners as tenants thereon would not be affected by virtue of Section 16. The necessary corollary would be that by virtue of Section 9 (1), the State Government, who is their land-owner will not be competent, to eject them except on grounds (i) to (vii) contained therein notwithstanding anything contained in any other law for the time being in force, namely, Punjab Tenancy Act, 1887. The only remedy available to it to eject tenants will be under Section 9 (i) or under Section 14 (i) and (ii) of the Act of 1953. (Para 12)

A bare reading of Section 21 (1) does go to show that the provisions of the Act would not apply to land held by the State Government while in possession of a tenant or lessee. On the other hand, a reading of Sections 6, 10-A (b), 16 and 19 goes to show that only limited protection has been granted to the property owned by the State Government or the Central Government. If Section 21 is to be read to completely exclude the applicability of the Act to the land owned by the Government, when it is in possession of a tenant or a lessee, then the provisions of Ss. 6, 10-A and 16 would be rendered completely obsolete and redundant so far as the land owned by the Government in possession of tenant other than that which was acquired by it under any law for the time being in force is concerned. This could not have been the intention of the Legislature. Under the principles of interpretation of the pro-

visions of law, the provisions must be construed in such harmonious way that no provision of law is left redundant. Therefore, on the harmonious construction as also on the plain reading of Section 21 (1), it would apply only to such land held by a tenant or lessee under Government or local bodies in State; or any unallotted evacuee land, immediately before the commencement of the Act and not thereafter. The voluntary transfers do not come within the ambit of acquisition by the State Government under any law for the time being in force, but would be a case of transfer by private contract. Section 21 has application to such land in possession of a tenant or a lessee belonging to the Government on the commencement of the Act, whereas Section 16 of the Act has application to acquisitions by the State after 1-2-1955, other than under any law for the time being in force. Section 10-A (b) of the Act has application to utilization of such land which was not acquired by the State Government under any law for the time being in force which would be only after the commencement of the Act. 1961 Pun LJ 18 (FC); 1963 Pun LJ 140, Approved.

(Paras 7, 8, 10, 11)

Cases Referred : Chronological Paras
1963 Pun LJ 140 8
1961 Pun LJ 18 (FC) 3, 12
AIR 1959 SC 422 7
AIR 1953 SC 394 8

S. C. Kapoor, for Petitioner; O. P. Goyal for Advocate General (Haryana), for Respondents.

GOKAL CHAND MITAL, J.:— A common question of law which arises in this set of seven writ petitions (C. W. P. Nos. 158, 486 to 490 and 565 of 1980), is whether the tenant of the State Government in respect of agricultural land acquired by the State Government after 1st February, 1955, shall be governed by the provisions of the Punjab Security of Land Tenures Act, 1953, (hereinafter called the 'Act') and can claim protection by virtue of Section 16 read with Section 9 of the Act and can avoid ejectment under the provisions of the Punjab Tenancy Act, 1887.

2. Raja Narinder Singh and others were the land-owners and the petitioners in the seven cases before us were their tenants since long before the coming into force of the Act. Raja

Narinder Singh and others gifted the property in dispute to the Jhajjar Education Society, Jhajjar, by three separate registered gift deeds during the period 1958 to 1961. By another registered gift deed dated 2nd August 1963, the Jhajjar Education Society, Jhajjar, gifted the property in dispute to the State of Haryana. The net result was that the petitioners became the tenants of the State of Haryana with effect from 2nd August, 1963.

3. After the State Government became the land-owner of the property in dispute, they started proceedings for ejectment of the petitioners under the Punjab Public Premises and Land (Eviction and Recovery) Act 1959, and finally obtained orders of their ejectment. The petitioners filed writ petitions in this Court challenging the orders of ejectment on the ground that since they were tenants, no proceedings under that Act could be taken against them under the 1959 Act. At the hearing of those writ petitions, the State Government gave an undertaking that they would not implement the orders of ejectment, with the result that the writ petitions became infructuous. Thereafter, the State Government filed applications, under Sections 42 (b), 43 and 45 of the Punjab Tenancy Act, 1887, against the petitioners before the Assistant Collector Ist Grade, Jhajjar, for their ejectment. The petitioners took up the defence that the Punjab Tenancy Act, 1887, was not applicable to them as they had the protection of the Act which had the overriding effect and, therefore, they could not be ordered to be ejected under that Act. On the contrary, the stand of the State Government was that in view of Section 21 of the Act, the Act was not applicable to the land in dispute which came to be owned by the State Government, and, therefore, the petitioners could not rely on any provision of the Act. The Assistant Collector upheld the contention of the petitioners and dismissed the applications and vacated the notices of ejectment issued against the petitioners by order dated 26th Nov. 1976, copy Annexure P. 1. In doing so, he followed a decision of the Financial Commissioner in *Bachan Singh v. Sardarni Rupinder Kumari*, 1961 Pun LJ 18. The State Government took the matter in appeal and revision before the Collector and

Commissioner in which they failed vide orders Annexures P. 2 and P. 3 respectively. Then a further revision was filed before the Financial Commissioner, Haryana. The Financial Commissioner took a view contrary to Bachan Singh's case (supra) and held that even if transfer of the property to the State Government is made after 1st February, 1955, the provisions of the Act would not come to the rescue of the petitioners and they would not be entitled to the benefit of Section 16 of the Act as the Act would be wholly inapplicable, by virtue of Section 21 of the Act, with the result that the revisions filed by the State Government were allowed by order dated 23rd November, 1979, (copy Annexure P. 4) and the matter was remanded to the Assistant Collector to decide the same on merits. The petitioners filed the present writ petitions to impugn the order of the Financial Commissioner initially, the writ petitions came up for consideration before me sitting singly and in view of the importance of the matter and conflicting views of the Financial Commissioner, the matter was ordered to be heard by a larger Bench and that is how these writ petitions have been placed before us for final disposal.

4. In order to appreciate the point involved in these cases, it will be useful to notice certain provisions of the Act, which are Sections 6, 9 (1), 10-A (b), 16, 19 and 21 (1), and are reproduced hereunder:—

"6. Certain previous transfers of land not to affect rights of tenants. No transfer of land, except a bona fide sale or mortgage with possession or a transfer resulting from inheritance, made after the 15th August, 1947, and before the 2nd February, 1955, shall affect the right of the tenant on such land under this Act.

9. Liability of tenant to be ejected.

(1) Notwithstanding anything contained in any other law for the time being in force, no land-owner shall be competent to eject a tenant except when such tenant:—

* XX XX XX XX
(various grounds of ejectment (i) to (vii) are stated).

10-A. (b). Notwithstanding anything contained in any other law for the time

being in force and save in the case of land acquired by the State Government under any law for the time being in force or by an heir by inheritance, no transfer or other disposition of land which is comprised in surplus area at the commencement of this Act, shall affect the utilization thereof in Cl. (a).

16. Saving of tenancies from effect of mala fide transfer.

Save in the case of land acquired by the State Government under any law for the time being in force, or by an heir by inheritance, no transfer or other disposition of land effected after the 1st February, 1955, shall affect the rights of the tenant thereon under this Act.

19. Sections 17 and 18 not to apply to certain property and tenants.

Nothing contained in Section 17 or Section 18 shall affect any land which is evacuee property, as defined in the Administration of Evacuee Property Act, 1950, (XXXI of 1950) or any other land which may at any time be acquired by the Central Government for resettlement of displaced persons.

21. Saving of tenants and lessees under Government.

(1) Nothing contained in this Act shall affect any land held by a tenant or lessee under Government, or local bodies in the State, or any unallotted evacuee land.

5. A reading of Sections 6 and 16 of the Act together shows that while bona fide sale, mortgage with possession or transfer resulting from inheritance made after 15th August, 1947, but before 2nd February, 1955, alone have been saved and all other transfers are not to affect the rights of the tenants under the Act during that period, according to Section 6, under Section 16 only the land acquired by the State under any law for the time being in force, or by an heir by inheritance, have been saved and no transfer or other disposition of land effected after 1st February, 1955, shall affect the rights of the tenant thereon under the Act. While under Section 6, certain bona fide transfers are permissible besides inheritance, under Section 16, no transfer is permissible which may have the result of affecting the rights of a tenant under the Act. The two exceptions are inheritance by an heir and the acquisition

by the State Government under any law for the time being in force. According to Section 9 (1) of the Act, no landowner is competent to eject a tenant except on grounds (i) to (vii) contained therein, notwithstanding any other law. This provision has the overriding effect on the other legislation concerning the ejectment of the tenant, namely, the Punjab Tenancy Act, 1887, as the Urban Rent Control legislation has over the Transfer of Property Act.

6. Section 10-A (a) of the Act authorises the utilization of surplus area and Section 10-A (b) thereof provides that the power to utilize is not affected by any transfer or other disposition of land comprising the surplus area at the commencement of the Act, save in the case of land acquired by the State Government under any law for the time being in force or by an heir by inheritance. It deserves to be noticed here that Section 10-A (b), as it stood before the amendment made in the connection by the Punjab Security of Land Tenures (Amendment) Act, 1959, which was published on 19th January, 1959, was minus the words "and save in the case of land acquired by the State Government under any law for the time being in force or by an heir by inheritance". Therefore, before the Amending Act, 1939, the utilization of the surplus area was not affected even by inheritance or by acquisition of land by the State Government under some law. But after the amendment, the saving clause operated in favour of an heir by inheritance and the acquisition by the State under some law. Section 19 of the Act has a reference to Sections 17 and 18 of the Act and before the scope of Section 19 is discussed, it will be useful to notice as to what is contained in Sections 17 and 18. Under Section 17 of the Act, certain tenants have been conferred the right to pre-empt the sale of land under their tenancy, while under Section 18 certain tenants have been conferred the right to purchase land under their tenancy subject to the conditions laid in that section. Therefore, by virtue of Section 19, Sections 17 and 18 of the Act would not apply to evacuee property as defined in the Administration of Evacuee Property Act, 1950, or any other land which may be acquired by the State (Central ?) Government for re-settlement of dis-

placed persons, meaning thereby that there would be no bar to the applicability of Sections 17 and 18 of the Act to any other land owned by the Central Government. Even to land which is evacuee property or the one acquired by the Central Government for re-settlement of displaced persons, all other provisions would apply barring Sections 17 and 18.

7. This brings me to the consideration of Section 21 (1) of the Act, which is the last provision to be construed. According to this provision, nothing contained in the Act is to affect any land held by a tenant or lessee under the Government or local bodies in the State or any unallotted evacuee land. A bare reading of Section 21 (1) does go to show that the provisions of the Act would not apply to land held by the State Government while in possession of a tenant or lessee. On the other hand, a reading of sections 6, 10-A (b), 16 and 19 goes to show that only limited protection has been granted to the property owned by the State Government or the Central Government. If Section 21 is to be read to completely exclude the applicability of the Act to the land owned by the Government, when it is in possession of a tenant or a lessee, then the provisions of Secs. 6, 10-A and 16 of the Act would be rendered completely obsolete and redundant so far as the land owned by the Government in possession of tenant other than that which was acquired by it under any law for the time being in force is concerned. This could not have been the intention of the Legislature. Under the principles of interpretation of the provisions of law, it has been held that the provisions must be construed in such harmonious way that no provision of law is left redundant. It is equally true that if on true construction a statute leads to anomalous results the Courts have no option but to give effect to it and leave it to the Legislature to amend and alter the law, but when on a construction of a statute two views are possible, one which results in anomaly and the other not, it is the duty of Courts to adopt the latter and not the former, seeking consolation in the thought that law bristles with anomalies. (See *N. T. Veluswami Thevar v. G. Raja Nainar*, AIR 1959 SC 422).

8. Following view was taken by the Supreme Court in *Rao Shiv Bahadur Singh v. The State of Vindhya Pradesh*, AIR 1953 SC 394 (at p. 397):—

"While, no doubt, it is not permissible to supply a clear and obvious lacuna in a statute and imply a right of appeal, it is incumbent on the Court to avoid a construction, if reasonably permissible on the language, which would render a part of the statute devoid of any meaning or application".

Following the aforesaid rules of interpretation, the only reasonable way of interpreting Section 21 of the Act and of giving full effect to it while reading Sections 6, 10-A (b), 16 and 19 of the Act on the statute book, would be that it applied to such land held by a tenant or lessee under Government, or local bodies in the State, or any unallotted evacuee land on the commencement of the Act. The word 'held' has been used in the past tense and, therefore, Section 21 (1) of the Act would be applicable only to such lands in possession of tenants or allottees immediately before the commencement of the Act. Therefore, on the harmonious construction as also on the plain reading of Section 21 (1) of the Act, I am of the considered view that Section 21 (1) would apply only to such land held by a tenant or lessee under Government, or local bodies in State, or any unallotted evacuee land, immediately before the commencement of the Act and not thereafter. If the State Government acquired land after the commencement of the Act by bona fide sale before 2nd February, 1955 such a transfer in favour of the State would be protected and the tenant will not be entitled to claim benefit of Section 6 of the Act in respect thereof. Similarly, if the State Government acquires surplus area by a voluntary transfer, the same would be liable to be utilized in pursuance of section 10-A (b) of the Act and the saving clause would apply only in respect of the land acquired by the State Government under any law for the time being in force. The voluntary transfers do not come within the ambit of acquisition by the State Government under any law for the time being in force, but would be a case of transfer by private contract. This view finds support from a decision of *A. N. Grover, J., in Mota*,

Singh v. The Financial Commissioner, Punjab, 1963 Pun LJ 140, wherein it was held as follows:—

"Section 10-A (b) of the Punjab Security of Land Tenures Act saves only those lands which are acquired by the State Government under any law for the time being in force, which necessarily must refer to lands acquired under the Land Acquisition Act or any other similar statute. Thus any land sold to the State Government by private treaty would not be covered by the saving clause under Section 10-A (b) of the Act."

9. The aforesaid decision is approved.

10. Any acquisition by a private contract after 1st February, 1955, according to Section 16 of the Act, is not to affect the rights of a tenant thereon under the Act and the only saving clause is acquisition by the State under any law for the time being in force. The words "land acquired by the State Government under any law for the time being in force" cannot be equated with the words "acquired in any manner" and, therefore, these words have to be read differently. The acquisition under any law for the time being in force is under the Land Acquisition Act or allied statutes, but private sale transactions are not called acquisitions under any law for the time being in force. Therefore, the words used by the Legislature in Section 16 of the Act have to be interpreted as they are and by giving full meaning to these words, the only conclusion is that the saving is in respect of land acquired by the State Government under any law for the time being in force and not to land acquired by a private contract or gift.

11. Once again, Sections 16 and 21 of the Act, if read together, clearly go to show that apart from the harmonious construction according to the word 'held' in Section 21, the Legislature must have intended that Section 21 would apply to any land held by a tenant or lessee under the Government on the date of commencement of the Act, whereas according to Section 16 of the Act, it envisaged the acquisition of land by the State Government not only after the commencement of the Act but after 1st February, 1955, and for acquisition after 1955, the saving clause is applied not to all acquisitions by the

State, whether under law or by private contracts, but only to such acquisitions which are under any law for the time being in force. This further goes to show that Section 21 has application to such land in possession of a tenant or a lessee belonging to the Government on the commencement of the Act, whereas Section 16 of the Act has application to acquisitions by the State after 18th (1st) February, 1955, other than under any law for the time being in force. Section 10-A (b) of the Act has application to utilization of such land which was not acquired by the State Government under any law for the time being in force which would be only after the commencement of the Act.

12. For the reasons recorded above, I am of the view that since the State Government acquired the land in dispute by gift on 2nd August, 1963, i.e., after 1st February, 1955, the rights of the petitioners as tenants thereon would not be affected by virtue of Section 16 of the Act. The necessary corollary would be that by virtue of Section 9 (1), the State Government, who is their land-owner, shall not be competent to eject them except on grounds (i) to (vii) contained therein notwithstanding anything contained in any other law for the time being in force namely, the Punjab Tenancy Act, 1887. The only remedy available to the State Government to eject the petitioners would be either under Section 9 (1) or under Sections 14-A (i) and (ii) of the Act. Accordingly, the decision in Bachan Singh's case (supra) is approved.

13. In the result, all the seven writ petitions are allowed with costs the decision of the Financial Commissioner dated 23rd November, 1979, Annexure P. 4 is set aside and that of the Commissioner, Ambala Division, dated 15th December, 1977, is restored; counsel's fee being Rs. 100/- in each case.

S. S. SANDHAWALIA, C. J.:— I agree.

Petitions allowed.

AIR 1982 PUNJAB AND HARYANA 31

J. V. GUPTA, J.

Amin Chand and others, Petitioners v. Gian Chand and another, Respondents.

Civil Revn. No. 631 of 1976, D/- 25-8-1981.*

(A) East Punjab Urban Rent Restriction Act (3 of 1949), S. 13 (2) (ii) (b) — Eviction — Premises rented out for selling firewood — Tenant selling firewood along with it tethering buffalo in premises — Held, user of premises not changed. (Landlord and Tenant — Eviction — Change of user).

According to S. 13 (2) (ii) (b), if the premises in dispute were being used for the same purpose for which they were originally let out and in addition thereto, a part of the building or the rented land, was also used for some other purpose, that per se would not give the landlord the right to claim the eviction of the tenant. (1966) 68 Pun LR 367, Foll., AIR 1980 Punj & Har 229 (FB) and 1976 Ren CR 65 (Punj & Har), Disting. (Para 5)

Where the tenant was using the premises for the purpose for which they were originally rented out, that is, for carrying out the business of selling firewood, though along therewith he had also started tethering his buffalo therein.

Held that, it could not be said that the tenant had been using the premises in dispute for the purpose other than that for which they had been taken out on rent by him. (Para 5)

(B) East Punjab Rent Restriction Act (3 of 1949), S. 13 (2) (iii) — Eviction — Rent Controller's order of eviction on ground that tenant had impaired value and utility of premises — Not substantiated by any cogent evidence on record — Finding liable to be set aside. (Para 6)

Cases Referred: Chronological Paras
AIR 1980 Punj & Har 229 (FB) 3
1976 Ren CJ (SN) 32: 1976 Ren CR 65
(Punj & Har) 3
(1966) 68 Pun LR 367 3; 5

Ravi Nanda and S. S. Mahajan, for Petitioners; Tejinder Singh Gujral, for Respondents.

ORDER:— The tenant-petitioner, had filed this revision petition against the order of the Appellate Authority, Jul-

*Against order of J. S. Chatha, Appellate Authority, Jullundur, D/- 17-4-1976.

IY/JY/E332/81/JJS

lundur, dated April 17, 1976, whereby the order of the Rent Controller, Jullundur, dated September 25, 1975, directing his ejectment was maintained.

2. The premises, in dispute, i.e., the vacant site measuring 4 marlas situated in Rasta Mohalla, Jullundur, were rented out to the petitioner at a monthly rent of Rs. 20 vide rent note, Exhibit A-1, dated October 2, 1964, for selling firewood. The ejectment of the tenant was sought on the grounds that, (a) the tenant had not paid to the landlords the rent of the demised premises since June 2, 1973, (b) that the respondent had been using the disputed premises for the purpose other than that for which they were taken on rent by him, (c) that the respondent had committed such acts as were sure to impair the value and utility of the disputed premises; (d) that the respondent had been guilty of such acts and conduct as were a nuisance to the occupiers of the buildings in the neighbourhood and (e) that the respondent had violated the terms and conditions, as contained in the aforesaid rent deed. The allegations of the landlord were controverted in the written statement filed by the petitioner. On the pleadings of the parties, the Rent Controller, framed the following issues:

1. Whether a valid notice was served on the respondent?

2. Whether the petition is bad for non-joinder of necessary parties?

3. Whether the respondent is liable to ejectment from the demised premises on the grounds alleged in the application except the non-payment of rent?

4. Relief.

The Rent Controller passed the order of the eviction of the petitioner from the demised premises on the ground that he had impaired the value and utility of the premises in dispute. The other grounds, on which the ejectment of the petitioner was sought, were found against the landlords. In appeal, the Appellate Authority reversed the finding of the Rent Controller on the ground that the tenant had impaired the value and utility of the demised premises, and came to the conclusion that this ground was not established by the landlords and, therefore, the eviction order, based on it, could not be sustained. However, the Appellate Authority maintained the order of eviction of the tenant on the other ground, that is, he (the tenant) had been using the premises in dispute, for the purpose other than that for which they had been

taken on rent by him. Feeling aggrieved against the same, the tenant-petitioner has come up in revision to this Court.

3. The learned counsel for the petitioner, contended that on the findings given by the Appellate Authority, it could not be held that the tenant-petitioner, had used the premises, in dispute, for a purpose other than that for which they had been taken on rent by him because it had been concurrently found by both the authorities below that the business of selling firewood, for which the demised premises were let out in the beginning was still being carried on by the tenant. In addition thereto, he was also tethering a buffalo and also selling toori therein and, therefore, in these circumstances, the order evicting the petitioner from the premises, in dispute, could not be passed by the Appellate Authority. In support of this contention, the learned counsel placed reliance on the firm *Himalayan Traders v. Narain Dass*, (1966) 68 Pun LR 367. On the other hand, the learned counsel for the respondents contended that the premises, in dispute, were let out to the petitioner for running the business of selling the firewood only and now the tenant had been found to be keeping his buffalo, and toori therein and, thus, he has been using the disputed property for the purpose other than that for which they were rented out to him. In support of this contention, the learned counsel placed reliance on *Des Raj v. Sham Lal*, AIR 1980 Punj. and Har 229 (FB), and *Both Ram v. Mathra Dass*, 1976 Rent CJ (SN) 32. The learned counsel further contended that in any case, the order of ejectment could be sustained on the ground on which the Rent Controller came to the conclusion that the tenant was guilty of impairing the value and utility of the premises, in dispute.

4. After hearing the learned counsel for the parties at a great length and going through the record, I find force in the contention raised by the learned counsel for the petitioner.

5. It has been held by the Appellate Authority that it is well known that the people keep the buffaloes in towns usually for business purposes and tethering of the cattle and selling of toori is certainly a different user and has nothing to do with the sale of wood. These observations, in my opinion, are without any material on the record and are merely based on surmises and conjectures. There is no evidence on the record that the tenant was doing the business of selling

milk. It could not be held on surmises alone that the people keep the buffaloes in towns usually for business purposes. This approach of the learned Appellate Authority was wholly illegal and improper and thus, the finding arrived on its basis is vitiated. The Local Commissioner, who was appointed by the Rent Controller, inspected the spot on October 4, 1974. It has been stated in his report, Exhibit A-7, that he found an iron kanda hanging in between the two rooms shown red in the map. In the front room, wooden pieces were lying, a buffalo was standing and beside the buffalo, a wooden kund for the buffalo was lying. Some green fodder was also lying beside the wooden pieces, small in quantity. It has also been stated therein that no damage to the demised premises was noticed by him. Thus, the only evidence on the record is that the tenant was using the premises for the purpose for which they were originally rented out, that is, for carrying out the business of selling firewood, though along therewith, he had also started tethering his buffalo therein.

Section 13 (2) (ii) (b) of the East Punjab Rent Restriction Act, 1949, reads:—

13. (1) ...

(2) A landlord who seeks to evict his tenant shall apply to the Controller for a direction in that behalf. If the Controller, after giving the tenant a reasonable opportunity of showing cause against the applicant is satisfied:—

(i) ...

(ii) that the tenant has after the commencement of this Act without the written consent of the landlord:—

(a) ...

(b) Uses the building or rented land for a purpose other than that for which it was leased, or;

The language of the abovesaid provision is itself suggestive that if the tenant, after the commencement of the aforesaid Act, uses the building of the rented land for the purpose other than that for which it was leased out, in other words, the purpose, for which the demised premises were leased out, in the beginning, was being carried out no more therein, the landlord was competent to seek his remedy under Section 13 (2) of the abovementioned Act, but if the premises, in dispute, were being used for the same purpose for which they were originally

let out and in addition thereto, a part of the building or the rented land, was also used for some other purpose, that per se would not give the landlord the right to claim the eviction of the tenant. In firm *Himalayan Traders case* (1966-68 Pun LR 367) (supra), it was held:—

"If it were the intention of the legislature that where a small part of the demised premises is not used for the purpose for which it had been let and that was to be ground of ejectment, it would have used the same phraseology as in S. 13 (2) (ii) (a) of the East Punjab Urban Rent Restriction Act and then it would have used in Section 13 (2) (i) (b) also the words 'any portion thereof'. This it has not done. What it has done is that it has said that when the building is used for a purpose other than that for which it was leased and, therefore unless the part so used can itself be described as building, the building to which this part of the clause refers must be taken as a whole. So that user of one room in a building taken on rent for residential purpose, as the godown, does not come under Section 13 (2) (ii) (b) of the Act."

The authorities cited on behalf of the respondent are not at all applicable to the facts of the present case. In all those cases, the original purpose, for which the premises were rented out, was abandoned by the tenants and the premises were being used for some other purpose and, therefore, under those circumstances, it was held that the tenants were liable to be evicted on that ground, therefrom.

6. As regards the other ground, that the tenant-petitioner had impaired the value and utility of the premises, in dispute, which did not find favour with the Appellate Authority, but on which the Rent Controller ordered the ejectment of the petitioner from the demised premises, has not been substantiated by any cogent evidence on the record, and, therefore, it has been rightly held by the Appellate Authority that the tenant had not impaired the value and utility of the demised premises.

7. For the reasons recorded above, this revision petition succeeds and is allowed. The order of the Appellate Authority is set aside and the application for the ejectment of the tenant-petitioner from the demised premises is dismissed, but with no order as to costs.

Revision allowed.

AIR 1982 PUNJAB AND HARYANA 33

J. M. TANDON, J.

Gram Sabha, Shahzadpur and others, Petitioners v. State of Haryana and others, Respondents.

Civil Writ Petn. No. 2909 of 1980, D/- 20-2-1981.

(A) Haryana Municipal Act (24 of 1973), S. 3 (1) — Validity — Does not violate Article 14 of Constitution. (Constitution of India, Art. 14).

Section 3 provides a detailed procedure for constituting a municipality. The State Government is required to issue a notification when it proposes to constitute a Municipal Committee in respect of any local area. Such notification is required to define the limits of the local area to which it relates. A detailed procedure is prescribed for the publication of the notification. The inhabitants of the local area are entitled to file the objections in writing. The objections have to be disposed of by the State Government by passing orders. It is thus clear that a municipality can be constituted after following the detailed procedure and it cannot be said that an arbitrary power in this regard has been conferred on the State Government. This apart the Act gives ample indication about the purpose of setting up of a municipality which is a sufficient guide for the State Government for making a notification under S. 3. It can, therefore, be said that the power conferred on the State Government to issue notifications under S. 3 (1) of the Act is neither arbitrary nor unguided and as such is not violative of Art. 14 of the Constitution.

(Paras 12, 13)

(B) Haryana Municipal Act (24 of 1973), S. 3 — Right of Government to set up municipality in respect of area covered by Panchayat — Not negated by Art. 40 of Constitution. (Constitution of India, Article 40).

Article 40 in no way negatives the right of the State Government to set up a municipality over the area which is covered by the village Panchayat. The setting up of a Panchayat is a step towards Self Government and a municipality is a further improvement in that direction. Article 40, therefore, cannot be taken as a bar for setting up municipality under S. 3 of the Act even with respect to an area which is covered by a Panchayat or Gram Sabha. (Para 15)

DY/EY/B755/81/JHS

Cases Referred :	Chronological	Paras
AIR 1980 SC 882 : 1980 All LJ 401		11
AIR 1979 Punj. & Har 46		8
(1978) 80 Pun LR 696		9
AIR 1968 SC 1344		9
AIR 1968 All 285		10, 14
AIR 1967 SC 1404		4, 5

I. S. Mehta and (K. K. Mehta with him), for Petitioners; Naubat Singh, Sr. Deputy Advocate General, Haryana, for the State; Y. P. Gandhi, for Respondent.

ORDER :— The State Government in exercise of the powers conferred by sub-section (1) of S. 3 of the Haryana Municipal Act, 1973 (hereinafter the Act) issued notification (Annex. P. 4) dated March 25, 1980, proposing the local areas of villages Shahzadpur and Majra in Naraingarh Tahsil of Ambala District, the boundaries of which were detailed therein, to be 'C' class Municipality of Shahzadpur. The State Government thereafter issued another notification (Annex. P. 8) dated August 5, 1980 under sub-section (6) of S. 3 of the Act declaring the local areas of Shahzadpur and Majra detailed in notification (Annexure P 4) to be 'C' Class Municipality of Shahzadpur. Gram Sabhas of Shahzadpur and Majra and a few other residents of these villages have filed the present writ petition challenging these two notifications on various grounds, inter alia, sub-section (1) of Sec. 3 of the Act is ultra vires Art. 14 of the Constitution and further they have been issued mala fide to harm Dr. Amar Nath Gupta, Sarpanch (under suspension), Gram Sabha, Shahzadpur petitioner and to benefit Rai Pirthi Singh respondent in the matter of payment of compensation to him of the charand land which is in occupation of Gram Panchayat, Majra. The mala fides are attributed to Shri Lal Singh, Deputy Minister, Labour and Public Health, Haryana, Chandigarh, who has been impleaded as a respondent.

2. The State of Haryana has contested the writ petition. It has been denied that the impugned notifications (Annexures P. 4 and P. 8) have been issued mala fide or at the instance of Shri Lal Singh respondent. It has also been averred that sub-section (1) of S. 3 of the Act is intra vires Article 14 of the Constitution and the two impugned notifications (Annexures P. 4 and P. 8) are valid. Shri Lal Singh respondent in his separate return has denied the allegations of mala fides levelled against him.

3. The main attack of the learned counsel for the petitioners is that sub-section (1) of Sec. 3 of the Act is ultra vires Art. 14

of the Constitution inasmuch as it does not lay down guidelines in the matter of discretion to be exercised by the State Government for issuing the notification thereunder with the result that an arbitrary and unbridled power has been conferred upon it in this regard. The learned Senior Deputy Advocate General appearing on behalf of the State has argued that under sub-sec. (1) of Sec. 3 of the Act, the State Government can only propose any local area to be a Municipality by a notification. Under sub-section (5) of S. 3 of the Act the inhabitants have a right to submit objections within six weeks from the date of the notification under sub-section (1). Under sub-sec. (6) it is incumbent upon the State Government to consider the objections filed and pass orders thereon before issuing the notification declaring the proposed local area to be a Municipality. The argument of the learned Sr. Deputy Advocate General proceeds that in view of the detailed procedure prescribed under Sec. 3 of the Act the power exercisable under sub-section (1) thereof cannot be taken as arbitrary or unbridled or ultra vires Art. 14 of the Constitution. The contention of the learned Senior Deputy Advocate General must prevail.

4. The learned counsel for the petitioners has relied upon Ram Bachan Lal v. State of Bihar, AIR 1967 SC 1404, wherein Section 4 (1) of the Bihar and Orissa Municipal Act was examined and was held to be not violative of Art. 14 of the Constitution. Section 4 of the Bihar and Orissa Municipal Act reads :—

“4. Declaration of intention to constitute or alter limits of municipality :

(1) (a) When the State Government is satisfied that three-fourths of the adult male population of any town are engaged on pursuits other than agriculture and that such town contains not less than five thousand inhabitants, and an average number of not less than one thousand inhabitants to the square mile of the area of such town, the State Government may declare its intention to constitute such town, together with or exclusive of any railway station, village, land or building in the vicinity of such town, municipality, and to extend to it all or any of the provisions of this Act.

(b) When the State Government is satisfied that any municipality, or any area in a municipality, does not fulfil the conditions specified in Cl. (a), or when the Commissioners at a meeting have made a recommendation in this behalf, the State Gov-

ernment may declare its intention to withdraw such municipality from the operation of this Act, or to exclude such area from such municipality."

5. Their Lordships of the Supreme Court held that S. 4 (1) of the Bihar and Orissa Municipal Act contemplates a town containing not less than five thousand inhabitants and a town of a particular density of population and further that three-fourths of the adult male population should be engaged in pursuits other than agriculture. These requirements show that the area has reached such a stage of development that the Government should constitute a municipality in the area. It was further held that section 388 of the said Act would come into picture only if the requirements of Sec. 4 are not satisfied but yet the Government considers it necessary to make administrative provisions for all or any of the purposes of the Act. This gives sufficient guidance to the Government and no arbitrary power has been conferred on the Government. The learned counsel for the petitioners has argued that the provisions contained in sub-section (1) of S. 3 of the Act are not at par with S. 4 of the Bihar and Orissa Municipal Act. No guidelines as contained in S. 4 of the Bihar and Orissa Municipal Act are provided in S. 3 of the Act. Sub-section (1) of S. 3 of the Act is, therefore, violative of Art. 14 of the Constitution. This contention is without merit. In *Ram Bachan Lal's case* (AIR 1967 SC 1404) (supra), their Lordships were examining Section 4 of the Bihar and Orissa Municipal Act. It was held to be not violative of Art. 14 of the Constitution. Section 3 of the Haryana Municipal Act is not similar to Section 4 of the Bihar and Orissa Municipal Act. It cannot be inferred from the ratio of *Ram Bachan Lal's case* (supra) that Sec. 3 (1) of the Haryana Municipal Act must conform to Sec. 4 of the Bihar and Orissa Municipal Act to be contravening Art. 14 of the Constitution.

6. The learned counsel for the petitioners has argued that under S. 258 of the Haryana Municipal Act (since deleted) which deals with the Constitution of a notified area, it was specifically provided that no area shall be made a notified area unless it contains a town or a bazar and is not a purely agricultural village. No such guideline is provided in S. 3 (1) of the Haryana Municipal Act with the result that it is hit by Art. 14 of the Constitution. This contention is also without force. Sub-sec. (1)

of Sec. 3 of the Act cannot be held to be violative of Art. 14 of the Constitution because under S. 258 (since deleted) it was provided that no area shall be made a notified area unless it contains a town or a bazar and was not a purely agricultural village.

7. The learned counsel for the petitioners has relied upon sub-section (2) of Section 3 of the Punjab Municipal Corporation Act, 1976, whereunder the Government by notification may constitute a municipality to be a city provided its population exceeds three lacs and its total income exceeds two crore rupees per annum. The argument is that no such guideline is provided in Sec. 3 of the Act and as such it is ultra vires Art. 14 of the Constitution. This contention has also no force. Section 3 (1) of the Act is to be examined on its own merits and not by comparison with S. 3 (2) of the Punjab Municipal Corporation Act, 1976.

8. In *State of Punjab v. Dewan Chand*, AIR 1979 Punj & Har 46, a challenge had been laid to the vires of S. 10 of the Punjab Municipal Corporation Act. In this connection Section 4 of the Punjab Municipal Corporation Act which is similar to Section 3 of the Act was examined. It was held (at p. 47):

"From a bare perusal of this section, it is evident that no guideline is provided as to in which cases the area of any municipality could be withdrawn from the operation of the Act. Section 10 forms part of Chap. II which relates to the constitution of Municipalities. Section 4 provides a detailed procedure for constituting a municipality. Under this section the State Government is required to issue a notification when it proposes to constitute a Municipal Committee in respect of any local area. Such a notification is required to define the limits of the local area to which it relates. A detailed procedure is prescribed for the publication of the notification. The inhabitants of the area, who may object to the notification, are entitled to file objections in writing. The objections have to be disposed of by the State Government by passing orders. It would thus be seen that a municipality can be constituted only after following a detailed procedure and nothing has been left to the whim of the State Government."

In this judgment Sec. 4 of the Punjab Municipal Corporation Act, 1976 was found not ultra vires the Constitution inasmuch as a blanket power has not been given to the State Government and the inhabitants have been given a right to raise objections which

the State Government is bound to decide by passing orders. Section 3 of the Act being similar to S. 4 of the Punjab Municipal Corporation Act it or any sub-section thereof cannot be treated *ultra vires* the Constitution.

9. In *Ayodhya Prasad Vajpai v. State of U. P.*, AIR 1968 SC 1344, the notification issued by the Government of Uttar Pradesh under the Uttar Pradesh Kshetra Samitis and Zila Parishads Adhiniyam (33 of 1961) Ss. 3 and 8 were challenged. By these notifications the Government of Uttar Pradesh redivided the rural area in the district with the result that a few khandas were abolished and new created in their place. The argument advanced was that the power of the Government to do so amounted to excessive delegation of legislative functions to the State Government and being not supported by adequate safeguards or guides were liable to be struck down. This argument was not upheld. It was held (at p. 1347):

"The Act speaks for itself and is self-contained. Its policy is stated in clear terms and the power to create Khandas must be read with the power to abolish Khandas and create new Khandas in their place. The details of how big a Khand should be, what territory it should involve and so on and so forth, cannot be the subject of detailed legislation. The Act gives ample indication of what the purpose of making a Khand is and the duties which the Kshetra Samitis must perform. On this subject the legislative will has been sufficiently expressed and must, therefore, guide the State Government in making its notifications."

The ratio of *Ayodhya Prasad Vajpai's* case (supra) was followed in *State of Haryana v. Gram Panchayat, Dera Fateh Singh, Teh. Gulha*, (1978) 80 Pun LR 696 and it was held that the State Government is competent under sub-section (2) of S. 4 of the Punjab Village Common Lands (Regulation) Act, 1961 to include or exclude any area of the Sabha.

10. In *Tulsipur Sugar Company Ltd. v. Notified Area Committee, Tulsipur Town*, AIR 1968 All 285, the notification under Section 3 of the U. P. Town Areas Act was under challenge. Section 3 of this Act reads (at p. 286):—

"(1) The State Government may by notification in the Official Gazette—

(a) declare any town, village suburb, bazar or inhabited place to be a town area for the purpose of the Act, ...

(b) to (d)

Provided that an agricultural village shall not be declared, or included within the limits of a town area.

(2) The decision of the State Government, that any inhabited area is not an agricultural village within the meaning of the proviso to sub-section (1) of this section shall be final and conclusive, and the publication in the Official Gazette of a notification declaring such area to be a town area or within the limits of a town area shall be conclusive proof of such decision."

Holding the notification to be valid, it was held that when an area is declared as a Town Area no specific rights of residents are adversely affected. It may be that in due course of time taxes would be imposed, and residents of the locality may have to pay such taxes. But it cannot be said that a mere declaration of a town area with respect to a specified area directly affects the rights of the residents of the locality. Such a declaration is of administrative nature. Since the decision is of administrative nature, it is not necessary for the State Government to give an opportunity to residents of the locality to oppose such a proposal.

11. *Tulsipur Sugar Company* having lost in the High Court preferred an appeal in the Supreme Court which was also dismissed. Their Lordships of the Supreme Court in their judgment reported in *Tulsipur Sugar Co. Ltd. v. Notified Area Committee, Tulsipur*, AIR 1980 SC 882 held (at p. 887):

"We are concerned in the present case with the power of the State Government to make a declaration constituting a geographical area into a town area under Section 3 of the Act which does not require the State Government to make such declaration after giving notice of its intention so to do to the members of the public and inviting their representations regarding such action. The power of the State Government to make a declaration under Section 3 of the Act is legislative in character because the application of the rest of the provisions of the Act to the geographical area which is declared as a town area is dependent upon such declaration. Section 3 of the Act is in the nature of a conditional legislation."

12. Section 3 of the Act provides a detailed procedure for constituting a municipality. The State Government is required to issue a notification when it proposes to constitute a Municipal Committee in respect of any local area. Such notification is required to define the limits of the local

area to which it relates. A detailed procedure is prescribed for the publication of the notification. The inhabitants of the local area are entitled to file the objections in writing. The objections have to be disposed of by the State Government by passing orders. It is, thus, clear that a municipality can be constituted after following the detailed procedure and it cannot be said that an arbitrary power in this regard has been conferred on the State Government. This apart the Act gives ample indication about the purpose of setting up of a municipality which is a sufficient guide for the State Government for making a notification under S. 3 of the Act.

13. I, therefore, hold that the power conferred on the State Government to issue notifications under sub-section (1) of S. 3 of the Act is neither arbitrary nor unguided and as such is not violative of Article 14 of the Constitution.

14. The learned counsel for the petitioners has further argued that the right given to the inhabitants to file objections under sub-sec. 3, (5) of the Act is illusory, because no right has been given to them to substantiate the same. I am not impressed by this contention. In *Tulsipur Sugar Co. Ltd. v. Notified Area Committee, Tulsipur*, AIR 1968 All 285, Sec. 3 of the U. P. Town Areas Act did not provide that the inhabitants could file objections at all against the notification. It was held that the mere declaration of a town area with respect to a specified area did not directly affect the rights of the residents of the locality. Their Lordships of the Supreme Court in *Tulsipur Sugar Co.'s case* (supra) held further that a declaration under Sec. 3 of the U. P. Town Areas Act is legislative in character because the application of the rest of the provisions of the Act to the geographical area which is declared as a town area is dependent upon such declaration. The observations of their Lordships completely demolish the contention of the learned counsel for the petitioners that the notifications under S. 3 of the Act are bad because the objectors who file objections under sub-section (5) thereof have not been given a right to substantiate the same.

15. Another argument of the learned counsel for the petitioners is that the impugned notifications are ultra vires Article 40 of the Constitution, inasmuch as the areas detailed in notification P. 4 under Sec. 3 (1) of the Act had already been declared Sabha Areas of Shahzadpur and Majra. The argu-

ment in other words is that no municipality can be constituted over the area which is part of Sabha Area under Sec. 4 of the Gram Panchayat Act. The contention is devoid of any force. Article 40 is contained in Part IV of the Constitution which deals with the Directive Principles of State Policy and reads:

Organisation of Village Panchayats:—
The State shall take steps to organise Village Panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-Government.

This Article in no way negatives the right of the State Government to set up a municipality over the area which is covered by the Village Panchayat. The setting up of a Panchayat is a step towards Self-Government and a municipality is a further improvement in that direction. Article 40 of the Constitution therefore, cannot be taken as a bar for setting up municipality under Section 3 of the Act even with respect to an area which is covered by a Panchayat or Gram Sabha.

16. It has been argued by the learned counsel for the petitioners that the areas of Gram Sabhas of Shahzadpur and Majra were admittedly governed by the Gram Panchayat. After the impugned notifications P. 4 and P. 8, they will be governed by the Act. There is no provision in the Act that it will apply notwithstanding that the area was governed by the Gram Panchayat Act. The impugned notifications are, therefore bad on that account. This contention is outright fallacious. There is no bar under the Haryana Municipal Act for setting up a municipality with respect to an area which had earlier been declared a Sabha Area under the Gram Panchayat Act. After a notification under S. 3 (6) of the Act is issued with respect to an area which had earlier been declared a Sabha Area the Gram Panchayat Act would cease to apply and the Act would come into force in relation thereto.

17. The last contention of the learned counsel for the petitioners is that the notifications P. 4 and P. 8 are liable to be struck down because they have been issued mala fide to harm Dr. Amar Nath Gupta petitioner and to benefit Rai Pirthi Singh respondent. This contention has also no force. Dr. Amar Nath Gupta, petitioner was Sarpanch of Gram Sabha, Shahzadpur. He was placed under suspension. According

to the petitioners the municipality in Shahzadpur has been set up to dissolve the Gram Sabha and to render the claim of Dr. Amar Nath Gupta for reinstatement as Sarpanch infructuous. The mala fides are attributed to Shri Lal Singh, Deputy Minister, Labour and Public Health, who in his return has categorically denied the allegations levelled against him. In view of the denial by Shri Lal Singh, the allegations of mala fides against him cannot be upheld. It is, however, significant that the impugned notifications P. 4 and P. 8 have not been issued by or under the authority of Shri Lal Singh who holds the portfolios of Labour and Public Health. The notifications have been issued by the Local Government Department. It is admitted that Shri Lal Singh has never been in charge of the Local Government Department. The case of the petitioners against Rao Pirthi Singh respondent is that his ancestors owned about 400 Bighas of land in Majra which is Chirand. This land or a part thereof was acquired. The Additional District Judge, Ambala directed that the compensation of the acquired land be paid to Rai Pirthi Singh who is its owner though its possession was with the Village Panchayat. The Village Panchayat has filed an appeal against the order of the Additional District Judge which is pending in this Court. The effect of the dissolution of Gram Sabha, Majra as a result of impugned notifications P. 4 and P. 8 would be that Gram Panchayat Majra would cease to have locus standi to maintain the appeal against the orders of the Additional District Judge, Ambala. Shri Lal Singh, Deputy Minister, Labour and Public Health has been instrumental in getting the impugned notifications issued for the benefit of Rai Pirthi Singh. Shri Lal Singh has denied allegations made against him on this point as well. This apart the impugned notifications have not been issued under his authority. The petitioners, therefore, cannot justify their claim that these notifications be quashed on the ground of mala fides.

18. In view of the discussion above there is no merit in this writ petition and the same is dismissed with no order as to costs.

Petition dismissed.

AIR 1982 PUNJAB AND HARYANA 38

J. V. GUPTA, J.

Natha Singh, Appellant v. Gurdial Singh and others, Respondents.

F. A. F. O. No. 85 of 1976, D/- 25-8-1981.*

(A) Motor Vehicles Act (4 of 1939), Sections 96 and 102 — Truck accident causing injury — Owner of truck and insurance company impleaded — Death of truck owner during pendency of proceeding — His legal representative not impleaded — Insurance company is liable to satisfy claim of compensation.

In view of provisions of Ss. 96 and 102 it cannot be said that the insurance company is not liable to satisfy the claim for compensation to be awarded in the claim application simply because the legal representatives of insured who died during the pendency of the proceedings, were not brought on the record. Therefore, the claim petition could not be dismissed on the ground that the legal representatives of the truck owner the deceased, were not brought on the record. (1974) 76 Pun LR 118; (1964) 66 Pun LR 804 and AIR 1963 Punj 214, Rel. on.

(Para 3)

(B) Motor Vehicles Act (4 of 1939), Section 110-B — Truck accident causing injury to claimant — Fracture of legs and permanent disability caused to the extent of 30% — Claimant required to spend some 3,900/- rupees and could not cultivate land thereafter and could walk very small distance — Held, a sum of Rs. 20,000/- would meet the ends of justice and not Rs. 10,000/- which was awarded by Tribunal.

(Para 5)

Cases Referred: Chronological Paras
AIR 1978 Punj & Har 113 2, 3
(1974) 76 Pun LR 118 2
(1964) 66 Pun LR 804 2
AIR 1963 Punj 214 : (1962) 64 Pun LR 917 2

V. P. Gandhi, for Appellant; Maharaj Bux Singh (for No. 6) and Pardeep Gupta for Satya Parkash Jain (for No. 5), for Respondents.

JUDGMENT:— Natha Singh, appellant, who was injured in an accident which had taken place on June 9, 1968, at 5.30 A. M., filed his claim petition on July 17, 1968, before the Motor Accidents Claims Tribunal, Ropar (hereinafter called the Tribunal), claiming compensation to the tune of Rupees 80,000/-, on the allegations that on June 9,

* From order of Mirchia, Motor Accidents Claims Tribunal, Ropar, D/- 17-11-1975.

1968, at about 5.30 A. M. he was going in a cart to the fields when Gurdial Singh respondent No. 1 driving truck no. PNU-2229 came from Dera Bassi side, at a high speed and struck with the cart with the result, Natha Singh, appellant, was injured and one ox died. It was alleged therein that the act of Gurdial Singh, respondent, was rash and negligent driving of the truck. In his claim application, the appellant arrayed Gurdial Singh, the driver of the truck, Amrit Lal Gupta and Darshan Singh, as the owners of the truck and the National Insurance Company, as the insurer of the truck. However, the claim petition qua Gurdial Singh, was dismissed on Oct. 20, 1971, for non-payment of the process fee. Amrit Lal Gupta, respondent, was served for Dec. 18, 1969, but he failed to attend the Court as he was confined to bed according to the report made on the summons. Subsequently, he died and Shri J. S. Chatha, the then Presiding Officer, of the Tribunal, declined to bring his legal representatives on the record by his detailed order dated April 12, 1972. Darshan Singh, the other alleged owner of the truck, was proceeded ex parte as he failed to appear in spite of service. Thus, the claim was contested by the National Insurance Company alone which filed its written statement dated August 17, 1971. In one of the additional pleas taken in the written statement, it was pleaded that the replying respondent (the insurance company) takes over the defence of the claim in the name of the insured to contest the case as they have reserved this right under the policy of insurance. On the pleadings of the parties, the learned Tribunal framed the following issues on Nov. 17, 1971:

1. Was the accident due to any negligent act on the part of the driver of the vehicle involved?

2. What should be the quantum of compensation due, if any, and from whom to whom?

3. Whether the application is time-barred?

4. Relief.

On issue No. 3, it was found that the application was clearly within time. Issue No. 1 was also found in favour of the claimant holding that the accident had resulted due to the rash and negligent act on the part of Gurdial Singh, the driver of the truck. On the question of quantum of compensation, the learned Tribunal found that a sum of Rs. 10,000/- would meet the ends of justice. In spite of this finding, the claim petition was dismissed on the ground that since the claimant failed to bring the

legal representatives of the deceased Amrit Lal Gupta, the owner of the truck, on the record, and his application was dismissed vide order dated April 12, 1972 being inordinately delayed, no order under S. 96 of the Motor Vehicles Act, 1939 (hereinafter called the Act), could be passed against the insurance company because the very insured had not appeared in the Court and his legal representatives were not brought on the record. However, as regards Darshan Singh, respondent, it was found that there was no documentary evidence on the record to show that the truck, in question, belonged to him. Feeling aggrieved against the same the claimant has come up in appeal to this Court.

2. The learned counsel for the appellant, contended that admittedly Amrit Lal Gupta, was arrayed as a respondent in the claim petition filed by him and he was also served therein. Subsequently, though the application for bringing his legal representatives on the record was made, yet the same was dismissed on April 12, 1972. According to the learned counsel, in view of the written statement filed on behalf of the insurance company and the plea taken in para 3 of the additional pleas, it was not necessary for him to implead the legal representatives of Amrit Lal Gupta, deceased, in his place. He has also referred to the order of the Tribunal, recorded while Kartar Singh, A. W. 1, was being examined. When this witness was being cross-examined by the learned counsel for the insurance company, it was objected to by the claimant and on his objection, the Tribunal passed the following order:

"The counsel for the petitioner had objected to the cross-examination by the Insurance Company as it could not contest the case on merits. However, in para 3 of the Addl. objection, the Insurance Company has taken over the defence of the insured and in that capacity, it is allowed to cross-examine the witness."

In support of his contention, the learned counsel placed reliance on New India Assurance Company Ltd., New Delhi v. Norati Devi, AIR 1978 Punj & Har 113. On the other hand, the learned counsel for the insurance company submitted that the law of abatement is applicable to these proceedings and since the claimant failed to bring the legal representatives of Amrit Lal Gupta, deceased, on the record, within the time prescribed, the claim petition would be deemed to have abated and no award could be given against the insurance company in the

absence of the owner of the truck who was insured and to whom a certificate of insurance was issued. In support of his contention, the learned counsel relied on *Oriental Fire and General Insurance Co. Ltd., New Delhi v. Raja Ram Gupta*, (1974) 76 Pun LR 118, *Alwar Motor Association (Private) Ltd., Alwar v. Hazari Lal*, (1964) 66 Pun LR 804 and *Nand Singh Viridi v. Punjab Roadways, Amritsar*, (1962) 64 Pun LR 917 : (AIR 1963 Punj 214).

3. Section 96 of the Act provides for the duty of the insurers to satisfy judgments against persons insured in respect of third party risks. It also provides that the insurance company or the insurer to whom the notice of the bringing of any such proceedings is given, shall be entitled to be made a party thereto and to defend the action on any of the grounds given therein. Section 102 of the Act provides,—

“Notwithstanding anything contained in Section 306 of the Indian Succession Act, 1925 (XXXIX of 1925), the death of a person in whose favour a certificate of insurance had been issued, if it occurs after the happening of an event which has given rise to a claim under the provisions of this Chapter, shall not be a bar to the survival of any cause of action arising out of the said event against his estate or against the insurer.”

In view of these provisions of the Act, it cannot be said that the insurance company is not liable to satisfy the claim for compensation to be awarded in the claim application simply because the legal representatives of Amrit Lal Gupta insured who died during the pendency of the proceedings, were not brought on the record. It is particularly so because in the insurance policy, Exhibit R-11, it has been provided *inter alia* vide Cl. (4) of Section II, thereof that the company may, on its own option, undertake the defence of proceedings in any Court of law in respect of any act or alleged offence causing or relating to any event which may be the subject of indemnity under that section. It was because of this term of the policy that the insurance company took a specific plea in paragraph 3 of their additional grounds that it had taken over the defence of the claim petition in the name of the insured to contest the claim, as they had reserved the right under the policy of insurance. As observed earlier, this claim was accepted by the Tribunal and on that account, it was allowed to cross-examine the witnesses on merits, as well. Under the circumstances, the ratio of the decision in *Norati Devi's case*, (AIR-1978

Punj & Har 113) (*supra*), is most relevant. It has been held therein (at p. 114),—

“Section 96 only clarifies that if an award is made, it would be the duty of the insurance company to meet the claim. It nowhere lays down that if the insurance company is allowed to contest the liability in the absence of the insurer, it should not be held liable. Therefore, it cannot be contended that an insurance company can never be held liable so long as the insured is not impleaded as a party to the proceedings, or having been impleaded his name is ordered to be struck off from the array of the respondents on the basis that he enjoys diplomatic immunity from being sued in a Court.”

In view of the abovesaid decision of this Court, the claim application of Natha Singh, appellant, could not be dismissed on the ground that the legal representatives of Amrit Lal Gupta, deceased, were not brought on the record.

4. Now, the question to be decided is as to the amount of compensation to which the appellant is entitled on account of the injuries sustained by him.

5. Dr. Kuldip Singh, Medical Officer, General Hospital, Sector 16, Chandigarh, who appeared as A. W. 3, has stated that the appellant had compound fracture of the bones of the left leg at the junction of the middle and distal one-third. He also had lacerated wound on the right foot. The skin flap was evulsed with gross contamination. The fracture of the left leg was reduced and he was put under plaster. For the injury on the right foot, skin grafting was done. He was discharged on Nov. 8, 1968, from the hospital while he was admitted there on June 9, 1968. According to the doctor, he was again admitted to the hospital on Nov. 16, 1968, because the wound on his right foot had resulted in a big scar and weight could not be put on it. He was again operated upon and skin grafting around his heel was done. Thus, he was discharged from the hospital on April 12, 1969. During the time he was admitted to the hospital, he could not move about and was confined to his bed. According to this doctor, he could not fully bear the weight on his right foot and that his disability was 30 per cent. The learned Tribunal, on these findings, came to the conclusion that the claimant was entitled to a sum of Rs. 10,000/- as compensation because of the disability suffered, the expenses on treatment, the amount spent on food and medicines, mental agony and pain. However, considering the facts and circumstances of this case, I am of the considered opinion

that this amount is too meagre; particularly in view of the permanent disability which the appellant has suffered to the extent of 30 per cent. It is in the statement of the appellant, who appeared as A. W. 4, that he spent Rs. 1,500/- on his treatment, Rs. 1,200/- on his food and Rs. 1,200/- on his medicines and now he cannot cultivate the land and that he can walk very small distance. Although, he did claim a sum of Rs. 80,000/- in his claim application, yet in view of these facts, a sum of Rs. 20,000/- will meet the ends of justice.

6. As a result of the above discussion, this appeal succeeds and is allowed. The order of the Tribunal is set aside and a sum of Rs. 20,000/- is awarded as compensation against the National Insurance Company, respondent No. 6, with interest at the rate of six per cent. per annum from the date of the filing of the present appeal, that is, March 3, 1976. In case, this claim is not satisfied within a period of three months, the appellant will be further entitled to interest at the rate of twelve per cent, from the date of this order till realisation. No costs.

Appeal allowed.

AIR 1982 PUNJAB AND HARYANA 41

D. S. TEWATIA AND G. C. MITAL, JJ.

Pardeep Kumar, Petitioner v. Punjab University, Chandigarh and another, Respondents.

Civil Writ Petn. No. 1327 of 1981. D/- 15-7-1981.

Punjab University Calendar (1979), Vol. II, Chap. 9, Regulation 2.1 — Expression “that the candidate should have passed the Matriculation examination with English as one of the subjects offered in that examination” — Meaning of.

Regulation 2.1 envisages fulfilment of only two conditions by a student who wishes to appear in the Pre-University examination to be held by the Punjab University (i) that he should have passed the given examination, and (ii) that he should have offered English as one of the subjects in that examination. If the intention had been that the concerned students had not only to pass the given examination but had also to pass in the subject of English therein, then the framers of the regulation would have used in Regulation 2.1 the expression ‘with English as one of the compulsory subjects’ and would not have rest content with the expression ‘English as one of the subjects’.

(Para 8)

Held that the University authorities could not impose the condition that students who though had passed the given examination of the concerned institutions with English as one of the subjects but had not passed in the subject of English they had offered in that examination were not eligible to appear in the Pre-University Examination. (Para 9)

Vinod Sharma with D. V. Sharma, for Petitioner; B. K. Aggarwal (for No. 1) and S. P. Jain (for No. 2), for Respondents.

TEWATIA, J.:— The petitioner Pardeep Kumar who had passed the All India Secondary School Examination conducted by the Central Board of Secondary Education, New Delhi, in the year 1980, was admitted by Goswami Ganesh Dutt Sanatan Dharma College, Chandigarh (respondent No. 2) in the Pre-University class. His admission form was also received by the University for the examination to be held in 1980-81. His roll-number was despatched to the college by the University, but the same was withheld from the petitioner. This led the petitioner to file the present writ petition seeking a direction to the Principal of the Sanatan Dharma College, Chandigarh (respondent No. 2) and the Punjab University (respondent No. 1) to confirm the admission of the petitioner and allot to him registration number, release his roll number and permit him to take the examination.

2. The stand taken by the Principal in his return was twofold (1) that the petitioner had not secured requisite marks in the monthly test and the test held in December and such students who did not secure the requisite marks in such tests were not permitted to appear in the annual university examination. The principal of a private affiliated college is given the discretion to hold a special test for such students and students who secure 30% or above in this special test, their provisional admission to the examination is confirmed. Since the result of the special test held from 24-3-1981 to 31-3-1981 was not declared prior to the filing of the writ petition, his roll number remained withheld from him. The petitioner having secured 30% marks in the special test, his roll number was to be released to him, even if he had not filed the present petition; and (2) that the admission of the petitioner was provisional, as he had not passed in English in the Secondary School Examination held by the Central Board and a condition stood incorporated to his knowledge in the prospectus that such students who had not passed in English subject offered in the given examination had to pass in that subject before April.

1981. Since the petitioner had not complied with the aforesaid condition, so by virtue of the University Regulation 2.1 contained in the Punjab University Calendar, 1979 (Vol. II), Chap. 9 at page 41, he was not entitled to appear in the Pre-University Examination in question.

3. Punjab University, respondent No. 1, in its reply took up the stand that under Regulation 2.1 of the Punjab University Calendar, 1979 (Vol. II), before a candidate becomes eligible for admission to the Pre-University examination, he must pass in the subject of English. As the petitioner failed in the subject of English, he was not eligible for admission to the Pre-University class. Provisional admission to Pre-University class was by way of concession. It was made clear in the 'instructions to the Principals' and the prospectus issued by the colleges on that basis, that the candidates who had failed in the subject of English were provisionally admitted subject to their qualifying in the deficient subject of English by April, 1981.

4. The respondent University additionally asserted that it did not allot any registration number to the petitioner, because he had not qualified and passed in the deficient subject of English; that he could appear in the Pre-University examination provisionally subject to his qualifying in the deficit subject of English by April 1981; and that if he did not appear and pass in the subject of English either in the supplementary examination held by the Central Board of Secondary Education in 1980 or in April 1981, his result of the Pre-University examination would be quashed.

5. Mr. R. K. Aggarwal, learned counsel appearing for the University, while supporting the stand of the University, made a reference to the instructions, Annexures R-1 and R-2, filed along with the return of the University, issued by the University to the Principals of the affiliated colleges and drew pointed attention to para 4 of Annexure R-2, which is in the following terms:

"From
The Registrar,
Punjab University,
Chandigarh.

To

(a) The Principals of all the affiliated colleges.

(b) The Principals of all the Higher Secondary Schools located in Chandigarh.

Registered

No. 8202-8286/R & S

D/- 26-7-1980

Subject: Admission criteria in respect of the students who appeared/passed the 10th class examination under 10 plus 2 pattern of education.

Dear Sir/Madam,

I am to invite your attention to the note given at page 9 of the circular letter No. 7096-7245/ R & S dated 11-7-1980 stating therein that "Guidelines relating to admission criteria in case of candidates who have passed the 10th class examination under 10+2 pattern of education will follow."

In this connection, I am to inform you that the candidates falling in the above category may be allowed to join the Pre-University class in the following manner.

* * *

(4) A candidate who has been declared pass in the abovesaid examination while failing in English may be allowed to join Pre-University class provisionally subject to his qualifying in the deficient subject of English by April 1981 from Board of School education Punjab/Haryana/Central Board of Secondary Education, New Delhi. If he fails to qualify the deficient subject of English by April, 1981, his admission to Pre-University class and also the result thereof shall be cancelled. Such a candidate is required to have obtained 40% marks in the aggregate at the time of admission, if he offers Science Group in Pre-University class.

Yours faithfully,

Sd/-

(Balwant Rai)

Assistant Registrar (R & S)
for Registrar."

6-7. It is contended on behalf of the petitioner that the instructions issued by the University to the Principals of the colleges and the conditions imposed in the prospectus on the basis of those instructions run counter to Regulation 2.1 *ibid*. The relevant portion of Regulation 2.1 is in the following terms:

"2.1. The Pre-University examination shall be open to a person who satisfies the requirements in (A) and (B), viz.—

(A) has passed not less than one academic year previously—

(i) the Matriculation examination with English as one of the subjects of the Punjab University before 1970, or of the Board of School Education Examination, Punjab, Haryana, Himachal Pradesh or of Central Board of Secondary Education, Delhi (Students of Union Territory of Chandigarh only);

or

(ii) Higher Secondary Part I examination with English as one of the subjects of the Punjab University after 1964 and before 1970 or of the Board of School Education Punjab, Haryana, Himachal Pradesh or of Central Board of Secondary Education, Delhi (for students of Union Territory of Chandigarh only);

*
*
*"

Mr. Raj Kumar Aggarwal, learned counsel for the respondent University, has however, urged that according to the understanding of the University authorities of Regn. 2.1, a student who had not only offered the subject of English but had a student who had also passed therein while passing in the given examination of Board of School Education from Punjab, Haryana, Himachal Pradesh or of the Central Board of Secondary Education, Delhi or of the Matriculation Examination of the Punjab University before 1970, was entitled to appear in the Pre-University Examination held by the Punjab University. The University rather gave a concession to students who had passed such an examination without actually passing in the English subject by granting them provisional admission and permitting them to appear in the Pre-University Examination if by the dates indicated in the instructions they had removed the deficiency in English subject.

8. A bare perusal of Regulation 2.1 *ibid* would show that the interpretation put thereon by the University authorities that a student has to pass not only the given examination but also to pass the English subject in the examination, in our opinion, is not correct. The regulation, in our view, envisages fulfilment of only two conditions by a student who wishes to appear in the Pre-University examination to be held by the Punjab University— (i) that he should have passed the given examination, and (ii) that he should have offered English as one of the subjects in that examination. If the intention had been that the concerned students had not only to pass the given examination but had also to pass in the subject of English therein, then the framers of the regulation would have used in Regulation 2.1 the expression 'with English as one of the compulsory subjects' and would not have rest content with the expression 'English as one of the subjects'.

9. In view of the interpretation that we have put on Regulation 2.1, the University authorities could not impose the condition of the kind they have imposed on the students who though had passed the given examination of the concerned institutions with English as one of the subjects but had not

passed in the subject of English they had offered in that examination.

10. For the reasons aforementioned, we allow the writ petition and direct the respondent University to declare the result of the petitioner who had already taken the examination by virtue of our interim order, within three days from today. The petitioner shall have his costs from the University.

G. C. MITAL, J.:— I agree.

Petition allowed.

AIR 1982 PUNJAB AND HARYANA 43

S. C. MITAL, J.

Mohinder Singh, Petitioner v. The Collector, Karnal and others, Respondents.

Civil Writ Petn. No. 1641 of 1970, D/- 16-7-1981.

Punjab Land Revenue Act (17 of 1887), S. 3 (8) (as amended by the Punjab Land Revenue (Haryana Amendment) Act (45 of 1973)) — Expression "defaulter" — Recovery of land revenue by lambardar on behalf of Govt. — Misappropriation and embezzlement of — Lambardar is "defaulter" in view of amendment of definition — He can be arrested in recovery proceedings of the money embezzled. 1970 Cur LJ (Punj) 431; 1971 Pun LJ 166 (Punj), Held no longer good law in view of amendment. (Para 3)

Cases Referred: Chronological Paras
1971 Pun LJ 166 (Punj) 2
1970 Cur LJ 431 (Punj) 2

Kuldip Singh with S. S. Shergil, for Petitioner; Naubat Singh, Sr. Dy. Advocate General Haryana, for Respondents.

ORDER:— The salient facts of this case are that according to the Collector, Karnal, Mohinder Singh Lambardar recovered Rupees 99,736.42 as land revenue but he deposited Rs. 90,292.34 in the Government treasury. Thus, Rs. 9,444.08 were outstanding against him. For the recovery thereof, Mohinder Singh was proceeded against under the provisions of the Punjab Land Revenue Act as applicable to Haryana. The Tahsildar, Revenue, Karnal, issued warrant of his arrest. Feeling aggrieved, Mohinder Singh filed this writ petition challenging the said mode of recovery.

2. Mohinder Singh solely relied on the definition of "defaulter" given in S. 3 (8) of the said Act, at the time of the institution of the writ petition. It reads:—

" "defaulter" means a person liable for an arrear of land revenue, and includes a person who is responsible as surety for the payment of the arrears."

Reliance was then placed on Sarup Singh v. Collector, Hissar, 1970 Cur LJ 431 (Punj), wherein B. R. Tuli, J. laid down:—

“A Lambardar while collecting the land revenue acts as an agent of the State Government and he can be proceeded with civilly or criminally if he has collected the land revenue but has not deposited the same in the Government treasury, but he cannot be proceeded with as a defaulter under the Punjab Land Revenue Act or the Rules framed thereunder.”

Similarly, a Bench of this Court consisting of Harbans Singh, C. J. and Gurdev Singh, J. in Gurmukh Singh v. State of Punjab, 1971 Pun LJ 166 held that by no stretch of language the word “defaulter” as defined in S. 3 (8) of the Punjab Land Revenue Act can include a person who has misappropriated and embezzled Government money or the money that he had collected on behalf of the Government.

3. The two authorities cited above would have fully covered this case, but for the fact, as pointed out by the learned Deputy Advocate General, Haryana, that during the pendency of this writ petition, the definition of “defaulter” was amended by the Punjab Land Revenue (Haryana Amendment) Act No. 45 of 1973. The amendment reads:—

“‘defaulter’ means a person liable for an arrear of land revenue or any tax in lieu thereof and includes—

(i) a person who is responsible as surety for the payment of the arrear; and

(ii) a headman or any other person who has collected the land revenue or any tax in lieu thereof but has not deposited the same into the Government Treasury.”

In view of the abovesaid amendment of the expression “defaulter” learned counsel for the petitioner conceded that the above quoted rulings do not now hold good and they are of no avail to the petitioner and that he has become a “defaulter”. It follows, therefore, that the petitioner can be arrested in the recovery proceedings in question.

4. Whether Rs. 9,444.08 are actually due from the petitioner or not is a disputed question of fact, which by reason of the intricacies of accounts relating to the huge amount of Rs. 99,736.42, I decline to go into in the exercise of writ jurisdiction. The learned senior Deputy Advocate General has very fairly contended that he would intimate the authority concerned that the petitioner be not arrested unless and until he is given an opportunity to inspect the relevant record to satisfy the authority that he is not a “defaulter”.

5. In the result, this petition is hereby dismissed. No order as to costs.

Petition dismissed.

AIR 1982 PUNJAB AND HARYANA 44

S. S. SÁNDHAWALIA, C. J. AND

S. P. GOYAL, J.

Charanjit Lal, Appellant v. Ram Sarup and others, Respondents.

Second Appeal No. 738 of 1969, D/- 29-5-1981.*

(A) Punjab Pre-emption Act (1 of 1913), Section 28 — It does not affect the substantive rights of the parties. (Pre-emption).

Section 28 enacts a convenient procedure, but it cannot affect the substantive rights of the parties. It cannot be said that once the right of pre-emption has been exercised successfully by the tenant without following the procedure contained in Section 28, no second decree for the right of pre-emption can be passed. AIR 1958 SC 838, Followed.

(Para 4)

(B) Punjab Security of Land Tenures Act (10 of 1953), Section 17-A (as introduced by amendment of 1959) — Protection to tenant against pre-emption under S. 17-A, when available — Rule of lis pendens — Applicability of. (Punjab Pre-emption Act (1 of 1913), S. 28; T. P. Act (1882), S. 52).

A landholder sold the disputed land. Another person filed a suit and claimed possession of that land by way of pre-emption on the ground that he was holding the said land as tenant at the time of its sale, under the vendor. Suit was decreed on compromise on 4-11-1966. During the pendency of tenant's suit vendor-landholder's son filed the suit to pre-empt the said sale. Section 17-A though gave to tenant protection against subsequent pre-emption in respect of original sale of land in his favour in the line of pre-emptors, it placed the tenant at the fifth place after the relations and co-sharers of the vendor. The tenant claimed protection of Section 17-A on the ground that once the land stood transferred to the tenant in exercise of right of pre-emption, he would be deemed to have been substituted in place of original vendee and it would be open to him to put up all the defences to defeat the subsequent suit for pre-emption.

Held, that the pendente lite transfer in tenant's favour effected by means of the consent decree would be hit by the rule of lis

* From decree of S. R. Seth 2nd Addl. Dist. J., Karnal, D/- 7-12-1968.

HY/IY/D826/81/AAJ

pendens and plea under S. 17-A of the Act would not be available to him so as to defeat the right of pre-emption of the vendor's son.

(Para 7)

As the right of pre-emption of all the subsequent vendees as tenants was admittedly inferior to that of landholder's son, the consent decree in favour of tenant could not be said to have been passed in recognition of his equal or superior right of pre-emption than that of vendor's son and as such he could not be regarded as anything more than the successor-in-interest of the original vendee, having no right to defend the suit except on the pleas that were open to such vendee himself. Case law discussed.

(Para 7)

Cases Referred: Chronological Paras

AIR 1958 SC 838 4, 6

AIR 1946 Lah 142 (FB) 6

AIR 1930 Lah 356 (FB) 6

M. S. Jain with V. K. Gupta and V. K. Jain, for Appellant; N. C. Jain (C. L. Ghai and S. S. Jain with him), for Respondents.

S. P. GOYAL, J.:— The sole question on which this regular second appeal has been referred to this larger Bench is as to whether the land sold by the vendor not to his tenant but acquired by him through pre-emption decree would be covered by the provisions of Section 17-A of the Punjab Security of Land Tenures Act and, therefore, the suit for pre-emption by a person having admittedly a better right of pre-emption than the tenant would not be competent.

2. The land in dispute was sold by Dewan Chand, Hukam Chand and their sister Smt. Shanti Devi to Ram Sarup and his three brothers vide sale deed dated Mar. 8, 1965. Budhu, respondent No. 5, filed a suit for possession of this land by way of pre-emption on the ground that he was holding the said land as tenant at the time of its sale under the vendor which was decreed on compromise on Nov. 4, 1966. In the meanwhile, prior to the date of the said decree, Charanjit Lal, appellant, son of Dewan Chand, vendor, and nephew of other two vendors filed the present suit to pre-empt the said sale which was dismissed by the trial Court on the ground that the suit land having been transferred in favour of the tenant in recognition of his right of pre-emption and the rule of lis pendens being not applicable, the sale in favour of tenant was protected by the provisions of Section 17-A of the Land Tenures Act and, therefore, not pre-emptible. On appeal, the view of the trial Court was upheld by the learned Additional District Judge, Karnal, vide judgment dated Dec. 7, 1968 which led to the filing of this second appeal by the plaintiff.

3. The learned counsel for the appellant assailing the correctness of the view of the Courts below contended that the provisions of Section 17-A of the Land Tenures Act save only the sale made in favour of tenant and the same cannot be extended to acquisition of the property acquired by a tenant in exercise of his right of pre-emption under the Punjab Pre-emption Act (hereinafter called the Pre-emption Act). The learned counsel for the tenant, on the other hand, argued that once the land stood transferred to the tenant in exercise of his right of pre-emption under the compromise decree, he is deemed to have been substituted in place of the original vendee and it is open to him to put up all the defences to defeat the suit of pre-emption which would have been available to him if the sale was made primarily in his favour. In the alternative he argued that once the right of pre-emption has been exercised successfully by the tenant without following the procedure contained in S. 28 of the Pre-emption Act, no second decree for the right of pre-emption can be passed.

4. So far as the second argument of the learned counsel for the respondent is concerned, it creates no difficulty because this point stands concluded by the Supreme Court in *Bishan Singh v. Khazan Singh*, AIR 1958 SC 838 wherein a similar contention was rejected with the following observations:—

“Nor can we accept the argument of the learned counsel for the appellants that S. 28 precludes the Court from giving a decree for pre-emption in a case where the two suits were not joined together but one of the suits was decreed separately. Section 28 enacts a convenient procedure, but it cannot affect the substantive rights of the parties. We do not see that, if the plaintiffs were entitled to a right of pre-emption, they would have lost it by the appellants obtaining a decree before the plaintiffs instituted the suit, unless it be held that the decree itself had the effect of substituting them in place of the original vendees. We cannot, therefore, hold that the plaintiffs' suit is in any way barred under the provisions of the Act.”

5. As regards the first and the main question, a perusal of Section 17-A of the Land Tenures Act provides that notwithstanding anything to the contrary contained in the Punjab Pre-emption Act, a sale of land comprising the tenancy of a tenant made to him by the landowner shall not be pre-emptible under the Punjab Pre-emption Act and no decree of pre-emption passed after the commencement of the said Act in respect of any such sale of land shall be executed by any

court. This provision in the Land Tenures Act was introduced by the Punjab Security of Land Tenures (Amendment) Act, 1959 with the object of preventing the ejection of the tenants in a circuitous way which would be evident from the following statement of the objects and reasons contained in the bill :—

"It has come to the notice of Government that land-owners who are not competent to eject their tenants from lands comprising their tenancies under the Punjab Security of Land Tenures Act, 1953, are circumventing the provisions of that Act by executing mala fide transactions of sale and mortgages with possession in respect of such lands in favour of the tenants. Subsequently such a sale is pre-empted under the Punjab Pre-emption Act, 1913 by an eligible pre-emptor with the connivance of the vendor (erstwhile landlord) and the pre-emptor takes possession of the land comprising the tenancy; likewise, such a mortgage is redeemed by the mortgagor (erstwhile landlord) and in either case the tenant is duped and deprived of his tenancy. Government have decided to safeguard the rights and interests of tenants against such mala fide transactions; their tenancies will not be disturbed, and if these have been disturbed already, they will be restored to them by a summary procedure. The tenant (erstwhile vendee) will have also the option to claim, by a summary procedure, restoration of rights of ownership in respect of the pre-empted land on payment of the price paid to him by the pre-emptor."

When this amendment was introduced, a tenant had no right of pre-emption and this right was conferred upon him for the first time by Act No. 10 of 1960 and in the order of preference he was placed at No. 5 after the relations and co-sharers of the vendor. When these two amending provisions are viewed together, no doubt, is left about the intention of the Legislature in enacting the provisions of S. 17-A of the Land Tenures Act which was only to prevent the ejection of the tenant by resorting to the right of pre-emption by the relations of the vendor or his co-sharers. Had the intention of the Legislature been to give an absolute protection to the tenant against the right of pre-emption or to confer upon him a better right of pre-emption, the Legislature would have certainly put him at No. 1 in the category of persons entitled to pre-empt the sale. So the Legislature in spite of the provisions of S. 17-A of the Land Tenures Act placed the tenant in the line of pre-emptors only at the fifth place and the provisions of S. 17-A, there-

fore, cannot be interpreted so as to frustrate the intention of the Legislature.

6. The learned counsel for the respondent does not dispute that if the two suits filed by the present appellant and the tenant were decided together the appellant would have got the first right of pre-emption and the provisions of Section 17-A would not have come into play. He, however, seeks its protection on the ground that by transfer of the land by the vendee in favour of the tenant in recognition of his right under the compromise decree, the latter is deemed to have been substituted in place of the vendee and is entitled to defeat any right of pre-emption by invoking all the pleas which would have been open to him as if he were the original vendee. In support of his contention, he relied on a Full Bench decision of the Lahore High Court in *Mt. Sant Kaur v. Teja Singh*, AIR 1946 Lah 142, and the decision of the Supreme Court in *Bishan Singh's case* (AIR 1958 SC 838) (supra). Both these decisions, however, in our view, do not support his contention. So far as *Mt. Sant Kaur's case* (FB) (supra) is concerned, the learned counsel relied on the following observations :—

"** ** Where the subsequent vendee has still the means of coercing, by means of legal action, the original vendee into surrendering the bargain in his favour, a surrender as a result of a private treaty, and out of Court, in recognition of the right to compel such surrender by means of a suit cannot properly be regarded as a voluntary transfer so as to attract the application of the rule of *lis pendens*. The correct way to look at the matter, in a case of this kind, is to regard the subsequent transferee as having simply been substituted for the vendee in the original bargain of sale. He can defend the suit on all the pleas which he could have taken had the sale been initially in his own favour."

These observations, when read out of the context, appear to support his contention but when the whole judgment is read, it is revealed that the Full Bench has expressly approved the earlier Full Bench in *Mool Chand v. Ganga Jal*, AIR 1930 Lah 356 wherein it was held that where a sale is made by the vendee in favour of a person with a right of pre-emption either equal or superior to that of the plaintiff in recognition of such right he is deemed to be substituted in position of the vendee and entitled to defend the sale on all the pleas which he could have taken had the sale been initially in his favour. Both these Full Bench cases were approved by the Supreme Court in *Bishan Singh's case*

(AIR 1958 SC 838) (supra). The principle enunciated in these decisions, therefore, would be available to the subsequent vendee who has purchased the land during the pendency of the suit if the transfer had been made in his favour in recognition of his equal or superior right of pre-emption than the plaintiff. The exception to the rule of *lis pendens* in the case of a subsequent vendee with equal or superior right of pre-emption was made on the ground that it did not apply to assertion of rights which existed prior to the institution of the pending suit and that the pre-emptor was not in a worse position without asserting his right privately than when he asserted it by suit. It was because of this reason that in the later Full Bench case of *Mt. Sant Kaur* it was held that where at the time of transfer, limitation for instituting the suit for pre-emption by the subsequent vendee had expired and he had lost all use of coercive machinery of law for compelling the vendee to transfer the property in recognition of his right of pre-emption, the transfer in his favour by the vendee must be regarded as voluntary transfer of such title as vendee had himself acquired under the original sale so as to attract the principle of *lis pendens* and that in such a case the transfer has not the effect of substituting the subsequent transferee in place of the vendee so as to entitle him to defend the suit on pleas which would have been available to him if the sale had been initially made in his favour.

7. In the present case the right of pre-emption of all the subsequent vendees as tenants is admittedly inferior to that of the appellant. So the consent decree in favour of the tenant cannot be said to have been passed in recognition of his equal or superior right of pre-emption than that of the appellant and as such he cannot be regarded as anything more than the successor-in-interest of the original vendee, having no right to defend the suit except on the pleas that were open to such vendee himself. Hence the *pendente lite* transfer in his favour effected by means of the consent decree would be hit by the rule of *lis pendens* and the plea under S. 17-A of the Land Tenures Act would not be available to him so as to defeat the right of pre-emption of the appellant.

8. In the result, this appeal is allowed, the impugned judgment and decree reversed, and the suit of the plaintiff decreed without any order as to costs provided he deposits the purchase money after deducting the amount already deposited by him in the trial Court on or before the 1st of Aug., 1981. If

the amount is not deposited as directed, the suit shall stand dismissed with costs.

S. S. SANDHAWALIA, C. J.:— I agree.

Appeal allowed.

AIR 1982 PUNJAB AND HARYANA 47 SPECIAL BENCH

S. S. SANDHAWALIA, C. J., M. R.
SHARMA AND S. S. KANG, JJ.

Mrs. Veena James, Petitioner v. Kewal Krishan James, Respondent.

Matrimonial Reference No. 2 of 1980,
D/- 24-9-1981.*

Divorce Act (4 of 1869), Ss. 18 and 17
— Reference under — Parties Christians —
Application by wife for declaring marriage
null and void — Husband marrying appli-
cant misrepresenting that he was bachelor
though he was married and having children
— First marriage proved by evidence of
first wife — Marriage with applicant by
Church authority and applicant herself —
Evidence not discredited and Court granting
decree — Held, that the applicant was en-
titled to decree of nullity of marriage.

(Para 6)

Ravinder Chopra, for Petitioner.

S. S. SANDHAWALIA, C. J.:— This is a reference under S. 17 of the Indian Divorce Act, 1869, for the confirmation of the decree nisi granted by the learned Addl. District Judge, Ferozepore, declaring the marriage of the petitioner with the respondent as null and void.

2. The petitioner, Mrs. Veena James had preferred the petition under Sec. 18 of the Indian Divorce Act, 1869, on the allegations that being a spinster of about 25 years of age, she married the respondent Kewal Krishan James, (who had fraudulently represented himself to be a bachelor) at Ferozepore, according to the Christian rites. Thereafter, both of them lived together at Ferozepore and Dabwali. At the latter place it came to the knowledge of the petitioner that in fact the respondent-husband had already been married with one Bina Sharma and not only that he had three children from that wife. The respondent further started assaulting and mal-treating the petitioner and went to the length of making an attempt on her life in Jan., 1980, which culminated in security proceedings being taken by the

*From decree of Mrs. Harmohinder Kaur, Sandhu, 2nd Addl. Dist. J., Ferozepore, D/- 7-10-1980.

KY/KY/F16/81/MVJ

police. Thereafter, the petitioner has been residing with her parents at Ferozepore and a child named Rohit James had been born out of the wed-lock on March 31, 1977.

3. Notice of the petition was duly served on the respondent-husband, but he refused to accept the same and necessarily ex parte proceedings were ordered against him.

4. To substantiate her case, the petitioner herself stepped into the witness box as A. W. 1. Her father Dudlay Spencer, A. W. 2, fully supported the case of the petitioner. A. W. 3 Henry Singh deposed about the marriage of the petitioner having been performed with the respondent by Rev. D. R. Masih, who was Pastor Incharge of the Church and had issued the certificate to that effect. Rev. D. R. Masih himself stepped into the witness box as A. W. 4 and proved the certificate with regard to the marriage, Ext. A./1. He further deposed that prior to his marriage the respondent-husband had converted his religion to Christianity and submitted an affidavit Ext. A./2, before the marriage to the effect that he was a bachelor. The petitioner also summoned and examined A. W. 5, Bina Sharma, former wife of the respondent-husband. She deposed about the earlier marriage and the birth of two sons and one daughter from the loins of the respondent. Birth certificates Exts. A/3 and A/4 were tendered in evidence with regard to two of the children, wherein the father's name was recorded as Kewal Krishan son of Ram Parkash. She stated that she was never divorced by the respondent and the marriage with the respondent still subsisted. Accepting the un rebutted evidence of the wife, the learned Additional District Judge granted an ex parte decree declaring the marriage of the petitioner with the respondent as null and void.

5. In the present proceedings also the respondent has been duly served but has not chosen to put in appearance and proceedings against him are, therefore, ordered to be taken ex parte. It is the admitted position that the statutory period of six months has elapsed.

6. After hearing the learned counsel for the petitioner, we find not the least ground to take a view other than the one arrived at by the learned Additional District Judge. The testimony of as many as five witnesses including the petitioner herself stands wholly uncontradicted. Therefrom the only irresistible conclusion is that the petitioner is plainly entitled to a decree of nullity of marriage.

7. In the result, we allow the reference and confirm the decree nisi. The parties shall, however, bear their own costs.

Reference allowed.

AIR 1982 PUNJAB AND HARYANA 48 FULL BENCH

PREM CHAND JAIN, S. C. MITAL AND
SURINDER SINGH, JJ.

Punjab National Bank, Applicant v. M/s. Laxmi Chand Sunder Dass and others, Respondents.

Civil Misc. No. 510-CI of 1981 (in R. F. A. No. 558 of 1979), D/- 15-9-1981.

Punjab Courts Amendment Act (5 of 1980), S. 3 (3) — Provisions under, do not apply to appeals filed before commencement of amendment Act. F. A. O. No. 79 of 1980, D/- 9-4-1980 (Punj & Har), Held overruled in view of Amendment Act, (Punjab Courts Act (1918), S. 39 (1) (a); Interpretation of Statutes — Fundamental Rules — Literal construction).

The applicability of the Amendment Act (5 of 1980) remains confined to the appeals filed in the High Court after the commencement of the Act and not to the appeals filed before the commencement of the Act.

(Para 8)

A statutory enactment must ordinarily be construed according to the plain natural meaning of its language and no words should be added, altered or modified unless it is plainly necessary to do so in order to prevent a provision from being unintelligible, absurd, unreasonable, unworkable or totally irreconcilable with the rest of the statute.

(Para 7)

The Objects and Reasons of Amendment Act (1980), will not certainly stand frustrated if the applicability of the Act remains confined to the appeals filed in the High Court after the commencement of the Act.

(Para 8)

Upon a careful scrutiny of S. 3 (3), its context does not at all appear to suggest that the word "pending" occurring therein has relation to the appeals pending before the commencement of the Act. If such were the intention of the legislature, the provision instead would have been that the Act shall apply to "appeals to be filed after the commencement of this Act and filed before such commencement".

(Para 7)

Held that an appeal, the value of which did not exceed five lac rupees, filed in the

High Court before the date of commencement thereof, i.e., 9th Jan., 1980, and pending in the High Court could not be transferred to the District Judge exercising ordinary territorial jurisdiction in such appeal. F. A. O. No. 79 of 1980, D/- 9-4-1980 (Punjab & Har), held overruled in view of Amendment Act, AIR 1978 SC 897, Followed. (Para 9)

Cases Referred: Chronological Paras
(1980) F. A. O. No. 79 of 1980, D/- 9-4-1980 (Punjab & Har) 3, 7
AIR 1978 SC 897 : 41 STC 409 : 1978 Tax LR 1907 7

R. N. Narula with K. E. Chaudhary, for Applicant; Mohinderjit Singh, Addl. Advocate General (Punjab) (for the State); A. N. Mittal, as Intervenor; A. L. Bansal, for Respondents.

S. C. MITAL, J.:— The above noted regular first appeal was filed in the High Court in March, 1981 (1979?) against the decree dated 24th Jan., 1979 of Senior Sub Judge, Bhatinda. The jurisdictional value of the appeal is claimed to be Rs. 1,56,675/-. During the pendency of this appeal, the Punjab Courts Act, 1918, was amended by Punjab Act No. 5 of 1980 (hereinafter referred to as the Amendment Act, 1980) which is deemed to have come into force on 9th Jan., 1980. In view of the provisions of sub-s. (3) of S. 3 thereof, this appeal, the value of which does not admittedly exceed five lac rupees, was ordered to be transferred to the District Judge, Bhatinda. By the present civil miscellaneous application, the said order of transfer has been challenged.

2. The crucial point for determination is, whether by virtue of the provisions of subsection (3) of Section 3 of the Amendment Act, 1980, an appeal, the value of which does not exceed five lac rupees, filed in the High Court before the commencement thereof, i.e., 9th Jan., 1980, and pending in the High Court shall stand transferred to the District Judge exercising ordinary territorial jurisdiction in such appeal.

3. A short legislative history of S. 39 of the Punjab Courts Act, 1918 (hereinafter referred to as the principal Act), which stands amended by the Amendment Act in question, is as follows: Formerly, an appeal from a decree or order of a subordinate Judge lay to the District Judge where the value of the original suit did not exceed five thousand rupees. In any other case, the appeal lay to the High Court. Later, the Punjab Act No. 35 of 1965 brought about an amendment to the effect that where the decree or order was made by the subordinate

Judge before 28th June, 1963, and the value of the original suit did not exceed five thousand rupees or where the decree or order was made after 28th June, 1963 and the value of the original suit did not exceed ten thousand rupees, appeal lay to the District Judge, and to the High Court in any other case. The next amendment of S. 39 of the principal Act was made by the Punjab Courts (Amendment) Act, 1975, with effect from 21st July, 1975. By that amendment, the jurisdiction of the District Judge to hear an appeal was enhanced in cases where the value of the original suit in which the decree or order was made did not exceed twenty thousand rupees. It was further provided therein that all appeals pending in the High Court, the value of which did not exceed twenty thousand rupees, shall stand transferred to the District Judge exercising ordinary territorial jurisdiction in such appeals. Then on 9th Jan., 1980, the Punjab Courts (Amendment) Ordinance, 1979 (Punjab Ordinance No. 1 of 1980) was promulgated by which in S. 39 (1) (a) of the principal Act, for the words "twenty thousand rupees", the words "five lakh rupees" were substituted. It will not be out of place to mention here that no identical amendment was made by Punjab Ordinance No. 1 of 1980 in sub-s. (2) of S. 39 of the principal Act providing for transfer of pending appeals from the High Court to the District Judge concerned. In Mohinder Singh v. Baldev Kaur, F. A. O. No. 79 of 1980 decided by a Bench of this Court on 9th Apr., 1980, the scope of the Punjab Ordinance No. 1 of 1980, came up for consideration. The learned Judge held as under:—

"Punjab Ordinance No. 1 of 1980 is not retrospective either expressly or by necessary intendment and the change made in law is of substance and not procedural with the result that from all suits of the value of more than Rs. 20,000/- but less than Rupees 5,00,000/-, instituted before 9th of January, 1980, when the Ordinance came into force, first appeals against decrees or orders passed therein would lie to the High Court and not to the District Judge."

It may as well be pointed out that during the Presidential Rule, Punjab Ordinance No. 1 of 1980, was repealed by Punjab Ordinance No. 4 of 1980 on 21st April, 1980, whereby the preceding amendment of S. 39 (1) (a) of the principal Act enhancing the jurisdiction of the District Judge to hear appeals of the value of five lac rupees, was re-enacted.

4. At this stage, it would be worthwhile to quote the provisions of Amendment Act, 1980:—

1. Short title and commencement: (1) This Act may be called the Punjab Courts (Amendment) Act, 1980. (2) It shall be deemed to have come into force on the 9th day of January, 1980.

2. Amendment of Section 39 of Punjab Act 6 of 1918:— In the Punjab Courts Act, 1918 (hereinafter referred to as the principal Act), in Section 39, in sub-sec. (1), in Cl. (a), for the words, "twenty thousand rupees", the words "five lakh rupees" shall be substituted.

3. Repeal and saving.— (1): The Punjab Courts (Second Amendment) Ordinance 1980 (Punjab Ordinance No. 4 of 1980), is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken or deemed to have been done or taken under the principal Act, as amended by the Ordinance referred to in sub-section (1), shall be deemed to have been done or taken under the corresponding provisions of the principal Act, as amended by this Act.

(3) Notwithstanding anything contained in any judgment, decree or order of any Court, the provisions of the principal Act, as amended by this Act, shall apply to every appeal from a decree or order of a subordinate Judge filed or to be filed after the commencement of this Act and all such appeals the value of which does not exceed five lakh rupees filed in the High Court after such commencement and pending therein shall stand transferred to the District Judge exercising ordinary territorial jurisdiction in such appeals."

5. Before proceeding further, it deserves mention that the learned counsel for the respondent, having instructions not to oppose the civil miscellaneous application under consideration, did not render any assistance to us. The question being of great general importance, affecting a large number of appeals, we instead received assistance from Mr. Mohinderjit Singh Sethi, Additional Advocate General, Punjab, as *amicus curiae*.

6. Very candidly, learned counsel for the applicant and Mr. Mohinderjit Singh Sethi agreed that the short legislative history, set out hereinbefore was not helpful in the interpretation of the above quoted sub-s. (3) of S. 3 of the Amendment Act, 1980.

7. Their Lordships of the Supreme Court in *Polster Electronic (Pvt.) Ltd. v. Addl. Commr., Sales Tax*, 41 STC 409 : (AIR 1978 SC 897) have laid down (at p. 904 of AIR):—

"A statutory enactment must ordinarily be construed according to the plain natural meaning of its language and no words should

be added, altered or modified unless it is plainly necessary to do so in order to prevent a provision from being unintelligible, absurd, unreasonable, unworkable or totally irreconcilable with the rest of the statute. This rule of literal construction is firmly established and it has received judicial recognition in numerous cases."

So far as the non obstante clause of sub-section (3) of S. 3 of the Amendment Act, 1980 is concerned, it has, inter alia, the effect of nullifying the above cited judgment of this Court in F. A. O. No. 79 of 1980. Now, the important words are that: "the provisions of the principal Act, as amended by this Act, shall apply to every appeal from a decree or order of a subordinate Judge filed or to be filed after the commencement of this Act and all such appeals the value of which does not exceed five lakh rupees filed in the High Court after such commencement and pending therein shall stand transferred". The provisions in question have been made to apply to every appeal "filed or to be filed after the commencement of this Act". Besides, having classified the appeals by their valuation of five lac rupees, emphasis is again on such appeals "filed in the High Court after such commencement and pending therein". In order to buttress his contention that S. 3 (3) of the Amendment Act also applied to the appeals filed before the commencement of the Act, Mr. Mohinderjit Singh Sethi laid stress on the words "filed" and "pending" occurring therein. But, in our view, the contention ignores the significant aspect of the matter that the Amendment Act, 1980, though published in the Punjab Government Gazette (Extraordinary) on 28th July, 1980, was made to come into force on 9th Jan., 1980. In the nature of things, after the said date of the commencement of the Act, appeals were expected to have been filed in the High Court. Some of them, which had not been disposed of, were obviously pending when the Amendment Act, 1980, was published in the Punjab Government Gazette. In view of the object of the limited retrospectivity, S. 3 (3) of the amendment Act, 1980, provided that the Act was applied to every appeal "filed or to be filed after the commencement of this Act". Upon a careful scrutiny of S. 3 (3), its context does not at all appear to suggest that the words "pending" has relation to the appeals pending before the commencement of the Act. If such were the intention of the legislature, the provision instead would have been that the act shall apply to "appeals to be filed after the commencement of this Act and filed before such commencement."

8. Mr. Mohinderjit Singh Sethi also referred to the Statement of Objects and Reasons which are as under:—

"The value of the property has risen manifold as a sequel where to the High Court is clogged with many cases of appeals of Civil nature involving an amount exceeding rupees twenty thousand. In order to cope with voluminous work with the High Court it is difficult for the State Government to add more Judges to the High Court's strength. Preference of appeals to the High Court in the cases of more than 20,000/- value causes inconvenience to a sizeable chunk of public also. For the expeditious disposal of the cases at lower level the jurisdiction of the District and Sessions Judges in the State of Punjab to dispose of the appeals is being enhanced through this Bill, up to Rs. 5 lac." In our view, the Objects and Reasons of Amendment Act, 1980, will not certainly stand frustrated if the applicability of the Act remains confined to the appeals filed in the High Court after the commencement of the Act.

9. For the foregoing reasons, we allow this application and set aside the order of the transfer of this appeal to the District Judge, Bhatinda.

PREM CHAND JAIN, J.:— I agree.

SURINDER SINGH, J.:— I agree.

Application allowed.

AIR 1982 PUNJAB AND HARYANA 51

G. C. MITAL, J.

Karam Singh, Appellant v. Jagta and others, Respondents.

Second Appeal No. 496 of 1970, D/- 21-8-1981.*

(A) Civil P. C. (5 of 1998), Ss. 11, 105 (1) — Res judicata — Interlocutory order passed by trial court — Revision against, dismissed in limine — Order in revision does not operate as res judicata — Aggrieved party can re-agitate matter in appeal — Case law discussed. (Para 2)

(B) Civil P. C. (5 of 1998), O. 13, Rr. 1, 2 — Production of document at late stage — Power of court to reject — Scope.

It cannot be ruled that in every case where a document is tendered at a late stage or is not mentioned in the list of reliance it would always be excluded from consideration or from being exhibited and proved. This would depend

*From order of S.S. Sodhi, Addl. Dist. J., Hoshiarpur, D/- 7-2-1970.

FY/JY/E326/81/VVG/SNV

on the facts and circumstances of each case and the nature of document sought to be produced. (Para 4)

Where in the suit for possession of land, the defendant, who claimed ownership to the suit land on basis of a registered will and who actually got mutation of the suit land entered in his favour on basis of the will, failed to mention the will in his list of reliance and produced it just before entering on his defence, the refusal to admit the will and proof thereof only because of its late production was erroneous, as the will was not a document which could be manufactured by the defendant a little before it was sought to be produced and more so it was a document having great bearing on the decision of the case. (Para 4)

(C) Punjab Custom (Power of Contest) Act (2 of 1920), S. 7 (as amended by Punjab Custom (Power of Contest) Amendment Act 12 of 1973) — Will under custom — Validity of, cannot be challenged on ground that ancestral property cannot be willed away. (1974) 76 Pun LR 125, Foll. (Para 7)

Cases Referred: Chronological Paras (1981) 1 Serv LR 274 (Punj and Har) (FB) 3

1980 Rev LR 132: 1980 Pun LJ 24 2

AIR 1978 SC 1283: 1978 Lab IC 1111: (1978) 2 Lab LJ 161 3

AIR 1978 Punj and Har 329: 1978 Pun LJ 228 3

AIR 1976 SC 830: (1976) 1 SCC 803: 1976 Lab IC 575 3

(1974) 76 Pun LR 125: 1974 Rev LR 80 7

AIR 1973 Punj and Har 392: 75 Pun LR 323 2

ILR (1970) 1 Punj and Har 533 2

T. S. Mangat and D. S. Kang, for Appellant; Ashok Bhan, (for No. 1) and Gurbachan Singh (for No. 4), for Respondents.

JUDGMENT:— Dalip Singh was the last male-holder who owned about 57 Kanals and 3 Marlas of land in village Golewal, Tehsil Garhshankar, District Hoshiarpur. On his death, mutation was recorded in favour of Karam Singh defendant on the basis of a registered will dated 22nd Aug., 1963 and he also entered into possession of the land left by Dalip Singh. Jagta, son of Dalip Singh, filed the present suit for possession on the basis that the land held by Dalip Singh was ancestral that he was his sole heir being this son and that after the death of Dalip Singh, Karam Singh and his two brothers entered into forcible

possession of the land in dispute after getting mutation sanctioned in favour of Karam Singh on the basis of some will which Dalip Singh had never executed nor was he entitled to do so under the custom. Certain other pleas were also raised with which we are not concerned at this stage. Karam Singh, defendant, contested the suit and pleaded that Dalip Singh had executed the will in his favour in a sound and disposing state of mind and the same was rightly given effect to by the revenue authorities while sanctioning the mutation. It was also pleaded that Shmt. Kartari was daughter of Dalip Singh who was later on impleaded as defendant No. 4 and in any event she would be entitled to half of the property; and therefore, suit of the plaintiffs could not be decreed for the entire land. The trial court found that the plaintiff was son of Dalip Singh and Shmt. Kartari defendant was daughter of Dalip Singh. With regard to the will set up by Karam Singh defendant it was held that the same was not proved. Hence a decree for half share was passed in favour of Jagta plaintiff. Karam Singh defendant took the matter in appeal. The only point urged before the lower appellate court was that the trial court was in error in not granting permission to Karam Singh defendant to prove the will after exhibiting the same. The lower appellate court repelled the contention on the sole ground that the order of the trial court declining permission to Karam Singh to prove and get the will exhibited was sought to be revised by Karam Singh by filing Civil Revision No. 10 of 1968 in this Court which was dismissed on 8th January, 1968; and, therefore, in view of the High Court order he could not be allowed to re-agitate the matter in appeal. In the absence of a will, Karam Singh could have no claim to the property in dispute with the result the appeal was dismissed. Karam Singh defendant has come to this Court in second appeal.

2. The crucial point which will arise for consideration in this appeal would be whether the order of this Court passed in revision would either operate as *res judicata* or bar Karam Singh to re-agitate the same matter either before the first appellate court or before this Court now in appeal. In order to go into this matter, it will be useful to notice as to what order was passed by this Court in the revision petition. A look at the order which is at page 39 of the file of the lower ap-

pellate court would show that the revision was dismissed in limine with one-word order. "Dismissed". It cannot be disputed that if this Court had found that there was no merit in the revision then such an order would have operated as *res judicata* between the parties at least up to the stage of this Court but if the revision was not dismissed by a speaking order, then the possibility cannot be excluded that this Court declined to entertain the revision either on the ground that the impugned order did not amount to a case decided and, therefore, no revision was competent or because no error of jurisdiction was shown. In either of these two eventualities, it would not be held that this Court found the order of the court below to be correct on merits. The effect in this situation would be that this Court was helpless in entertaining a revision and no more. Whether such an order would operate as *res judicata* or would come in the way of the aggrieved party to impugn the same before the lower appellate court or this Court in view of S. 105 (1) of the Civil P. C. is the next point which falls for consideration. This matter is not *res integra* and has engaged the attention of this Court at least in three decisions out of which the first one is by a Division Bench, namely, *Roop Kishore v. Firm Raghbir Singh Baboo Ram*, ILR (1970) 1 Punj and Har 533; *Ishar v. Sudesh Kumar* AIR 1973 Punj and Har 392 and *Pohlu Ram v. Gram Panchayat, Dharamgarh* 1980 Rev LR 132. The facts of the aforesaid cases are identical and it was held that dismissal of a revision with one-word order, 'Dismissed', would not debar the aggrieved party from re-agitating the matter in appeal from the final decree. Hence it is held that if any interlocutory order was passed by the trial court which was subject-matter of revision in this Court and the revision was dismissed with one-word order, 'Dismissed', that would not operate as *res judicata* nor debar the aggrieved party to re-agitate the matter in the first or a second appeal.

3. Shri Ashok Bhan appearing for the plaintiff-respondent, relied upon *Reserve Bank of India v. Ramkrishna Govind Morey*, (1976) 1 SCC 803: (AIR 1976 SC 830) and a Division Bench judgment of this Court in *Amarjit Singh v. Financial Commissioner, Taxation, Punjab, Chandigarh*, AIR 1978 Punj and Har 329. In *Reserve Bank of India v. Ramkrishna Govind Morey*

(supra), the point whether dismissal of a revision against an interlocutory order with one word, 'Dismissed', was not the subject-matter of consideration. Even a summary dismissal, as already stated above, can amount to res judicata or debar the aggrieved party to re-agitate the matter provided it can be found from the summary order that it was on merits. Hence that is distinguishable. As regards Amarjit Singh v. Financial Commissioner, Taxation, Punjab, Chandigarh (supra), the question was entirely different. There an order of Financial Commissioner was challenged by filing a writ petition which was dismissed in limine and thereafter the aggrieved party filed a review application before the Financial Commissioner which was allowed and against the review order of the Financial Commissioner, the writ was allowed by this Court after recording a finding that the earlier order of the Financial Commissioner merged with the order of this Court in the writ petition and, therefore, the Financial Commissioner could not have reviewed the matter. A reading of this judgment also does not show that the earlier writ petition was dismissed with one-word order, 'Dismissed'. There is a latest judgment of this Court delivered by a Full Bench of five judges in Teja Singh v. Union Territory of Chandigarh (1981) 1 Serv LR 274, which considered the effect of an order passed in writ petition with one-word order, 'Dismissed', wherein it was held that such an order would not operate as res judicata in any other proceedings but would only debar the party concerned from filing a fresh writ petition. The Full Bench had placed reliance on a decision of the Supreme Court in Workmen of Cochin Port Trust v. Board of Trustees of the Cochin Port Trust, AIR 1978 SC 1283, besides other decisions. It was then urged by Mr. Ashok Bhan that the Division Bench had applied the rule of merger of judgment of the Financial Commissioner with that of this Court. The rule of merger would apply only if a judgment is delivered by a superior court on merits. Hence this rule will also not be applicable to the facts of the present case. Accordingly, the two decisions relied upon by Mr. Ashok Bhan are either distinguishable or in any event would not stand in the way of the appellant to urge that the order of his Court dismissing the revision petition with one-word, 'Dismissed', would not stand in his

way to re-agitate the matter in an appeal from the final decree.

4. This brings me to the consideration of the merits of the present case. Karam Singh defendant produced Nathu Ram, scribe of the will as D. W. 1 who appeared on 14th Dec., 1967. He stated that he had scribed the will dated 22nd Aug., 1963, on behalf of Dalip Singh. Then the original will was sought to be exhibited on which objection was raised by the plaintiff and the trial court passed the following order:

"Tendered in evidence at this stage. Not admitted as it was produced only on last hearing and is not a document relied upon."

However, the witness was allowed to be examined further. The scribe made a statement about the execution of the will and other attending circumstances. Some of the questions put were objected to by the plaintiff's side and at the close of the examination-in-chief, the will was marked 'A'. It was this order of the trial court which was impugned by Karam Singh defendant in this Court by filing Civil Revision No. 10/1968 which was dismissed in limine with one-word order, 'Dismissed', on 8th Jan., 1968. The two reasons given for declining to admit the will and proof thereof were that it was tendered in evidence at a late stage and was not a document relied upon in the list of reliance. As a matter of law, it cannot be ruled that in every case where a document is tendered at a late stage or is not mentioned in the list of reliance it would always be excluded from consideration or from being exhibited and proved. This would depend on the facts and circumstances of each case and the nature of document sought to be produced. What I find on the facts of the present case is that Karam Singh defendant produced the original will before the Assistant Collector 1st Grade to claim ownership on the basis of this will and to have mutation of ownership entered in his favour and the Assistant Collector ultimately accepted the will to be a good document and sanctioned mutation in his favour. A look at the original will further show that the will was returned by the Assistant Collector 1st Grade on 18th April, 1967 and was produced before the civil court in the present litigation on the hearing prior to 14th December, 1967 and before Karam Singh defendant started leading evidence. Moreover, the will was duly presented for registration on 22nd

Aug., 1963, when it was scribed and was actually entered in the register of Sub-Registrar on 21st January, 1964. It is not a document which could be manufactured by Karam Singh defendant a little before it was sought to be produced. A will of the kind in dispute had a great bearing on the decision of the case one way or the other and merely because Karam Singh or his advocate was remiss in mentioning the will in the list of reliance or by inadvertence failed to produce it either with the written statement or at an early stage of the proceedings would not disentitle Karam Singh defendant from consideration of the will on merits. The procedural law is a hand-made of justice; and even if there was infraction of the same, if no valuable right had accrued to the opposite party it was a fit case for granting permission to have the will exhibited and proved. The opposite party could well be compensated by payment of costs. In the present case, Karam Singh defendant does not deserve to be burdened with costs since the will was produced on a hearing before he started leading evidence and about which there was a mention in the plaint and written statement. Therefore, the opposite party very well knew about the will. Accordingly, I am of the opinion that the trial court committed an error in declining the production of the original will on record or to have the same proved in accordance with law. Accordingly, I set aside the order of trial court dated 14th December, 1967 quoted above, as being illegal and erroneous and while doing so grant permission to Karam Singh defendant to have the will exhibited and proved in accordance with law. The original will which has already been produced on the record and was marked 'A' by the court below is exhibited as D. W. 1/A.

5. Since the will has been exhibited today, Karam Singh defendant may like to lead further evidence to prove the same. Shri Ashok Bhan appearing for the plaintiff-respondent also claims an opportunity to lead evidence in rebuttal without agreeing to the order exhibiting the document and without prejudice to the rights of his client to challenge this order. I think the claim is reasonable.

6. The suit was filed in June, 1966 and the litigation has been pending for over fifteen years already. Under the circumstances I consider it desirable to remit the case to the trial Court under O. 41,

R. 25, Civil Procedure Code so that the trial Court may record evidence with regard to the will as may be sought to be led by Karam Singh in the first instance and rebutted by the plaintiff-respondent, and after doing so he would hear the arguments of both the sides and decide issue No. 2, that is, "whether Dalip Singh deceased executed a valid will in favour of defendant No. 1". After he decides this issue on the basis of evidence already led and to be led, he would send the record of the case along with his report to the learned District Judge who may hear the arguments of the parties on this issue and shall prepare his report and send the entire record along with his report to this Court when the matter would be decided by this Court finally. The District Judge may do so himself or make over the case to an Additional District Judge for the purpose.

7. Findings on issues Nos. 1 and 5 have not been disputed before me and the decision on those issues is upheld. As regards issues Nos. 3 and 4, the same have become redundant because after the amendment of the Act No. 12 of 1973 and the Division Bench decision in Charan Singh v. Gehal Singh, (1974) 76 Pun LR 125, the validity of a will under custom on the ground that the ancestral property cannot be willed away can no longer be challenged. Therefore, only issue No. 2 survives for decision.

8. For the reasons recorded above the case is remitted to the trial Court along with record of the case for complying with this Order. The parties through their counsel are directed to appear before the trial Court, that is, Sub Judge Ist Class, Garhshankar on 14th of Sept., 1981. The trial Court shall submit its report to the learned District Judge within a period of four months from the date of the appearance of the parties before him and shall give ten days' date for appearance of the parties before the learned District Judge.

The learned District Judge or the Additional District Judge, as the case may be, shall submit his report along with the records of the case to this Court within six weeks of the appearance of the parties. A copy of this judgment along with the record of the case be sent to the trial Court forthwith.

Order accordingly.

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**S. S. SANDHAWALIA, C. J. AND
S. P. GOYAL, J.**

Narain Singh, Appellant v. Bakson Laboratories and another. Respondents:

Civil Revn. No. 386 of 1976, D/- 28-7-1981.*

East Punjab Urban Rent Restriction Act (3 of 1949), Section 13 (2) (iii). — Tenant enclosing front and back verandas by brick walls — Act falls within mischief of Section 13 (2) (iii). C. R. No. 482 of 1964, D/- 11-12-1964 (Punj) and C. R. No. 528 of 1970, D/- 21-4-1971 (Punj) Overruled.

Without the authority or sanction of the landlord the respondent-tenant had enclosed the front veranda of the residential bungalow by a brick wall with cement mortar and some glass-panes therein. The rear veranda of the bungalow had also converted by him into a room in the same fashion. Further the window of the kitchen had been removed and a door had been permanently installed in the wall.

Held, the acts came within the mischief of Section 13 (2) (ii). The designed use of the word 'likely' in Section 13 (2) (iii) clearly shows that it is not that the impugned acts must have conclusively diminished the value or utility of the building, but it would be within the mischief of the statute if they are likely to do so. A closer look at the provision would, therefore, indicate that it is tilted in favour of the landlord because even if the acts may not conclusively impair the value or utility but merely have a tendency to the same effect they may well come within the wider net of the language employed by the legislature. What next calls for notice is that the statute talks not merely about the impairment and the diminishing of the financial value of the building but equally of the diminishing of its utility. Whilst undoubtedly the true encl for determining these factors would ultimately be the objective finding of the Court, there is a large body of judicial opinion that the impairment value or utility has to be examined from the point of view of the landlord. In particular it is not whether the utility is diminished qua the tenant because the acts complained of would be

those committed by him and would obviously not diminish the utility of building for his purpose. Therefore the impairment of the utility is particularly relevant to either the needs of the owner of the building or in the larger prospect of its utility to an intending purchaser in the market. Equally well-settled it is that the words 'value or utility' in Section 13 (2) (iii) have to be read disjunctively. It suffices if the material impairment is either of the financial value of the building or similarly of the utility of the building. It consequently suffices for the purposes of the landlord if he is able to establish either of the two requirements. It is with the aforesaid approach towards Section 13 (2) (iii) that one must notice that broadly there is a consensus of judicial opinion in this particular context and also in the context of corresponding provisions of other rent statutes that any material structural alterations which tend to change the nature and the character of the building would come within the mischief of the statute. The view that the material structural alterations cannot be said to impair the value or utility of the building because the doors and the walls can be easily removed at any time is not sustainable on a closer analysis. A landlord may well be compelled to transfer the building whilst still in the occupation of the tenant and the impairment of its utility because of such material changes may gravely affect its value in the market. A hideous structural alteration obviously affecting the front of rear elevation of a house or building would inevitably impair its value or in any case is likely to do so and to slur it over on the ground that this would only be a matter of taste or opinion would hardly be justified. The permanent closure of verandas on the front and the rear of a residential bungalow adversely affecting both its utility and the elevation of the house does impair its value or utility. The same is more so where further windows are either removed and doors installed which inevitably have to be embedded in the flooring of the house. C.R. No. 482 of 1964, D/- 11-12-1964 (Punj) and C.R. No. 528 of 1970, D/- 21-4-1971 (Punj) Overruled; (1976) 78 Pun LR 174 and (1980) 2 Ren. CR. 629 (Punj & Har) and ILR (1964) 14 Raj 819 and (1980) 2 Ren. CR. 492 (Punj & Har); AIR 1976 Raj 160 and (1969) 71 Pun LR 39 and (1978) 2 Ren. CR. 19 (Punj) and

*Case referred by S. P. Goyal J., on 10-12-1980.

(1977) 2 Rent LR 689 (Punj & Har) and AIR 1982 NOC 28 (Punj & Har), Relied on.

(Paras 6, 7, 8, 9, 11, 12, 18)

Cases Referred: Chronological Paras

AIR 1982 NOC 28: 1981 Cur LJ (Civ) 168 (Punj & Har) 17

(1980) 2 Ren CR 492 (Punj & Har) 16

(1980) 2 Ren CR 629 (Punj & Har) 15

(1977) 2 Rent LR 689 (Punj & Har) 17

(1976) 78 Pun LR 174 15

AIR 1976 Raj 160 16

(1972) 74 Pun LR (SOC) 2: (1978) 2 Ren CR 19 17

(1971) C. R. No. 528 of 1970 D/- 21-4-1971 (Punj) Smt. Shanti Devi v. Lekh Raj 13

1969 Ren CR 36: (1969) 71 Pun LR 39 (Punj & Har) 16, 17

(1964) C. R. No. 482 of 1964 D/- 11-12-1964 (Punj), Babu Ram v. Smt. Kesra Devi 10, 13

ILR (1964) 14 Raj 819 15

Mrs. Surjit Bindra, for Petitioner; S. P. Jain, for Respondents.

S. S. SANDHAWALIA, C. J.:— Whether the unauthorised permanent conversion of verandahs into rooms and the installation of a door by a tenant, are acts likely to impair materially the value or utility of the demised premises within the meaning of Section 13 (2) (iii) of the East Punjab Urban Rent Restriction Act, 1949, is the somewhat interesting question which has necessitated this reference to the Division Bench.

2. At the revisional stage the matrix of facts giving rise to the aforesaid issue are not in serious dispute and may, therefore, be briefly noticed. Narain Singh petitioner (now deceased) had preferred a petition for ejectment against Messrs. Bakson Laboratories and its sole proprietor Shri R. L. Soni from Bungalow No. 456-L, Model Town, Jullundur. Amongst various other grounds it was specifically alleged that the respondent had covered the verandahs on the front and back sides of the bungalow and had opened a door by breaking a wall of a room and thus diminished the value and utility of the premises and further that their presence was a nuisance to the petitioner and his neighbours. In contesting the ejectment petition the respondent had admitted the tenancy and had controverted the allegations in the petition. On the pleadings of the parties the following issues were framed:—

1. Whether the petition is bad for non-joining of necessary parties?

2. Whether a valid notice was served in this case?

3. Whether the respondent is liable to ejectment on the grounds mentioned in the petition?

4. Relief.

Issues Nos. 1 and 2 were found in favour of the petitioner but issue No. 3 was decided against him and consequently the petition was dismissed. The Rent Controller noticed that the parties were really in contest on the ground of the diminishing of the value and the utility of the premises because of the conversion of the verandahs and the installation of the door by the tenant. He found as a fact and in essence it was virtually the admitted position that the front and the back verandahs had been enclosed with a brick wall with the use of cement mortar and a door had been opened in the wall in place of a window. Nevertheless he took the view that since the walls built by the respondent could be removed at any time there was no impairment of the utility of the premises.

3. On appeal, the appellate authority took the view that the only ground surviving was with regard to the material impairment of the value and the utility of the demised premises. It was observed as follows:—

"...Thus the only point to be seen in this case is whether with the construction of temporary walls in the front and back verandahs and turning of a window into a door it can be said that material impairment of either the value or utility of the building has been brought about."

Affirming the findings of the trial Court the appellate authority also took the view that the offending walls joined with the other parts of the building can be removed at any time and further that the installation of the door was something which had been done by the tenant for his convenience and the building could be put back to its old shape. Consequently the appeal was also dismissed.

4. The present civil revision first came up before my learned brother S. P. Goyal J., sitting singly. Noticing the meaningful issue involved and some conflict of precedent on the point he referred the same for a decision by the Division Bench.

5. It would be plain from the above resumé of facts that the concurrent findings of the Courts below are that without the authority or sanction of the land-

lord the respondent-tenant had enclosed the front verandah of the residential bungalow by a brick wall with cement mortar and some glass-panes therein. The rear verandah of the bungalow has again been converted into a room in the same fashion. Further the window of the kitchen has been removed and a door has been permanently installed in the wall. The crucial issue, therefore, is whether these acts would come within the mischief of Section 13 (2) (iii) of the Act.

6. Inevitably one must first turn to the language of the aforesaid provision which is in the following terms:—

"Section 13 (1) xx xx xx xx

(2) A landlord who seeks to evict his tenant shall apply to the Controller for a direction in that behalf. If the Controller, after giving the tenant a reasonable opportunity of showing cause against the applicant, is satisfied—

(i) & (ii) xx xx xx

(iii) that the tenant has committed such acts as are likely to impair materially the value or utility of the building or rented land, or

(iv) — (vi) xx xx xx xx

The Controller may make an order directing the tenant to put the landlord in possession of the building or rented land and if the Controller is not so satisfied he shall make an order rejecting the application;

Provided — * * *

Herein what first meets the eye and perhaps deserves highlighting (because it seems to have missed notice earlier) is the designed use of the word 'likely' in the aforesaid provision. The statute has not used peremptory or categorical language. Therefore it is not that the impugned acts must have conclusively diminished the value or utility of the building, but it would be within the mischief of the statute if they are likely to do so. A closer look at the provision would, therefore, indicate that it is tilted in favour of the landlord because even if the acts may not conclusively impair the value or utility but merely have a tendency to the same effect, they may well come within the wider net of the language employed by the legislature.

7. What next calls for notice is that the statute talks not merely about the impairment and the diminishing of the

financial value of the building but equally of the diminishing of its utility. Whilst undoubtedly the true anvil for determining these factors would ultimately be the objective finding of the Court, there is a large body of judicial opinion that the impairment of value or utility has to be examined from the point of view of the landlord. In particular it is not whether the utility is diminished qua the tenant because the acts complained of would be those committed by him and would obviously not diminish the utility of building for his purpose. Therefore the impairment of the utility is particularly relevant to either the needs of the owner of the building or in the larger prospect of its utility to an intending purchaser in the market.

8. Equally well-settled it is that the words 'value or utility' in the aforesaid provision have to be read disjunctively. It is not that the impugned act must impair both the value and utility of the building but it suffices if the material impairment is either of the financial value of the building or similarly of the utility of the building. It consequently suffices for the purposes of the landlord if he is able to establish either of the two requirements.

9. It is with the aforesaid approach towards Section 13 (2) (iii) of the Act that one must notice that broadly there is a consensus of judicial opinion in this particular context and also in the context of corresponding provisions of other rent statutes that any material structural alterations which tend to change the nature and the character of the building would come within the mischief of the statute. The use of the word 'material' in the provision only effectuates the hallowed rule of the law that it does not take account of trifles and consequently both the impairing of its value or its utility must be of a substantial and not inconsequential nature.

10. At the very outset I would wish to notice that the corner-stone of the argument on behalf of the respondent-tenant is rested on the observations of Chief Justice Falshaw in C.R. No. 482 of 1964—Babu Ram v. Smt. Kesra Devi, decided on 11th Dec., 1964. In this case a verandah in the front of the house divided into four arches had been bricked up and in two of the apertures doors had been fitted by the tenant unauthorisedly to convert the same into a room.

The Rent Controller ordered the ejectment of the tenant and the appellate authority upheld the same. However, reversing the Courts below, the learned Chief Justice observed as follows:—

"The lower Appellate Authority on the other hand found that the removal of bricks from the floor of the verandah could not be made a ground for ejectment because this had never been pleaded, but at the same time he was of the opinion that the closing of the arches impaired the value or utility of the building because, as recorded in his inspection note by the Rent Controller, the obstructions lessened the light and air in the rooms lying behind. He found that although there may not have been any impairment in the sense of any financial damage the quality of the building had been impaired. I myself should have thought that the amount of light and air reaching the back rooms was a matter for the concern of the tenant alone as long as he remains in occupation of the premises and does not concern the landlord at all, and I am unable to see how the creation of an extra room by enclosing the verandah can be said to have impaired the value or utility of the building in any way, since the doors and walls can easily be removed at any time. The learned counsel for the landlord sought to argue that the appearance of the front of the house was spoiled, but it seems to me that that is entirely a matter of opinion."

Now a close perusal of the very brief judgment recorded by the learned Chief Justice would indicate that the matter was decided as if it was one of first impression. It is patent that the issue was not adequately canvassed and neither any principle nor the large mass of authority on the point seems to have been at all adverted to. With the greatest respect, it seems to me that the aforesaid observations suffer from a triple fallacy. Firstly the view that the diminishing of the light and air to the rooms by enclosing of the verandah concerns the tenant alone and not the landlord, cannot possibly be supported on a closer analysis. As has been noticed earlier, the impairment of the utility of the building and the adverse results of the act of the tenant have relevance to the requirements of the owner of the building and not to those of the tenant who would have himself made the alterations. The observations seem to rest on the as-

sumption that the tenant is to remain in perpetual possession and, therefore, the diminishing of the light and air to the rooms is his concern only. This view can hardly be justified because the ultimate diminishing of value may either be when the landlord resumes possession for his needs or may be compelled to transfer the property (even whilst still in the occupation of the tenant) despite the impairment of its utility and consequently of its value to the new owner.

11. Again the view that these material structural alterations cannot be said to impair the value or utility of the building because the doors and the walls can be easily removed at any time is not sustainable on a closer analysis. Carried to their logical extent it would mean that any alteration, however material, which can be removed or where the building can be restored to its original state would never come within the ambit of the statute. With the present day construction technology one can hardly imagine any material structural alteration which cannot be either reversed or restored. Again this view suffers from the erroneous assumption that the building would be necessarily vacated and the tenant would be then either willing to remove the material alterations and restore the building to its original state or that the landlord would always be in a position to do so. Under the present Rent Laws it is not always that the landlord can secure possession and be in the enviable position of either removing the unauthorised structural changes and alterations and thus restoring the building to its original state. It was aptly argued by Mrs. Bindra the learned counsel for the petitioner that a landlord may well be compelled to transfer the building whilst still in the occupation of the tenant and the impairment of its utility because of such material changes may gravely affect its value in the market. Therefore, the hypothetical consideration that either the landlord may be able to secure possession and restore the building to its original state or the tenant may well be willing to do so appears to be rather irrelevant to the issue. It is manifest that the statute visualises such acts as and when they are committed during the occupancy of the building by the tenant, which can give rise to the remedy of ejectment. The matter has, therefore,

to be considered in praesenti and not in futuro.

12. Lastly, it has been observed that even though the appearance of the front of the house may be spoiled yet this was entirely a matter of opinion. Carried to its logical length these observations would give a carte-blanche to a tenant to completely alter the elevation and the aesthetic look of the building because this can always be termed as a matter of opinion. A hideous structural alteration obviously affecting the front or rear elevation of a house or building would inevitably impair its value or in any case is likely to do so and to slur it over on the ground that this would only be a matter of taste or opinion would hardly be justified.

13. With the greatest respect it appears to me that for the aforesaid reasons the view in Babu Ram's case (supra) is unsustainable and has to be overruled. In Smt. Shanti Devi v. Lekh Raj C. R. No. 528 of 1970 decided on the 21st of April, 1971, even though the facts were slightly different the observations in Babu Ram's case were quoted with approval and followed. For the identical reasons this authority, therefore, also does not lay down the law correctly and has to be overruled. Once it is so, it would be unnecessary to individually advert to the authorities following the aforesaid line of reasoning and it suffices to say in my view they do not enunciate the law correctly.

14. Once the view in Babu Ram's case and its line of reasoning have been effectively repelled the rest appears to be easy sailing. There is a long line of precedent both within this Court and without it to the effect that material structural alterations which changed the nature and character of the building are within the mischief of the statute. Can it be said that the permanent closure of verandahs on the front and the rear of a residential bungalow adversely affecting both its utility and the elevation of the house does not impair its value or utility. I believe it does. The same is more so where further windows are either removed and doors installed which inevitably have to be embedded in the flooring of the house.

15. Within this Court the case that directly covers the point is Chatar Singh v. Bishan Lal, (1976) 78 Pun LR 174. Therein also the precise issue was with regard to the enclosing of a verandah

and converting it into a part of the shop. Verma J. observed as follows:—

“***. A verandah has its own utility. It provides light and air to the rooms adjoining it. A building with a verandah is admittedly more useful than the one without a verandah. Therefore, there can hardly be any doubt that the inclusion of verandah into the shop constitutes structural alteration and had impaired materially the utility of the premises. So, the aforesaid act of the petitioner undoubtedly fell within the ambit of S. 13 (2) (iii).”

The aforesaid view was then followed by Kang J., with the following observations in Dewan Chand v. Babu Ram, (1980) 2 Ren CR 629:—

“***. The facts enumerated above, do not constitute minor changes. Drastic changes in the structure of the building have been made. They have caused cracks in the walls. The verandah has completely been merged in the room. The utility and the value of the shop in dispute has been impaired. The interest of justice demands that the finding of the Appellate Authority should be set aside.”

Though the language of the Rajasthan Premises (Control of Rent and Eviction) Act, is slightly different yet in an identical factual situation Bhargava J., in Khinva Ram v. Lakhi Prasad ILR (1964) 14 Raj 819 observed as follows:—

“***. The alteration should be of structural nature and not merely of decorative nature. Fixing a door to a room or to a garage by a tenant may not amount to material alteration within the meaning of S. 13 (1) (c) of the Act but the same will not be the case when an open verandah is converted into a closed room by fixing doors on the open portion. The character and shape of the premises in the former case remain unchanged while in the latter case, the form and structure of the premises is changed. What was formerly a chabutra with a tin shed over it is converted into a closed room. In the present case it is admitted by the appellant that he has constructed a pucca masonry wall upon the floor of the Chabutra and has converted the whole of the open chabutra into a closed shop, a part of which in his own admission is occupied by his son.”

It would be obvious from the above that the weight of authority directly covering the point is heavily tilted in favour of the petitioner. Mr. S. P. Jain learned

counsel for the respondent could offer no meaningful criticism or lay any serious challenge to the reasoning and the ratio of the aforesaid cases.

16. Again as regards other changes and the installation of a door the following observations of R. N. Mittal J., in *Bawa Singh v. Smt. Pushpa Wati* (1980) 2 Ren CR 492 are instructive:—

“***. It appears from the plan that a part of it is pucca and a part is wooden. There was a window in one of the rooms so made. That window has been removed and a door has been fitted in its place. This has been the consistent view of this Court that if any material alteration has been made which changes the nature of the property, then the impairment of the value and utility of the building is to be seen from the point of view of the landlord. In the above view, I am fortified by the observations in *Siri Krishan Dev v. Jhabu Ram*, 1969 Ren CR 36.”

To the same tenor are the observations in *Sampatraj v. Bhagwatilal*, AIR 1976 Raj 160.

17. It would be wasteful and unnecessary to multiply authorities. It suffices to mention that the larger principle on which we are resting ourselves is equally borne out from *Siri Krishan Dev v. Jhabu Ram* (1969) 71 Pun LR 39; *Nirmala Devi Kapoor v. Kartar Singh*, (1972) 74 Pun LR (SOC) 2; *Raj Kumar v. Ram Kanwar*, (1977) 2 Ren LR 689 (Punjab and Har.) and *Smt. Nirmala v. Ishwar Chander*, 1981 Cur LJ (Civ) 168; (AIR 1982 NOC 28 (Punjab and Har.)).

18. In view of the above it must be held on principle, as also on the specific language of the statute and weight of authority, that the answer to the question posed at the outset has to be returned in the affirmative. The petitioner has fully established the requirements of Section 13 (2) (iii) and is, therefore, entitled to succeed. Setting aside the judgments of the Rent Controller and of the Appellate Authority the eviction petition is hereby allowed. However, in view of the ticklish issue involved we leave the parties to bear their own costs.

Order accordingly.

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S. S. SANDHAWALIA, C. J. AND

S. P. GOYAL, J.

Paras Ram, Appellant v. Kamlesh, Respondent.

F. A. F. O. No. 70-M of 1980, D/- 24-9-1981*

Hindu Marriage Act (25 of 1955), Sec. 13 (1) (ia) — Cruelty — Mere allegation of adultery made against a spouse in defence in a written statement does not by itself amount to cruelty — Petitioner must establish falsity of such allegation in order that it may constitute cruelty. 1979 Cur LJ (Civ) 509, Overruled.

It is a settled legal position that a false allegation of adultery against a spouse amounts to cruelty in the eye of law. However, it would be a far cry to infer therefrom that an allegation of adultery, whether proved or not, would by itself be the mathematical equivalent of legal cruelty. It is not, and cannot possibly be the law, that a factually true allegation of adultery whether made otherwise or in defence in a written statement would amount to cruelty. In this field the truth or otherwise of such an allegation is the crux of the matter. To highlight, it is a blatantly false allegation of adultery which would amount to legal cruelty, and not possibly a true allegation of that nature which cannot give any cause of action to the offending spouse. Once this is so, any such allegation of adultery must be put to trial and it is only when its falsity or otherwise is determined that any legal consequence can flow therefrom. It is manifest that in order to succeed on this ground the petitioner must establish the falsity of such an allegation. The burden of proof, however, being a negative burden would in the initial stage be a light one. It would, therefore, become necessary that the petitioner in such a situation would have to amend the petition and plead the false allegation of adultery amounting to cruelty as a specific ground for matrimonial relief. It is only when this has been made a ground of attack that the petitioner can possibly take advantage of such an allegation, if proved

*From order of O. P. Gupta Addl. Dist. J. Narnaul. D/- 14-2-1980.

false. AIR 1967 Punj & Har 397 and AIR 1969 Punj. & Har 25 Disting. 1979 Cur LJ (Civ) 509 Overruled.

(Paras 5, 13)

Cases Referred: Chronological Paras

1979 Cur LJ (Civ) 509: 1979 Hindu LR 599 3, 4, 6, 8, 9, 13

AIR 1969 Punj & Har 25: ILR (1969) 2 Punj 365 7

AIR 1967 Punj & Har 397: 68 Pun LR (D) 177 7

Ashok Kumar Aggarwal, for Appellant; Chandra Singh, for Respondent.

S. S. SANDHAWALIA, C. J.:— Would a mere allegation of adultery by a spouse against the other made in defence in a written statement, by itself amount to cruelty, within the meaning of Sec. 13 (1) (ia) of the Hindu Marriage Act is the core question which has necessitated this reference.

2. Because of reasons which appear hereinafter necessitating a remand to the trial court, it suffices to advert briefly to the facts relevant to the issue aforesaid only. The appellant-husband had preferred the petition for the dissolution of marriage against his wife u/s. 13 of the H. M. Act inter alia on the ground of cruelty and desertion. The respondent-wife filed a written statement and subsequently an amendment thereof. Therein whilst denying the factual averments made by the appellant-husband she herself alleged that he had illicit relations with some women in the village and wanted her to leave him forever so that he may either carry on such a liason with them or marry afresh. Equally scurrilous allegation made was that the wife of Sardar Singh, the elder brother of the appellant-husband having died he himself as also his relations wished her to cohabit with Sardar Singh or get Sardar Singh married by exercising the influence of her father. On the aforesaid pleadings the omnibus issue framed by the trial Court was in the following terms:—

1. Whether the petitioner is entitled for dissolution of marriage by divorce on the grounds stated in Para No. 4 of the petition?

2. Relief.

The trial Court found the material issue No. 1 against the appellant-husband on a firm finding that neither the ground of desertion nor that of cruelty as alleged in the petition stood proved. It was, however, urged before it that the respondent-wife had

made a wild allegation of adultery in her written statement which would per se amount to legal cruelty and, therefore, the appellant-husband was entitled to succeed on that score alone. This stand was rejected on the ground that it was not proved that these wild allegations against the appellant had been made prior to the filing of the petition and having been made merely by way of defence in the written statement these cannot amount to cruelty. As a necessary consequence the petition was dismissed.

3. On appeal when the matter came up before my learned brother S. P. Goyal, J., the aforesaid contention that the mere allegation of adultery made in the written statement would amount to mental or legal cruelty was strenuously pressed primarily on the basis of Smt. Jiwan Lata v. Krishan Kumar, 1979 Cur LJ (Civ) 509. Finding that the observations in Jiwan Lata's case did tend to support the appellant's claim and expressing a doubt about the correctness of its ratio, the matter was referred to a larger Bench.

4. As before the learned Single Judge so before us, the learned counsel for the appellant did not challenge the findings of the trial Court on the facts constituting the pleas of cruelty and desertion already taken in the petition which are accordingly affirmed. For the contention that the scurrilous allegation of adultery levelled by the respondent-wife in her statement would, without more amount to legal cruelty and the appellant was, therefore, entitled to succeed on this ground alone irrespective of his failure to establish the case set up by him, the ratio of Smt. Jiwan Lata's case has inevitably been commended for acceptance on behalf of the appellant.

5. Before adverting to the judgment on which basic reliance is sought to be placed the aforesaid argument deserves some consideration on principle as well. To my mind the inherent fallacy which seems to have crept in here stems from the settled legal position that a false allegation of adultery against a spouse amounts to cruelty in the eye of law. However, it would be a far cry to infer therefrom that an allegation of adultery, whether proved or not, would by itself be the mathematical equivalent of legal cruelty. It is not, and in my view cannot possibly be the law, that a factually

true allegation of adultery whether made otherwise or in defence in a written statement would amount to cruelty. In this field the truth or otherwise of such an allegation is the crux of the matter. Therefore, before an allegation of adultery can be deemed as legal cruelty it must first be proved as factually false. To highlight, it is a blantly false allegation of adultery which would amount to legal cruelty, and not possibly a true allegation of that nature which cannot give any cause of action to the offending spouse. Once this is so, it would appear to be elementary that any such allegation of adultery must be put to trial and it is only when its falsity or otherwise is determined that any legal consequence can flow therefrom. It would indeed be going too far to hold that a mere allegation by itself and that too made by way of a defence in legal pleadings should become legal cruelty in the eye of law and per se be the ground for divorce. Such a proposition is unwarranted either on the language of the statute or on principle. This apart, holding so might well frustrate a true and open trial of a matrimonial offence of adultery because it might well inhibit a spouse to raise such a defence, even though it may be factually true.

6. One may now examine the correctness of the view in Smt. Jiwan Lata's case, 1979 Cur LJ (Civ) 509 which provides the cornerstone for the argument on behalf of the appellant. Undoubtedly the observations therein would lend support to such a stand. A close perusal of the judgment, however, reveals that on this specific point there is hardly any discussion either on principle or by reference to precedent. It appears that the issue was hardly debated before the learned judge and the observations have been made on first impression. These again seemed to be based on a concession by the counsel for the parties on the larger issue that a false allegation of adultery would amount to cruelty without further analysis about the nature and the modus of proof therefor. The crucial distinction between allegation of adultery made prior to the filing of the case or a'unde or in collateral proceedings and such an allegation made by way of defence in the written statement seems to have been totally lost sight of. As already noticed there is no manner of doubt that an allegation of adultery made

prior to the filing of the petition and put in issue and found to be false would constitute legal cruelty. However, a mere allegation by way of a defence in the written statement irrespective of its falsity or otherwise is not in the same category unless, of course, such an issue is specifically put to trial and the firm finding arrived at whether the allegation was false or substantiated.

7. In arriving at the conclusion which he did, the learned single Judge referred to and has obviously placed reliance on Madan Mohan v. Smt. Sarla Kohli, AIR 1967 Punj & Har 397, and Smt. Dassi Dhani Ram v. Dhani Ram, AIR 1969 Punj & Har 25. An analysis of both of them would show that they pertain to allegation of adultery made earlier than the filing of the petition or in collateral proceedings which were at issue between the parties. These cases are no warrant for the authority that an allegation of this nature made in defence in written statement irrespective of its proof or falsity would by itself be legal cruelty on the basis of which a petitioner can succeed. Learned counsel for the appellant was indeed fair enough to concede that both the aforesaid cases are not directly attracted to the point. It was candidly conceded that there was no other authority to the effect that the mere allegation of adultery without more was itself cruelty even though it has neither been put in issue or tried thereafter.

8. The view taken in Smt. Jiwan Lata's case, 1979 Cur LJ (Civ) 509 if endorsed would tend to lead to curious, if not, startling consequences. One can well visualise a situation where such an allegation of adultery is made by the defending spouse in the written statement and neither the petitioner nor the respondent thereafter led any evidence. On the ratio of Smt. Jiwan Lata's case even though the petitioner would have totally failed to establish the case set up by him he would nevertheless be entitled to succeed on the mere ground that an allegation of adultery by the defending spouse had been made. The petition would thus have to succeed even though the petitioner neither leads evidence nor substantiates his case. Such a startling result did in fact ensue in Smt. Jiwan Lata's case despite the finding that the allegation levelled by the appellant-petitioner had not been proved

yet the petition for divorce was allowed to succeed. Such a result cannot be easily countenanced because it is well settled that a petitioner must succeed or fall on the case set up by him.

9. With the greatest respect it appears to me that on this specific point Smt. Jiwan Lata's case (1979 Cur LJ (Civ) 509) does not lay down the law correctly and is hereby overruled.

10. In fairness to the learned counsel for the respondent Mr. Chandra Singh, we must notice that in the alternative he had gone to the extreme length of contending that anything pleaded by way of defence in a written statement by a respondent cannot be made a ground for attack by the petitioner. To put it in legal terminology it was suggested that the averments in the written statement including allegation of adultery would be privileged in the sense that the petitioner cannot take any advantage thereof. To epitomise in slightly picturesque language the stand was that a shield cannot be turned into a sword.

11. I regret my inability to subscribe to this extreme proposition. Even when pressed learned counsel could cite no authority in support of this stand. On principle, it appears to us that countenancing such an extreme position may well work great public mischief. In substance it would imply that the defending spouse could raise the foulest allegation of adultery or other matrimonial offences against the other without any fear of any retribution.

12. The falsity of the aforesaid stand is also manifest when examined from another angle. The law seems to be settled that an earlier or collateral allegation of adultery, if false, would immediately give a cause of action to the offended spouse. If that be so, a second petition would obviously lie by a spouse against whom false allegation of adultery has been raised in an earlier petition. Indeed this position was not very fairly controverted by the learned counsel for the respondent. If in a second petition the allegation of adultery made in the earlier could be made as a cause of action, one fails to see why such an accusation in the written statement in the same proceeding should be on a different footing. Subscribing to the view canvassed on behalf of the respondent

can only tend to lead to a multiplicity of proceedings which it is always the intent of the law to avoid. I am, therefore, unable to subscribe to any abstract theory of a complete privilege to the allegation of adultery made in a written statement.

13. Once the aforesaid conclusion has been arrived at that a mere allegation of adultery without more does not amount to legal cruelty. It is manifest that in order to succeed on this ground the petitioner must establish the falsity of such an allegation. The burden of proof, however, being a negative burden would in the initial stage be a light one. It would, therefore, become necessary that the petitioner in such a situation would have to amend the petition and plead the false allegation of adultery amounting to cruelty as a specific ground for matrimonial relief. It is only when this has been made a ground of attack that the petitioner can possibly take advantage of such an allegation, if proved false. Unless the truth or falsity of such allegation made in the written statement is put to trial in the manner aforesaid and it is established one way or the other no legal consequences can flow therefrom for the purpose of Sec. 13 (1) (ia) of the Act. It is, therefore, necessary in such a situation that not only the requisite amendment should be made but a specific and clear issue with regard thereto be framed so that the parties should go to trial thereon with their eyes open. We cannot but view with disfavour the framing of rather omnibus issue in matrimonial matters as appears to be the situation in the solitary issue framed in his case.

It is elementary that in order to succeed in a petition the burden of establishing cruelty u/s. 13 (1) (ia) is on the spouse who alleges the same. However, in a case of the present nature where such an allegation has been made in defence in the written statement it would be a negative burden which can easily be discharged by merely averring that the allegation of adultery is false. It would then be for the spouse alleging the adultery to substantiate the same. We must now pointedly notice, that Mr. Ashok Aggarwal the learned counsel for the appellant has forthrightly prayed that on the aforesaid view of the law which we have taken he should now be allowed to amend the petition and expressly make the false allegation of

adultery made in the written statement as a ground for claiming divorce. In view of our overruling Smt. Jiwan Lata's case, (1979 Cur LJ (Civ) 509) learned counsel for the appellant seems to be on impeccable ground in contending that having acted in accordance with the law as it then existed, he is now more than entitled to seek an amendment of the aforesaid nature. We would, therefore, remand the case to the trial Court with the direction that the appellant be allowed to amend his petition, a specific issue thereon be framed, and thereafter to proceed to try the same.

The appeal is allowed in the aforesaid terms.

Appeal allowed.

AIR 1982 PUNJAB AND HARYANA 64
J. V. GUPTA, J.

Des Raj, Petitioner v. Smt. Jagdish Kaur, Respondent.

Civil Revn. No. 2879 of 1979, D/- 21-9-1981*

East Punjab Urban Rent Restriction Act (3 of 1949) Sec. 13 (3) (a) (iv) — Eviction petition — Bona fide requirement — Petition filed after more than 8 years after dismissal of previous ejectment application — Family members of landlord growing in age — No other residential building — Held, landlord would be entitled to seek ejectment of tenant.

Where the landlord had not vacated any residential building in the area in which his demised building was located nor was he in occupation of any other residential building and during the pendency of ejectment application, his eldest son was married and even a son was born of that wedlock, the accommodation in occupation of the landlord could be said to be insufficient for his requirements. Therefore, he would be entitled to seek the ejectment of the tenant for the residence of his son who was married despite the fact that his earlier application filed about 8 years before on the ground of his requirement was dismissed. In such a case it is not necessary that the landlord must

prove the change in his status in social life after the leasing of the demised premises to the tenant to justify his bona fide requirement when the ejectment application was filed after more than 8 years of the previous ejectment application and during that period, the family members of the landlord had grown up in age inasmuch as even the eldest son had been married during that period and therefore the need of the landlord had grown with the advancement of the age of his children.

(Para 5)

R. S. Ahluwalia, for Petitioner; B. S. Shant, for Respondent.

ORDER:— Des Raj, landlord petitioner, has filed this revision petition against the order of the Appellate Authority, Jullundur, dated Sept. 24, 1979, whereby the order of the Rent Controller, Jullundur dated Oct. 28, 1978 directing the ejectment of Shrimati Jagdish Kaur, tenant-respondent, from the demised premises was set aside.

2. Shrimati Jagdish Kaur, was the tenant in the portion of house No. WB-80, comprising of two rooms, kitchen, bath room and the courtyard, on a monthly rent of Rs. 47.50 since the year 1966. Her ejectment was sought inter alia on the ground that the landlord bona fide required the premises for his own use and occupation. The other grounds though taken in the ejectment application are not relevant for the purpose of this revision petition. It was pleaded therein that the premises, in question, were bona fide required by the landlord for his personal use and occupation as the accommodation available with him was quite insufficient to meet his and his family's requirements. He was in occupation of only two rooms and one kitchen in house No. WB-80; was not in occupation of any other residential building in the urban area of Jullundur City and had not vacated such a building without sufficient cause. The family of the landlord consisted of his mother, his wife, three sons and a married daughter. Two sons of the landlord were studying in the eighth and the ninth classes. His elder son was about 23 years old. The eviction application was filed on Apr. 26, 1975. In the written statement filed on behalf of the tenant respondent, it was pleaded that the landlord had got four rooms, a kitchen, a big courtyard and a parchhati in his possession which were sufficient for his

*To revise order of J. S. Chatta Appellate Authority, Jullundur, D/- 24-9-1979.

and his family's accommodation. None of the petitioner's son was married. The petitioner had previously also filed an application for the ejectment of the respondent which was dismissed by the Rent Controller on Jan. 31, 1967. In that application also, the landlord had pleaded that he bona fide required the demised premises for his own use and occupation, and the decision in that application operated as res judicata. On the pleadings of the parties, the Rent Controller framed the following issues:

1. Whether the petitioner requires the demised premises for his own use and occupation, bona fide?

1-A. Whether the present ejectment application is barred by res judicata in view of the objection taken in para 1 of the preliminary objection?

2. Whether the respondent has materially impaired the value and utility of the demised premises?

3. Whether there is change of user effected by the respondent? If so, to what effect?

4. Relief.

The learned Rent Controller passed the order of ejectment against the tenant-respondent as it came to the conclusion that the landlord bona fide required the premises for his own use and occupation and that she had changed the user of the demised premises from residential to non-residential. In appeal, the learned Appellate Authority, reversed the finding of the learned Rent Controller on both the grounds and consequently, dismissed the ejectment application. Feeling aggrieved against the same, the landlord-petitioner has come up in revision to this Court.

3. The learned counsel for the petitioner, contended that the learned Rent Controller, rightly held that the children of the landlord were not small kids and two of them were school going while the third was grown up and the requirement of separate study rooms for the school going children cannot be dubbed to be mala fide or unrealistic. His elder son was 24 years old while the other two sons were 20 and 16 years old respectively and were the students of the tenth and the ninth class, respectively. The betrothal of his eldest son

had also been performed and he was to be married. It has been stated at the bar by the learned counsel for the petitioner, that after the passing of the order by the Rent Controller, the eldest son of the petitioner has been married and out of that wedlock, a child has also been born. According to the learned counsel, the approach of the learned Appellate Authority was wholly illegal and it misdirected itself in coming to the conclusion that the landlord had failed to prove his bona fide requirement. On the other hand, the learned counsel for the respondent submitted that the Appellate Authority, after going through the evidence, has given a firm finding that the requirement of the landlord was not a bona fide one and it being a finding of fact, cannot be interfered with in the exercise of the revisional jurisdiction by this Court. Moreover, there is no evidence that there is any change in the status of the landlord after he let out the premises in the year 1966 to the respondent; rather one of the family members, i.e., his mother, has died and thus, the number of his family members has decreased and, therefore, there was no question of any bona fide requirement, as alleged by the landlord.

4. I have heard the learned counsel for the parties at a great length and have also gone through the record.

5. The learned Rent Controller, rightly came to the conclusion that the accommodation in occupation of the landlord was insufficient for his requirements and he had not vacated any residential building in Jullundur City after the coming into force of the East Punjab Urban Rent Restriction Act, nor he was in occupation of any other residential building. Moreover, at the time of the filing of the application, his eldest son was betrothed and now, as stated at the bar, he was married during the pendency of the eviction proceedings and even a son was born out of that wedlock. Under Sec. 13 (3) (a) (iv) of the aforesaid Act, the landlord is entitled to seek the ejectment of the tenant, for the residence of his son, who is married. In any case, there is nothing on the record to suggest that the requirement of the landlord was not a

bona fide one. The learned Appellate Authority has given undue importance to the factum of the earlier eviction application filed by the landlord against the tenant having been dismissed by the Rent Controller on Jan. 31, 1967. The observations made by the Appellate Authority that the landlord was always on the look out to eject his tenant and his personal necessity had continued right from 1966 onwards, are unwarranted. Admittedly, the eviction application out of which the present revision petition has arisen, was filed in the year 1975, i. e., after more than 8 years of the previous ejectment application. During this period, the family of the landlord has grown up in age inasmuch as even the eldest son has been married during this period. It is not required that the landlord must prove the change in his status in social life to justify his requirement, as observed by the Appellate Authority. The need of the landlord has grown with the advancement of the age of his children and as observed earlier, even the statute itself has provided an independent ground for the ejectment of a tenant in case the landlord requires the demised premises for the residence of his married son. There is absolutely no evidence on the record on behalf of the tenant that the accommodation in possession of the landlord was sufficient to meet his requirement. Under the circumstances, the finding of the Appellate Authority that the landlord has failed to prove his bona fide requirement; particularly when the social status of the landlord has not changed after the leasing of the demised premises to the tenant, is improper and is based on surmises and conjectures. The Rent Controller, after discussing the whole evidence, came to the right conclusion that the growing up of the children would definitely amount to the change of circumstances and the needs of the landlord.

6. For the reasons recorded above, this revision petition succeeds and is allowed. The order of the Appellate Authority is set aside and that of the Rent Controller, directing the ejectment of the tenant-respondent, is restored with costs. However, she is allowed two months' time to vacate the premises, provided all the arrears, if any, and the advance rent for two months, are deposited with the Rent Controller with-

in a fortnight from the date of this order.

Petition allowed.

AIR 1982 PUNJAB AND HARYANA 66

G. C. MITAL, J.

Umrao, Appellant v. Har Datt and others, Respondents.

Second Appeal No. 1357 of 1969, D/- 16-9-1981.

Limitation Act (36 of 1963), Arts. 65, 110, 113 — Applicability of — Suit by co-sharers against tenants of joint family property restraining them from paying rent to other co-sharers — Limitation is governed by Art. 110 or 65 and not by residuary Art. 113. — (Specific Relief Act (1963), S. 34). AIR 1935 Pesh 95, Dissented from.

Property in dispute was inherited by the descendant-co-sharers from their common ancestors. The plaintiffs co-sharers whose rights in the property were denied on 21-10-1956 filed a suit on 29-4-1966 against the tenants of joint family property for injunction restraining them from paying the rent to other co-sharers and also for, their respective shares in the rent.

Held, that Art. 110 or Art. 65 applied to the suit and not Art. 113. Hence the suit was not time barred as it was within period of 12 years. AIR 1935 Pesh 95 Dissented from. (Paras 4, 5)

The property in dispute either can be treated as Joint Hindu Family property, then Art. 110 would apply and the suit filed within the period of 12 years would not be time-barred. Even if it is assumed that it is not the property belonging to Joint Hindu Family then it would belong to the plaintiffs as co-sharers and a suit filed within 12 years from the date of denial of their share is within limitation. If suit is not filed within 12 years the other co-sharers could perfect their title to the joint property by adverse possession. AIR 1981 SC 77, Foll. (Para 5)

The suit in the instant case could safely be treated as a suit for declaration of title as co-sharer and for the recovery of share of rent on the basis of the title as a co-sharer instead of claiming a decree for joint possession. Admittedly the disputed property was in

possession of the tenants. If the disputed land had been in possession of the defendant co-sharers and the suit for joint possession had not been filed then it may have been said that a suit for mere declaration is not competent as another relief was also available which was necessary to be claimed. Hence the relief to claim share in the rent was the correct relief besides claiming a decree for declaration of title. Thus the form of the suit was correct and the limitation for bringing the suit was 12 years and not 6 years. AIR 1933 Lah 712 Disting. (Para 7)

Cases Referred : Chronological Paras

AIR 1981 SC 77 : 1980 All LJ 902 : 1930	
RD 300	8
AIR 1935 Pesh 95 : 157 Ind Cas 345	6
AIR 1933 Lah 712 : 34 P.J. LR 5	7

R. L. Bhatta for Appellant; S. P. Gupta (for No. 1) and S. K. Aggarwal Court guardian of LRs of Din Dayal for Respondents.

JUDGMENT :— Bal Mukand is alleged to have purchased two shops and a ahata vide sale deed dated 29th Feb. 1884 (Ex. PW 3/3). He died in the year 1922 and the property owned by him is alleged to have been inherited by three of his sons, widow of a pre-deceased son and son of another pre-deceased son. On 29th April, 66, Suit No. 195 was filed by two grandsons from two branches for an injunction restraining the tenants of the ahata once owned by Bal Mukand from paying the whole of the rent of the descendants of the remaining two branches as one branch had become extinct and claimed that half of the rent was payable to the plaintiffs and the other half to the other two branches who were also impleaded as defendants. A decree for Rs. 580/- representing the past three years' share of rent was also claimed. The defendants contested the suit and it was pleaded that Thakar Dass alone was the exclusive owner of the ahata and prayed that the suit be dismissed. Both the courts below found that the ahata was joint of the four branches in which the plaintiffs had half share and the other half belonged to defendants Nos. 3 to 6 jointly and defendant No. 7 in equal shares. However, both the courts below held the suit to be time-barred as the same was not filed within six years of the denial of plaintiffs' title vide written statement of Thakar Dass dated 21st Oct. 1956 (Ex.

R. 1) filed in the previous litigation in which the plaintiffs' right was denied to their knowledge. The residuary Art. 120 of the old Limitation Act Art. 113 of the Limitation Act, 1963 (hereinafter referred to as the Act) was applied to the facts of the present case. The plaintiffs have come up in R.S.A. No. 1357 of 1969.

2. The plaintiffs filed another civil suit No. 196 with regard to the two shops against tenants and impleaded the other co-sharers as defendants and claimed similar decree of injunction besides claiming a decree for Rs. 500/- towards the arrears of rent regarding their share for the past three years. That suit was also contested by the defendants. Both the courts below found that the shops also belonged to Bal Mukand and the defendants of the four branches were co-sharers. The suit was found to be within limitation and the claim of arrears in respect of Rs. 500/- was also found to have been proved with the result that the suit was decreed as prayed for. Some of the defendants have filed R. S. A. No. 1305 of 1969 in this Court. Counsel for the parties are agreed that common questions are involved in both the appeals and hence the two are being disposed of together. R. S. A. No. 1357 of 1969.

3. The learned counsel appearing for the plaintiff appellant has urged that the court below was in error in applying residuary Art. 113 whereas in fact Art. 110 or Art. 65 of the Act would apply to the present case. On the other hand, learned counsel for the defendants has urged that the court below was right in applying Art. 113 of the Act.

4. After hearing the counsel for the parties I am of the view that the present case would be governed either by Art. 110 or Art. 65 of the Limitation Act and not Art. 113 as held by the courts below. The learned counsel for the respondents were unable to show that the findings of the courts below were erroneous when they found that the ahata in dispute was joint of the parties which was once purchased by Bal Mukand, their common ancestor. Accordingly, I shall proceed on the basis that it came to the parties (barring the tenants) as descendants of Bal Mukand. In this situation, either the property can be treated as joint Hindu

family property. then Art. 110 of the Act would apply and the limitation would be 12 years from the date their right in the property was denied and the defendants have only shown that the right of the plaintiffs was denied to their knowledge only on 21st Oct. 1956 vide Ex. R1. The suit filed on 29th April, 1966 is well within 12 years and hence the suit could not be held to be time-barred.

5. Even if it is assumed that it is not proved that the property belonged to joint Hindu family, in that situation it will belong to them as co-sharers and the right of a co-sharer can be acquired by adverse possession if no action is taken by that co-sharer within 12 years of denial of his share to his knowledge. On this basis also the other co-sharers or Thakar Dass could perfect his title if the present suit had not been filed within 12 years of denial of title on 21st Oct. 1956 but the suit has been filed within 12 years as prescribed by Art. 65 of the Act. Hence on this basis also the suit is clearly within limitation.

6. The court below was of the opinion that the residuary Art. 113 of the Act was applicable to the present case and in holding this view, decision in *Moti Ram v. Devi Das*, AIR 1935 Pesh 95 was followed. The learned Additional Judicial Commissioner who decided that case was of the opinion that the suit brought in that case was for declaration with a consequential relief for an injunction and therefore, Art. 120 of the old Limitation Act was applied which is equal to 113 of the Act and the suit filed by a coparcener was held to be time-barred. I am not in agreement with the reasoning adopted in this decision in view of two specific Articles 110 or 65 as one of the two would be applicable to the facts of the present case in any event. When we have specific article which can be applied to the facts of case we cannot fall back upon the residuary article. Hence I dissent from the decision.

7. Moreover, on the facts of the present case I find that it can safely be treated as a suit for declaration of a title as co-sharer and for the recovery of share of rent on the basis of the title as a co-sharer instead of claiming a decree for joint possession as admittedly the ahata in dispute was in possession of the tenants. If the ahata in dispute had

been in possession of the defendants-co-sharers and the suit for joint possession had not been filed then it may have been said that a suit for mere declaration is not competent as another relief was also available which was necessary to be claimed. But on the facts of the present case I find that relief to claim share in the rent was the correct relief besides claiming a decree for declaration of title. Hence on the facts of the present case I am of the view that the form of the suit was correct and the limitation for bringing the suit was 12 years and not 6 years as held by the Court below. The Peshawar Court had relied on *Atma Ram v. Godhu Ram*, AIR 1933 Lah 712. That is not a case on the point of limitation but was only on the form of the suit. Hence that decision does not help the contesting defendants-respondents on the point of limitation.

8. The aforesaid view of mine finds full support from a recent decision of the Supreme Court in *Karbalai Begum v. Mohd. Sayeed*, AIR 1981 SC 77. The following observations therefrom deserve to be quoted (at p. 79)

"It is well settled that mere non-participation in the rent and profits of the land of a co-sharer does not amount to an ouster so as to give title by adverse possession to the other co-sharer in possession. Indeed even if this fact is admitted, then the legal position would be that the co-sharers in possession would become constructive trustees on half of the co-sharer who is not in possession and the right of such co-sharer would be deemed to be protected by the trustees."

9. For the reasons recorded above, the finding of the court below on the point of limitation is upset and it is held that the suit was clearly within limitation.

10. As regards the claim for Rs. 580 as plaintiff's share in the past three years' rent, the plaintiffs have clearly proved that they are entitled to this amount and the respondents have not been able to show if this amount does not represent the share of the plaintiffs. Hence the plaintiffs are held entitled to decree for Rs. 580/-.

11. For the reasons recorded above R. S. A. No. 1357 of 1969 is allowed and after setting aside the decree passed by the Courts below, the plaintiff's suit is

decreed as prayed for with costs throughout. The costs will be payable by defendants co-sharers and not the tenants.

R. S. A. No. 1305 of 1963

12. As regards this appeal, the counsel for the defendant-appellants has not been able to urge any point worth noticing because I find from a reading of para 6 of the judgment of the Lower Appellate Courts under attack that the only point raised was that the rate of rent was Rs. 240/- and not as pleaded by the plaintiffs. The finding of the trial court that the shops jointly belonged to the co-sharers was neither disputed before the lower appellate court nor has been disputed before me. Therefore, the only point that remains is as to what is the rate of rent. The learned counsel for the appellants has not been able to show how the finding arrived at by the courts below is erroneous in law. Hence there is no merit in this appeal and the same is dismissed with no order as to costs.

Order accordingly.

AIR 1982 PUNJAB AND HARYANA 69

S. S. SANDHAWALIA, C. J. AND

S. C. MITAL, J.

Jaswant Singh Multani, Petitioner v. Sub-Divisional Officer (Civil) and others, Respondents.

C. W. P. No. 4143 of 1980, D/- 16-9-1981.

Punjab Municipal Act (3 of 1911), S. 244 — Validity of — Guidelines for use of powers under the section by the State not provided — Art. 14 of Constitution of India held violated and hence the section is invalid. (Constitution of India, Art. 14 — Vesting of discretionary powers in State Government).

In the exercise of powers conferred by S. 241, a Notification was issued declaring certain area to be Notified Area. A Notified Area Committee was appointed for three years. Before the expiry of this period, another Notification was issued, in exercise of the powers conferred by S. 244, by which the previous Notification was cancelled. The question in issue was whether S. 244 was invalid as being violative of Art. 14 of the Constitution of India. While striking down the provisions of Sec. 244

as unconstitutional, it was held as follows.

Section 10 of the Punjab Municipal Act provides for the dissolution of Municipal Committees while S. 244 provides for the dissolution of Notified Area Committee. Though in the strict legal parlance it cannot be said that the two sections are literally in pari materia with each other their parity becomes obvious when they are juxtaposed against each other. A plain reading of the two provisions make their similarity, if not identity, quite obvious. S. 10 had been struck down as ultra vires Art. 14 of the Constitution by a Division Bench in AIR 1979 Punj and Har 46. No appeal to the Supreme Court was filed by the State nor were any statutory changes in the Act made by the State. This showed that the State willingly accepted the view taken in the decision. Once it is unconstitutional, it seems to follow logically that Section 244 would inevitably follow suit. It is obvious that not the least hint or guideline is spelled out in the statute for cancelling the earlier notification constituting the Notified Area Committee and thus dissolving the Local Body created under S. 241. The same vice which attaches to S. 10 would be equally attracted with even greater force to S. 244. AIR 1979 Punj & Har 46 Foll. (Paras 8, 9, 10 and 12)

It is not the law that merely because a power is vested in the Central Government or the State Government, it cannot be unconstitutional for reasons of being unguided and uncanalised. AIR 1978 SC 597 Expl. (Para 12)

A plain reading of the provisions of S. 241 should make it clear that the criteria spelled out by it for the creation of a Notified Area Committee can have little and indeed no relevance to the pre-conditions which might be necessary for its de-notification and dissolution. Indeed, at least for the limited purpose of the Act, the guidelines for the constitution and creation of a Notified Area Committee would be totally alien to the considerations which might later require its de-notification. (Paras 14 and 15)

There is no manner of doubt that a de-notification of a corporate urban area is fraught with grave and material legal and civil consequences not merely to the individual members of the Committee, but to the corporate existence of all the citizens composed thereof.

Nevertheless, S. 244 is wholly silent, both as to policy and as to guidelines for the exercise of a totally arbitrary power vested in the Government to de-notify an existing Committee. It seems to be now well settled that where such an unlimited and uncanalised power is vested without even remotely indicating a legislative policy or the rational criteria, the same would be hit by Art. 14 of the Constitution, even though the repository of the power is the State or the Central Government itself. AIR 1952 SC 123 and ILR (1974) 1 Punj 708 and AIR 1958 SC 538 Foll. (Para 16)

It cannot be maintained that the power of constituting a Notified Area Committee having been vested in the Government, it had an inherent power to undo the same irrespective of S. 244 or in the alternative the said section was merely declaratory of that power. Admittedly the source of the power is the Punjab Municipal Act. If the constitution and the creation of a Notified Area Committee has to look for its legal sanction under S. 241 thereof then the power to de-notify and dissolve the same must also necessarily flow from the same statute under Section 244. If the later provision does not satisfy the test on the anvil of Art. 14, it has to be necessarily struck down. (Para 18)

Cases Referred : Chronological Paras

AIR 1979 Punj & Har 46 : 80 Punj LR 686	8, 11, 12, 13
AIR 1978 SC 597 : (1978) 2 SCJ 312	11
(1975) CWP No. 2328 of 1966, D/- 23-4-1975 (Punj)	8
ILR (1974) 1 Punj 708	16
AIR 1968 SC 1344 : (1968) 2 SCJ 739	17
AIR 1958 SC 538 : 1958 SCA 754	16
AIR 1954 SC 224 : 1954 SCR 803 : 1954 All LJ 203	16
AIR 1954 SC 425 : (1955) 1 SCR 224 : 1954 Cri LJ 1036	16
AIR 1952 SC 75 : 1952 Cri LJ 510 : 1952 SCJ 55	16
AIR 1952 SC 123 : (1952) 3 SCR 435 : 1952 Cri LJ 805	16

R. S. Shant, for Petitioner; Mohinderjit Singh Sethi, Addl. Advocate General (Punjab), for the State.

S. S. SANDHAWALIA, C. J. :— Do the provisions of S. 244 of the Punjab Municipal Act, 1911 suffer from the taint of unconstitutionality, is the spinal issue which has necessitated the admission and hearing of this set of cases by the Division Bench.

2. For a question so pristinely legal, the facts pale into relative insignificance. However, a skeletal re'sume thereof giving rise to the issue seems to be inevitable and a reference to those in C. W. P. No. 4143 of 1980 (Jaswant Singh Multani v. Sub Divisional Officer (Civil) Exercising the powers of the Deputy Commissioner, Kapurthala and another), would suffice. By a notification published in the Punjab Government Gazette dated October 27, 1978, in exercise of the powers under S. 241 of the Punjab Municipal Act, 1911 (hereinafter called 'the Act'), the Governor of Punjab declared the local area comprising Bholath in the Kapurthala District, to be a notified area for the purpose of the said Act. Later, vide notification annexure P/2, dated February 8, 1980, the Government of Punjab appointed a Committee of 15 persons for the Notified Area Committee of Bholath and fixed their term for a period of three years from the date of its publication. By a similar notification, dated Feb. 9, 1980, Jaswant Singh Multani — petitioner was appointed as the President of the said Notified Area Committee and his term of office was also fixed for the same period of three years.

3. However, hardly eight months later on October 17, 1980, the respondent-State issued the notification annexure 1/4 abolishing the Notified Area Committee which is the primary subject matter of challenge and may, therefore, be quoted in extenso :—

"No. 41 (1) 80-USLG (3)/322 (Spl) — In exercise of powers conferred by Section 244 of the Punjab Municipal Act, 1911, and all other powers enabling him in this behalf, the Governor of Punjab is pleased to cancel with immediate effect Notification No. 10 (1) -78 USLG (3)/235 (Spl) dated 19th October, 1978, issued under Section 241 of the said Act declaring notified area and as published in the Punjab Government Gazette dated the 27th October, 1978."

In the writ petition, apart from the legal grounds, the issuance of the notification was sought to be challenged on the grounds of mala fides and extraneous consideration therefor. However, during the course of arguments, the allegations of mala fides and extraneous grounds were expressly given up and therefore, do not merit any reference. To complete the re'sume of

facts, it may be mentioned that during the pendency of the writ petition, the respondent-State issued another notification on November 21, 1980, annexure P/5, whereby the area earlier covered by the Notified Area Committee was constituted into a Sabha area and a Gram Panchayat was sought to be created therefor. In the amended petition, this notification was further made the target of attack.

4. Ere I advert to the basic issue of the challenge to the constitutionality of S. 244 of the Act, a bird's eye view of the broad scheme of the Local Self-Government within the State is called for. At the very grass-roots is the village as a unit and under S. 4 of the Punjab Gram Panchayat Act any village or group of villages may be declared a 'Sabha area' and a Gram Panchayat may be constituted therefor under S. 5 of the said Act. Next in the hierarchy thereto are the semi-urbanized areas for which the Government does not deem it expedient to constitute a Municipality. These are served by the creation of Notified Area Committee under S. 241 of the Act which fall for primary consideration here. Higher in rank comes the creation of Municipal Committees under Ss. 4 and 5 of the Punjab Municipal Act for areas which are truly urban in nature. At the very apex, in this context, are then the Municipal Corporations created by the statute for the larger cities of Amritsar, Jullundur and Ludhiana.

5. The learned counsel for the petitioner frontally assailed the provisions of S. 244 of the Act on the anvil of Art. 14 of the Constitution, by contending that it conferred totally unfettered, unguided and uncanalised powers in the State Government to abolish a Notified Area Committee at its whim. It was submitted that not the least guideline for exercising a power of such large and meaningful import had been given either expressly or by implication in the provision of S. 244 of the Act suffer from an excessive delegation of the legislative function to the State Government in (Contd. on Col. 2)

"10 (1). The State Government may, by notification withdraw from the operation of this Act the area of any municipality constituted thereunder.

absolute terms and was, therefore, not valid.

6. Before adverting to the merits of the aforesaid contentions, it deserves highlighting at the outset that within this Court, the question before us is covered by precedent, if not on all fours, at least by a virtually conclusive analogy. It is, therefore, necessary to point out the applicability of the binding precedent and if necessary to examine its correctness.

7. Now to appreciate the applicability of the earlier case law, it may be reiterated that the Punjab Municipal Act, 1911 itself visualised two distinct kinds of Local Self Government for the urban areas. The first is the creation of the Municipal Committees and the other at a slightly lower plane—where it is not deemed expedient to constitute them — is the creation of the Notified Area Committees. The pre-requisites and the procedural requirements for the constitution and creation of Municipal Committee and the addition or exclusion of area therefrom is spelled out in detail in Ss. 4, 5, 6, 7, 8 and 9 of the Act. Similarly, Ss. 241 to 243 of the Act laid down the basic criteria for the creation of the Notified Area Committees and matters relevant thereto.

8. As regards the dissolution or obliteration of an existing Municipal Committee or Notified Area Committee, the statute expressly confers this power on the State Government by S. 10 in the first case and Ss. 244 and 245 in the second. Mr. Sethi, the learned Additional Advocate General, Punjab, on behalf of the respondent-State made a vain attempt to draw a finical distinction between the objects and purposes of Section 10 on the one hand and S. 244 on the other, yet it suffices to say that these are distinctions without any material difference. Though in strict legal parlance it cannot be said that the provisions are literally in pari materia with each other, yet the parity of the provisions becomes obvious when they are juxtaposed against each other :—

"244. The State Government may at any time cancel or modify any notification under Section 241 or any order under Section 242."

10 (2). When a notification is issued under this section in respect of any municipality, this Act and all notifications, rules, bye-laws, orders, directions and powers issued, made or conferred under this Act, shall cease to apply to the said area; the balance of the municipal fund and all other property at the time of issue of the notification vested in committee shall vest in the State Government and the liabilities of the committee shall be transferred to the State Government."

Now a plain reading of the aforesaid provisions makes their similarity if not the identity so manifest that it would be labouring the obvious to elaborate the issue. It is in the aforesaid context that one may now advert to C. W. P. No. 2323 of 1966 (*Dewan Chand v. State*), decided on April 23, 1975. Therein the constitutionality of S. 10 of the Act was forcefully assailed and accepting the argument, the provision was struck down with the following observations.

"A reading of the section would show that no guideline is provided as to in which cases the area from the municipal committee is to be withdrawn under S. 10 of the Act and in which cases it is not to be withdrawn. Hence the powers under this section are highly arbitrary which may lead to disastrous results and cut the very root of the democratic fabric. Moreover, it may lead to discrimination among various municipal committees in the absence of any guideline. In the present case, the impugned notification is in respect to a small town but such a notification can be issued even in the cases of big towns like Ludhiana, Jullundur, Amritsar and Patiala. Moreover, it is not shown as to on what basis or material the State Government came to the conclusion to issue the impugned notification withdrawing the area of Narot Jaimal Singh from the operation of the Act. Since there are no guidelines and the blanket power is given to the Executive under S. 10 of the Act, I hold that S. 10 of the Act is ultra vires Arts. 14 and 19 of the Constitution".

The State of Punjab appealed, but the Letters Patent Bench in State of Punjab v. *Dewan Chand* AIR 1979 P & H 46, affirmed the said view even more categorically as follows (at p. 47) :

245. Save as provided in sub-section 7 (a) of Section 4 of this Act, when by reason of any order of cancellation under the last foregoing section any notified area ceases to be notified, the unexpended proceeds of any taxes levied therein under Section 242 shall be applied as the State Government may think fit."

"Further if the State Government intends to alter the limits of any municipality, then again a detailed procedure is prescribed under S. 5 of the Act. In Section 7, procedure is given with regard to cases covered by Section 6 which relates to the exclusion of local area from any municipality. It would thus be clear from the perusal of these sections, that a mandatory formality of inviting objections from the inhabitants of the local area, is required to be complied with and that before taking any action, the Government is duty bound to consider these objections. Surprisingly, under S. 10 which gives powers to withdraw municipal area altogether from the operation of the Act, a blanket power is given to the State Government and the right of an inhabitant of that area to raise an objection has been denied. As observed by the learned single Judge, it has been left completely to the whim of the State Government to withdraw any municipal area from the operation of the Act. the same is ultra vires of Articles 14 and 19 of the Constitution."

9. It would appear that the respondent-State has neither challenged the aforesaid judgment by way of appeal before their Lordships of the Supreme Court nor made any statutory changes or amendments in the Act as a consequence of the striking down of S. 10. In a way it can be said that the respondent-State has willingly accepted the view of this Court in this context.

10. Once it is held that S. 10 conferring virtually identical powers on the respondent-State of dissolving or obliterating the Municipal Committee is unconstitutional, it seems to follow logically that S. 244 of the Act would inevitably follow suit. It is obvious that not the least hint or guideline is spelled

out in the statute for cancelling the earlier notification constituting the Notified Area Committee and thus dissolving the Local Body created under S. 241 of the Act. The same vice which attaches to S. 10 would be equally attracted with even greater force to S. 244 of the Act.

11. Faced with the above, Mr. Sethi, the learned Additional Advocate General for the respondent-State was unable to advance any meaningful argument to distinguish Dewan Chand's case (supra), and equally the applicability of its ratio to the similar provisions of S. 244 of the Act. Unable to wriggle out of the aforesaid precedent, learned counsel for the respondents then made a flanking attack in attempting to assail the correctness of the view expressed by the learned single Judge and later affirmed by the Letters Patent Bench in Dewan Chand's case (supra). The primary argument raised in this context was sought to be rested on the observations of their Lordships in paragraph 25 of the report in *Smt. Maneka Gandhi v. Union of India*, AIR 1978 SC 597. On those premises, it was sought to be contended that the power under S. 244 of the Act having vested in the high authority of the State Government, the abuse of the power should not be lightly assumed.

12. I am unable to accede to the contention of the learned Additional Advocate General that Dewan Chand's case (AIR 1979 Punj & Har 46) (supra) is bad law on this score alone. The vesting of the power in high authority is only one of the many criteria for judging the constitutionality of a statute. It is not the law that merely because a power is vested in the Central Government or the State Government then it cannot be unconstitutional for reasons of being unguided and uncanalised. Indeed, a close reading of the judgment and the paragraph relied upon, would show that far from aiding the learned counsel for the respondent-State it seems to provide yet another arrow to the bow of the petitioner. Therein, it had been said in no uncertain terms as follows:— (at p. 631 of AIR 1978 SC 597).

".....Now, the law is well settled that when a statute vests unguided and unrestricted power in an authority to affect the rights of a person without laying down any policy or principle which is to guide the authority in exercise of this power, it would be affected by the

vice of discrimination since it would leave it open to the Authority to discriminate between persons and things similarly situated....."

In a way, therefore, the above observation further strengthens the view that a provision devoid of guidelines or policy and vesting an uncanalised and unguided power is conducive to the exercise of arbitrary and capricious fiats, and therefore, violates the equality clause of the Constitution. I must, therefore, conclude on precedent that the ratio of Dewan Chand's case (supra), covers the issue before us. Following the same, it must be held that Sec. 244 of the Punjab Municipal Act, 1911 is violative of Art. 14 of the Constitution and therefore, unconstitutional.

13. Nevertheless, I would not wish to rest this judgment entirely on the precedent in Dewan Chand's case (AIR 1979 Punj & Har 46) (supra), because it appears to me that even dehors the same, on principle and the existing statutory provisions, the same conclusion appears to be inevitable.

14. The core of the stand on behalf of the respondent State rested on S. 241 in contending that the criteria and preconditions for the creation of a Notified Area Committee therein may be read into Sec. 244 as implicit and these would provide the necessary guidelines for its de-notification. Though in the first flush of the argument, it appeared to have some tinge of plausibility, a closer analysis indicates that it is inherently fallacious. To appreciate it more fully, the provisions of Sec. 241 of the Act may first be read:—

"(1) The State Government may, by notification declare that with respect to some or all of the matters upon which a municipal fund may be expended under Sec. 52, improved arrangements are required within a specified area, which, nevertheless, it is not expedient to constitute as a municipality.

(2) An area in regard to which a notification has been issued under sub-section (1) is hereinafter called a notified area.

"(3) No area shall be made a notified area unless it contains a town or a bazar and is not a purely agricultural village.

(4) The decision of the State Government that a local area is not an agricultural village within the meaning of

sub-sec. (3) shall be final, and a publication in the Official Gazette of a notification declaring an area to be notified area shall be conclusive proof of such decision."

A plain reading of the aforesaid provisions should make it clear that the criteria spelled out by it for the creation of a Notified Area Committee, can have little and indeed no relevance to the pre-conditions which might be necessary for its de-notification and dissolution. For instance, one of the pre-requisites for the creation of a Notified Area Committee laid down in sub-sec. (3) is the existence of a town or a bazar therein. Some modicum of urbanization or semi-urbanization is thus a pre-requisite for the creation of a Notified Area Committee. Now it is manifest that this cannot have the remotest relevance when subsequently the question of the de-notification or the dissolution of an existing Notified Area Committee arises. Clearly the statute was not visualising an earthquake which would raze the town or bazar to shambles and consequently obliterate one of the pre-requisites for its creation. An urban area in the shape of a town or bazar having already come into existence, it is too remote a possibility that the same would vanish into thin air and in this manner provide a guideline or policy for de-notifying the Committee under Sec. 244 of the Act.

15. Again the other criterion negatively put for the creation of a Notified Area Committee is that the area comprised therefor is not a purely agricultural village. Now once this is satisfied and the area loses its pristine rural or agricultural nature so as to warrant the creation of a Notified Area Committee, it seems rather inconceivable, if not, impossible, that the same would revert again to a purely agricultural village so as to necessitate a de-notification. Indeed, it appears to me that the learned counsel for the petitioner is on a sound footing that at least for the limited purpose of the statute before us, the guidelines for the constitution and creation of a Notified Area Committee would be totally alien to the considerations which might later require its de-notification.

16. Once it is held as above, it appears to be plain and beyond cavil that in the language of Sec. 244 there is not

the least hint of any legislative policy or any inkling of a guideline for the de-notification of a Committee. Indeed, the language excels in its absoluteness and confers power on the State Government to cancel at any time any notification under Sec. 241 of the Act without more. There is no manner of doubt that a de-notification of a corporate urban area is fraught with grave and material legal and civil consequences not merely to the individual members of the Committee, but to the corporate existence of all the citizens composed thereof. Nevertheless, Section 244 is wholly silent, both as to policy and as to guidelines for the exercise of a totally arbitrary power vested in the Government to de-notify an existing Committee. It seems to be now well settled that where such an unlimited and uncanalised power is vested without even remotely indicating a legislative policy or the rational criteria, the same would be hit by Art. 14 of the Constitution, even though the repository of the power is the State or the Central Government itself. Way back, the final Court in *Kathi Raning Rawat v. State of Saurashtra*, (1952) 3 SCR 435 : (AIR 1952 SC 123), after an exhaustive discussion on principle and precedent held as follows:— (at p. 132).

".....On the other hand, if the statute itself does not disclose a definite policy or objective and it confers authority on another to make selection at its pleasure, the statute would be held on the face of it to be discriminatory irrespective of the way in which it is applied."

The aforesaid observations, to my mind, fit the present case like a glove. This view was again reiterated with the following observations in *Ram Krishna Dalmia v. S. R. Tendolkar*, AIR 1958 SC 538:— (at p. 548).

"..... After such scrutiny the Court will strike down the statute if it does not lay down any principle or policy for guiding the exercise of discretion by the Government in the matter of selection or classification, on the ground that the statute provides for the delegation of arbitrary and uncontrolled power to the Government so as to enable it to discriminate between persons or things similarly situate and that, therefore, the discrimination is inherent in the statute itself. In such a case the Court will strike down both the law as well

as the executive action taken under such law, as it did in State of West Bengal v. Anwar Ali Sarkar (AIR 1952 SC 75) (supra), Dwarka Prasad v. State of Uttar Pradesh, 1954 SCR 803 (AIR 1954 SC 224) and Dhirendra Kumar Mandal v. Superintendent and Remembrancer of Legal Affairs, (1955) 1 SCR 224: (AIR 1954 SC 424)".

Reference must also be made to a Division Bench of this Court in Surjit Singh Sud v. The State of Punjab, etc., 1974 (1) SLR 709 (or ILR (1974) 1 Punj 708), where even in a relatively narrow field of the removal from office of the Chairman of a Trust under Sec. 5 of the Punjab Town Improvement Act, it was observed in paragraph 15, thereof, as under:—

"On applying the aforesaid principles to the present case, it will be clear that the State Government has been given unbridled, uncanalised, and arbitrary powers to remove a Chairman of a Trust under Sec. 5 of the Act. No guideline has been provided according to which the said principles can be applied. It is at the whim of the State Government either to retain the Chairman or to remove him. It does not matter that the power vests in the State Government as a Chairman can be discriminated even if such a power is given to the highest executive authority."

It would be unnecessary to multiply authorities on the point and it suffices to say that the sound enunciation of the law aforesaid, has not been deviated from.

17. After the close of the argument, the learned Additional Advocate General for the respondent-State had attempted to place some fragmentary reliance on certain observations in Ayodhya Prasad Vajpai v. State of U. P. AIR 1968 SC 1344. In the said case, Sec. 3 of the Uttar Pradesh Kshettra Samitis and Zilla Parishads Adhiniyam, 1961, was the subject-matter of challenge. The said provision was in the following terms:

"The State Government shall by notification in the Gazette divide the rural area of each district into Khands specifying each Khand by a name and the limits or constituents of its area and may likewise change the names or make modifications in the areas and limits of the Khands by including therein or

excluding therefrom areas or create new Khands."

Their Lordships upheld the constitutionality of the abovesaid provision by holding that the preamble and the other provisions of the Act gave adequate indication of the purposes of making a Khand and the mere power to re-determine the boundaries of the Khand etc. was, in no way, unfettered or uncanalised.

It is obvious that the aforesaid judgment is distinguishable. The language of Sec. 3 of the Uttar Pradesh Kshettra Samitis and Zilla Parishads Adhiniyam is entirely different from what falls for construction here. It is apparent that under the aforesaid U. P. Act, merely a power of redistribution of areas constituting a Khand had been vested in the State Government under Sec. 3 thereof. The geographical areas would always continue to be a part of one Samiti or another and their inclusion in a body having corporate existence is not altogether abolition. As is rightly contended on behalf of the petitioner, the provisions in the U. P. Act were merely for a geographical change of areas and modification in the limits thereof, I am clearly of the view that the observations in Ayodhya Prasad Vajpai's case (supra) are not relevant to the issue herein.

18. Perhaps as a last argument of desperation, it was sought to be argued on behalf of the respondent-State that the power of constituting a Notified Area Committee having been vested in the Government, it had an inherent power to undo the same irrespective of Sec. 244 of the Act or in the alternative the said section was merely declaratory of that power. I am unable to subscribe to any such blanket proposition of what the learned Additional Advocate General styled as a sovereign or inherent power in the State Government to dissolve or obliterate statutory corporations or other authorities expressly created by or under a statute. It perhaps suffices to mention that herein admittedly the source of the power is the Punjab Municipal Act. If the constitution and the creation of a Notified Area Committee has to look for its legal sanction under Sec. 241 thereof then the power to de-notify and dissolve the same must also necessarily flow from the same statute under Sec. 244 of the Act. If the later provision does not satisfy the test

on the anvil of Art. 14, it has to be necessarily struck down.

19. In the wake of the aforesaid discussion I would hold both on principle and precedent that the provisions of Section 244 of the Punjab Municipal Act, 1911 plainly suffer from the taint of unconstitutionality and are hereby struck down.

20. It is the admitted and the common stand that the legal source for the impugned notification was Sec. 244 of the Act alone and the same having been itself cut down, the action thereunder must necessarily stand vitiated. The impugned notifications in all these cases are hereby quashed and inevitably the writ petitions are allowed. In view of the somewhat intricate questions, arising herein we leave the parties to bear their own costs.

S. C. MITAL J.:— I agree.

Petition allowed.

AIR 1982 PUNJAB AND HARYANA 76 FULL BENCH

S. S. SANDHAWALIA, C. J.,

S. P. GOYAL AND I. S. TIWANA, JJ.

Chander Bhan, Petitioner v. Financial Commissioner, Haryana, Chandigarh and others, Respondents.

Civil Writ Petn. No. 32 of 1980, D/- 3-11-1981.*

Punjab Security of Land Tenures Act (10 of 1953), Ss. 18, 10-A, 6 and 16 — Punjab Security of Land Tenures Rules, R. 20-C — Sale of agricultural land by big landowner to small landowner — Tenant evicted — Subsequently such land declared surplus and evicted tenant statutorily resettled on land — He is tenant of vendee small landowner and cannot exercise right of purchase of land under S. 18. 1980 Punj LJ 398 Overruled.

Where a big landowner sells certain agricultural lands to a small landowner and these lands are declared surplus in his hands subsequently, the tenant who was evicted consequent on the sale of the lands and statutorily resettled on such lands declared surplus, cannot be deemed to become the tenant of such big

landowner. Such a statutory re-settled tenant would become the tenant of the small landowner vendee who had earlier purchased the same from a big landowner. Consequently being the tenant of a small landowner he would not satisfy the basic pre-requisite of Section 18 and would be disentitled to purchase the land. AIR 1974 Punj 243 (FB) applied. 1980 Punj LJ 398 Overruled. (Para 20)

The object of the Act patently was to impose a ceiling on inordinately large holdings, to provide security of tenure to the tenants including the right to be resettled if ejected and thirdly to confer a right of purchase in strictitude only with regard to the surplus area of a big landowner. It would thus appear that the provisions of the Act as originally enforced in 1953 and its subsequent amendments took the middle road between the extremes of absolute laissez-faire to own agricultural land without any limits, against the other extreme of divesting the lawful owner of the land and substituting the tillers thereof in their place. It was, therefore, that the right of statutory purchase under S. 18 was limited and hedged with two significant pre-conditions. This right was allowed only as against a big landowner. The small landowners below the ceiling limits were absolutely protected against it, however long may have been the period of tenancy of their tenants. Even the big landowners were absolutely protected against this right of statutory purchase as regards the area reserved by them. Thus the right of statutory purchase by a tenant was confined strictly to the area which was above the ceiling limits and had been declared surplus in a big landowner's hands. (Para 5)

Section 16 in terms says that any mala fide transfer shall not adversely affect the rights of the tenant thereon. The crucial word here is "thereon". It necessarily flows therefrom that the tenant must be on the land at the material time in order to invoke the protection guaranteed by the statute. The word "thereon" cannot be whimsically converted to read as an equivalent to a tenant inducted years later under the provisions of the resettlement schemes and who may not have been even remotely in contemplation when

*Decided by Full Bench on order of Reference made by S. P. Goyal and J. V. Gupta, on 3-11-1981.

the alleged transfer was made. S. 16 was not intended to protect all the tenants who may subsequently be brought on the land in perpetuity. Clearly the protection extended by S. 16 to a tenant was in praesenti and not de futuro. S. 16 also does not provide a protection which may be termed as absolute. It is confined to the specific limit that the rights of the tenant will not be affected as a result of the transfer by the landowner. It is not as if thereby the tenant is, absolutely protected or converted into an owner or vested with an inflexible right to stay on the land. Even the tenants within the ambit of S. 16 would continue to be liable to ejectment for non-payment of rent or other contingencies provided by the statute in Ss. 9 and 14 of the Act. Even a re-settled tenant, who after having executed the kabuliati nama incurs the obligation of paying the rent to the transferee landowner, would also be liable to ejectment if he contravened any of the provisions of the statute. Thus S. 16 cannot be stretched and strained to arrive at the fictional construction that a statutory resettled tenant must be imagined to have become the tenant of the original big landowner, despite the fact that the area on which he is so re-settled had long since been transferred to a small landowner-vendee. (Paras 10, 11, 12, 15)

It is not that all the transfers by big landowners are illegal or barred by the provision. A plain reading of sub-ss. (b) and (c) of S. 10-A would indicate that the law merely provides that such transfers would be ignored if they come in the way of the utilisation of the surplus land for the re-settlement of tenants or for the purposes of the declaration of surplus area in the hands of a big landowner. There is neither a legal bar to the transfer of a surplus area by a big landowner nor could such a transaction be deemed as void ab initio or non est. (Para 16)

Further, the provisions of Rule 20-C not only recognised the factum of a resettled tenant being the tenant of the transferee landowner but further provide a statutory obligation of attornment to such a transferee as his landlord. Sub-rule (c) obliges such a resettled tenant to execute a Qabuliati Nama in favour of the transferee landowner who may be recorded as the

owner of the land in the revenue papers. The tenant thus comes under a legal obligation to tender the rent for the land to the transferee as his landlord. Inevitably he would incur the penalty of ejectment under S. 9 if he fails or refuses to pay rent to the landlord in whose favour he has executed a Qabuliati Nama. Therefore it is more than plain that apart from the principle that a tenant inducted or re-settled on the land would necessarily be the tenant of the owner of such land (and not fictionally of his predecessors-in-interest) there is a categorical statutory recognition of this situation. (Para 17)

Cases Referred: Chronological Paras
1980 Pun LJ 398 : 1979 Rev LR 653

1, 3, 16, 17, 18, 19, 21,
AIR 1974 Punj 243 : 1974 Punj LJ 251 :
76 Pun LR 597 (FB) 1, 18
1966 Punj LJ 16 : (1966) 68 Pun LR 41
16
1966 Pun LJ 252 : (1966) 68 Pun LR
787 13

G. C. Garg, for Petitioner; M. L. Sarin, with R. L. Sarin. (Nos. 2 to 8) for Respondents.

S. S. SANDHAWALIA, C. J. :—
Whether a tenant statutorily re-settled on agricultural land comprised in the surplus area of the original big landowner is to be fictionally deemed to become the tenant of such a landowner, despite the fact that the land had been sold much earlier to a vendee who was a small landowner is the somewhat intricate question which has necessitated this reference to the Full Bench. Even more pointedly at issue is the correctness of the view in Jagdish and Santu v. State of Haryana, 1980 Punj LJ 398 and its discordance with the earlier Full Bench in Chandni Ram v. State of Punjab, 1974 Punj LJ 251 : (AIR 1974 Punj 243).

2. The issue aforesaid is the common link in these three writ petitions and specifically arises in the context of the tenant's right of statutory purchase under Section 18 of the Punjab Security of Land Tenures Act (hereinafter called the Act). It suffices to refer to the facts in C. W. P. No. 32/1980 Chander Bhan v. Financial Commissioner, Haryana. Madan Gopal respondent No. 9 was a big landowner who had sold the land in dispute to respondents Nos. 2 to 8 vide registered sale deed executed way back on the 30th

of October, 1958. Later this area measuring 3 acres comprised in Killa Nos. 11, 12 and 14 of rectangle No. 9 situated in village Sewari was declared surplus in the hands of Madan Gopal respondent in the year 1961. It calls for pointed mention that the sale by Madan Gopal in favour of respondents Nos. 2 to 8 who admittedly were small landowners was ignored for the purpose of the determination of his surplus area by virtue of the provisions of Section 10-A of the Act, Chander Bhan petitioner who was an ejected tenant was re-settled on the aforesaid surplus area in accordance with the utilisation scheme and its possession was delivered to him on the 12th of June, 1964. On the completion of six years of his tenancy he preferred an application under Section 18 of the Act to the Prescribed Authority for its purchase. This application was dismissed by the Assistant Collector, Ist Grade, Gurgaon (the Prescribed Authority) by his order dated the 11th December, 1972, primarily on the ground that the transferees of Madan Gopal (who stood recorded as owners in revenue record) were small landowners and, therefore, the applicant did not satisfy the pre-condition of being the tenant of a big landowner prescribed by Section 18. The dismissal of the application was upheld in appeal by the Commissioner and in revision by the Financial Commissioner. He has then filed the present writ petition for quashing the impugned orders of the revenue authorities. The connected C. W. P. No. 33 of 1980 has been preferred by Jai Parshad another tenant of Madan Gopal whose application for statutory purchase of land over which he was re-settled as ejected tenant was dismissed on similar grounds.

3. C. W. P. No. 2438 of 1980 Ram Singh and others v. F. C. Haryana — presents the reverse situation. Therein the application under Section 18 of the Act of Ram Sarup, a re-settled tenant on the surplus land of Madan Gopal was allowed at the revisional stage in accordance with Jagdish and Santu's case (1980 Punj LJ 398). The transferees of Madan Gopal have preferred this writ petition for quashing the order of the Financial Commissioner.

4. Inevitably the controversy here would revolve around the provisions of

Section 18 of the Act and it is apt to read the relevant portion thereof:—

"18. (I) Notwithstanding anything to the contrary contained in any law, usage or contract, a tenant of a landowner other than a small land owner—

(i) who has been in continuous occupation of the land comprised in his tenancy for a minimum period of six years, or

(ii) who has been restored to his tenancy under the provisions of this Act and whose period of continuous occupation of the land comprised in his tenancy immediately before ejection and immediately after restoration of his tenancy together amounts to six years or more, or

(iii) who was ejected from his tenancy after the 14th day of August, 1947, and before the commencement of this Act, and who was in continuous occupation of the land comprised in his tenancy for a period of six years or more immediately before the ejection, shall be entitled to purchase from the landowner the land so held by him but not included in the reserved area of the landowner, in the case of a tenant falling within clause (i) or clause (ii) at any time and in the case of a tenant falling within clause (iii), within a period of one year from the date of commencement of this Act :

Provided that no tenant referred to in this sub-section shall be entitled to exercise any such right in respect of the land or any portion thereof if he had sublet the land or the portion, as the case may be, to any other person during any period of his continuous occupation, unless during that period the tenant was suffering from a legal disability or physical infirmity or if a woman was a widow or was unmarried :

Provided further that if the land intend to be purchased is held by another tenant who is entitled to pre-empt the sale under the next preceding section, and who is not accepted by the purchasing tenant, the tenant in actual occupation shall have the right to pre-empt the sale.

* * *

5. Before advertg to the other statutory provisions and the maze of precedent, it is refreshing to examine the larger purposes of the conferment of the right of statutory purchase, by

Section 18 of the Act. Was it the legislative intent that any and every tenant of an agricultural holding should be converted into its owner? The language of Section 18 and the other provisions of the Act do not seem to exhibit any such omnibus radical purpose. The larger triple object of the Act patently was to impose a ceiling on inordinately large holdings, to provide security of tenure to the tenants (as the very name of the statute indicates), including the right to be re-settled if ejected and thirdly to confer a right of purchase in strictitude only with regard to the surplus area of a big landowner. It would thus appear that the provisions of the Act as originally enforced in 1953 and its subsequent amendment took the middle road between the extremes of absolute laissez-faire to own agricultural land without any limits, against the other extreme of divesting the lawful owner of the land and substituting the tillers thereof in their place. It was, therefore, that the right of statutory purchase under Section 18 was limited and hedged with two significant pre-conditions. This right was allowed only as against a big landowner. The small landowners below the ceiling limits were absolutely protected against it, however long may have been the period of tenancy of their tenants. Even the big landowners were absolutely protected against this right of statutory purchase as regards the area reserved by them. Thus the right of statutory purchase by a tenant was confined strictly to the area which was above the ceiling limits and had been declared surplus in a big landowner's hands. All this manifests plainly the legislature's intent that the small landowners were completely out of the ambit of such a right and that within the ceiling limits even the big landowner was protected against any right of statutory purchase by his tenant under S. 18.

6. Now apart from the above, the right of purchase was not conferred unreservedly on any and every tenant-at-will. When originally enacted in 1953 it was only a statutory recognition of a very long standing tenancy which was sought to be allowed to ripen into ownership qua large feudal holdings. The statute, therefore, required a strict qualification of 12 years' of continuous

occupation as a tenant before such a right of purchase could be exercised. Later perhaps this period was considered to be inordinately long and by an amendment it was halved to a period of 6 years. The legislature has maintained this statutory period of 6 years now for well-nigh 26 years. It would thus be plain that the statutory right of purchase under Section 18 of the Act is a happy compromise or a golden mean between the absolutism of passing of title in land to its tiller only, and a feudal claim to own large chunks of land unreservedly without let or hindrance. The ideal which the statute apparently wishes to promote ultimately was that of peasant proprietorship within the ceiling limits. Certainly the object of the Act was not to expropriate small peasants at the hands of tenants whom they might have been compelled to induct because of innumerable circumstances. This is why no right of purchase was conferred qua small land holders at all or even with regard to the reserved area of big land-owners as well. The right of statutory purchase was, therefore, not intended to rob Peter and pay Paul in the sense of allowing a compulsory purchase by the tenant of a very small holding as well which would have the effect of expropriating even a peasant of his holding by a tenant, who in terms himself may well be a land holder also and sometimes quantitatively a bigger one. It is with this back drop of the legislative purpose, which is writ large over the statute that the individual provisions thereof have now to be construed.

7. Now the core of the argument on behalf of the tenant writ petitioners projected by their learned counsel Mr. G. C. Garg rests on an apprehension of an abuse or misuse of the statute by a crafty big land-owner. It was argued that such a big landowner may successfully transfer his surplus area in favour of a small landowner thus exposing the resettled tenants to the liability of ejectment and in any case defeating his right to purchase the same on the expiry of the statutory period of 6 years.

8. The learned counsel when unable to sustain his basic stand (that the big land-owner would be barred in law from transferring any part of the surplus area on either principle or any

other statutory provision) made a last ditch attempt to contend that Section 16 should be fictionally brought in and made applicable to resettled tenants also even by a process of strained construction because otherwise some of the purposes of the Act may be hindered.

9. In order to appreciate the rival contentions in the aforesaid context it is apt to read the provisions of S. 16:—

"16. Saving of tenancies from effect of mala fide transfer.

Save in the case of land acquired by the State Government under any law for the time being in force, or by an heir by inheritance, no transfer or other disposition of land effected after the 1st February, 1955, shall affect the rights of the tenant thereon under this Act."

10. Now a plain reading of the above makes it manifest that the language of Section 16 cannot possibly lend itself to the construction sought to be canvassed by Mr. G. C. Garg and is indeed categorically just opposite to his stand. It in term says that any mala fide transfer shall not adversely affect the rights of the tenant thereon. The crucial word here is "thereof". It necessarily flows therefrom that the tenant must be on the land at the material time in order to invoke the protection guaranteed by the statute. The word "thereon" cannot be whimsically converted to read as an equivalent to a tenant inducted years later under the provisions of the resettlement schemes and who may not have been even remotely in contemplation when the alleged transfer was made. Section 16 to my mind was not intended to protect all the tenants which may subsequently be brought on the land (either voluntarily by the landowner or statutorily by way of resettlement) in perpetuity. Clearly the protection extended by S. 16 to a tenant was in praesenti and not de futuro. The aforesaid view receives massive support in the light of the analogous provisions of Section 6 of the Act. Herein what calls for pointed notice is that this provision was substituted by Punjab Act No. 14 of 1962, nearly seven years after the enactment of Section 16. It reads as under:—

"6. Certain previous transfers of land not to affect rights of tenants.—

No transfer of land, except a bona fide sale or mortgage with possession

or a transfer resulting from inheritance made after the 15th August, 1947 and before the 2nd February, 1955, shall affect the rights of the tenant on such land under this Act."

11. Reading the provisions of Sections 6 and 16 together it would be plain that the protection was afforded to the tenants in cultivation of the land against mala fide transfers effected after the 1st February 1955. However, later a similar protection was thought necessary against similar transfers from the date of the partition of the country. Consequently Section 6 provided for protection to the tenants on such land against transfer made after 15th August, 1947 and before 2nd February, 1955. Both Sections 6 and 16, however, categorically provide that such a protection was to be accorded to existing tenants. Section 6 uses even more explicit phraseology namely 'the rights of the tenants on such land under this Act'. Consequently the use of the word "thereon" in Section 16 and the aforesaid language in Section 6 would leave no manner of doubt that the protection was sought to be given to an existing and known class of tenants in actual cultivation of the land and not to any future and unknown class of tenants either under the statutory schemes of resettlement, or inducted by agreement afterwards.

12. Again Section 13 does not provide a protection which may be termed as absolute. It is confined to the specific limit that the rights of the tenant will not be affected as a result of the transfer by the land-owner. It is not as if thereby the tenant is absolutely protected or converted into an owner or vested with an inflexible right to stay on the land. Even the tenants within the ambit of Section 16 would continue to be liable to ejectment for non-payment of rent or other contingencies provided by the statute in Sections 9 and 14 of the Act. It was not disputed before us that even a re-settled tenant who after having executed the kabuliinama incurs the obligation of paying the rent to the transferee landowner would also be liable to ejectment if he contravened any of the aforesaid provisions of the statute.

13. Apart from principle, authority also does not seem to be lacking for the

proposition that Section 18 stands by itself and no inroad into its provisions can be made on the basis of Sec. 16. The Division Bench in *Jot Ram v. The Financial Commissioner*, 1966 Punj LJ 787 has held in no uncertain terms that Section 16 has no application to Section 18, and that the protection envisaged by it was merely for tenants adversely affected by mala fide transfers. Section 18 was held to be complete by itself and in no way overridden by S. 16.

14. Again the suggested inference of Mr. Garg that a big landowner could not induct any tenant on the surplus area immediately after the 15th of April, 1953, when the Act came into force is neither borne out by principle nor by precedent. Plainly on that date and in many cases long thereafter the precise area surplus in the hands of a landowner may not come to be determined by the authorities. It seems vain to argue that any blanket bar was imposed on a big landowner to lease out all or any parts of his land to a tenant on the mere apprehension of some land being declared surplus in his hands. Not only a big landlord could induct a tenant on his land both before or after the declaration of surplus area but indeed if such a tenant could satisfy the requisite conditions of Section 18 he could well exercise the right of purchase also. The second proviso to Section 9-A is clearly a pointer to this effect. This provision created a bar against tenants who were closely related to the landlord from statutorily purchasing the same. The necessary corollary therefrom is that this was intended primarily to hit collusive induction of relations by big landowners as their tenants, and that the bona fide tenants inducted by the landowners who were not related would be entitled to the same rights of purchases conferred by S. 18.

15. In view of the aforesaid discussion, it seems to be plain that S. 16 cannot be stretched and strained to arrive at the fictional construction (advocated by Mr. Garg) that a statutory re-settled tenant must be imagined to have become the tenant of the original big landowner, despite the fact that the area on which he is so re-settled had long since been transferred to a small landowner-vendee.

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16. Coming now to the precedent which tilts to the contrary view (and which has necessitated this reference to the larger Bench) one may straightway notice the two basic premises on which Jagdish and Santu's case (1980 Punj LJ 398) (supra) rests and examine their correctness. The learned single Judge therein first proceeded on the assumption that Section 10-A of the Act bars any transfer by a big landholder altogether and in any case if such a transfer is made the same would be non est qua the vendee. This conclusion appears to us to be erroneous and based on a mis-construction of Section 10A as authoritatively construed. It is not that all transfers by big landowners are illegal or barred by the aforesaid provision. A plain reading of sub-sections (b) and (c) of Section 10A would indicate that the law merely provides that such transfers would be ignored if they come in the way of the utilisation of the surplus land for the re-settlement of tenants or for the purposes of the declaration of surplus area in the hands of a big landowner. Indeed within this jurisdiction this aspect is so well settled that even Mr. Garg fairly conceded that there was neither a legal bar to the transfer of a surplus area by a big landowner nor could such a transaction be deemed as void ab initio or non est. However, we are not at all basing ourselves on any concession but are inclined to the view both on the language of Section 10A and the precedents of this Court holding to the same effect which were not even remotely challenged before us. It suffices to refer to the following observations of the Division Bench in *State of Punjab v. Shamsher Singh*, 1966 Punj LJ 16.

"* * *. The Act does not invalidate alienations of an area from the holding of a landowner in which there is subsequently found to be surplus area, and all that it does is to provide in Section 10-A that the total holding of the landowner, ignoring the alienation or alienations, will be taken into consideration for determination of permissible area and surplus area. There is nothing in the Act which deprived the landowner of his right to dispose of any part of his holding simply because subsequently it may be found that part of his holding comes to be surplus area."

It would thus be plain that the fundamental premises underlying Santu's case that transfers by big landowners were under a blanket bar and any such transfer, if made, was non est cannot hold water on a close analysis.

17. Secondly the learned single Judge in Santu's case firmly took the view that no provision of law existed to indicate that the re-settled tenant on the surplus area would become the tenant of the transferee to whom it had been sold by the big landowner before such re-settlement. These observations and the inevitable conclusions therefrom appeared to us as having been rendered per incuriam. Counsel for the parties were apparently remiss in not bringing to the notice of the learned single Judge the pivotal provision of Rule 20-C in the basic set of statutory provisions with regard to the re-settlement of tenants. This reads as under :—

"R. 20-C. Conditions of resettlement: The tenant, who is resettled under this Part—

(a) shall be the tenant of the landowner in whose name the land in question stands in the revenue records;

(b) shall be liable to pay the same amount of rent as is customary in that estate for such lands subject to the maximum fixed under Section 12 of the Act; and

(c) shall in respect of the land upon which he is resettled execute a Qabuliyat or a Patta as given in Annexure 'C' appended to the Punjab Security of Land Tenures Rules, 1953, in favour of the landowner before he is put in possession of the land."

Plainly enough the aforesaid provisions not only recognised the factum of a re-settled tenant being the tenant of the transferee landowner but further provide a statutory obligation of attornment to such a transferee as his landlord. Sub-rule (c) obliges such a resettled tenant to execute a Qabuliat Nama in favour of the transferee landowner who may be recorded as the owner of the land in the revenue papers. The tenant thus comes under a legal obligation to tender the rent for the land to the transferee as his landlord. Inevitably he would incur the penalty of ejectment under Section 9 if he fails or refuses to pay rent to the landlord in whose favour he has executed a Qabuliat Nama. Therefore it is more

than plain that apart from the principle that a tenant inducted or re-settled on the land would necessarily be the tenant of the owner of such land (and not fictionally of his predecessors-in-interest) there is a categorical statutory recognition of this situation. The second basic rationale in Santu's case thus appears to us as equally unsustainable.

18. Lastly the whole tenor of Santu's case in our view runs counter to the core and gist of the ratio of the Full Bench in Chandi Ram's case (AIR 1974 Punj 243) (supra). The learned single Judge seemed to be aware of this fact and had attempted to distinguish this case. With respect we are unable to subscribe to that line of reasoning. It was observed that the Full Bench in Chandi Ram's case had not considered whether the transfer by the big landowner in favour of his sons was valid or invalid and the whole case was argued on the wrong assumption that the transfers were valid. However, we find that the clearest finding of the Full Bench in Chandi Ram's case (AIR 1974 Punj 243) which is in consonance with the earlier settled view of this Court is in the following terms (at pp. 245, 246):

"* * *. Therefore, if he satisfies the conditions which are a pre-requisite to the exercise of his right of purchase under Section 18 and one of the conditions being that the land is held by the landowner he can purchase it. Thus for the purposes of Section 18 a tenant cannot exercise his right of purchase by ignoring the transfer. This seems to be the true legal position with regard to all transfers made between 15th Aug. 1947 and 15th April, 1953, the date on which the Act came into force. It is significant that the transfers other than those excepted by Section 6 do not become void or inoperative so far as the transferor and the transferee are concerned but they cannot be recognised when they come in conflict with the purpose and the provisions of the Act. Bona fide sales are outside the prohibition regarding transfers under Section 6 between 15th August, 1947 and 15th April, 1953, and are also not prohibited even after the 15th April, 1953. See in this connection S. 16." and again

"* * *. Therefore, if the transfers are good and pass title, the tenant who

wants to exercise the right of purchase under Section 18 has to satisfy the requirements of that provision and one of the requirements of the same is that the land which he seeks to purchase is held by a 'landowner'. In all the present cases the lands are owned by small landowners and are not held by a landowner, and therefore the tenants cannot purchase the same. They can only purchase the same if the transfers by which the lands have vested in the small landowners are to be ignored. There is no provision under which they can be ignored for the purpose of Section 18 of the Act."

It would be plain from above that the observations in Santu's case run counter to the binding precedent in Chandi Ram's case and it suffices to mention that no challenge to the ratio thereof was even remotely raised before us.

19. For the aforesaid reasons with respect we must hold that Santu's case (1980 Pun LJ 398) does not lay down the law correctly and is hereby overruled.

20. To conclude, the answer to the question posed at the outset is rendered in the negative and it is held that a statutory re-settled tenant would become the tenant of the small landowner vendee who had earlier purchased the same from a big landowner. Consequently being the tenant of a small landowner he would not satisfy the basic pre-requisite of Section 18 and would be disentitled to purchase the land.

21. As a necessary application of the aforesaid view C. W. P. 32/1980 Chander Bhan v. Financial Commissioner Haryana and C. W. P. 33/1980 which have been preferred by the tenants claiming the right to purchase are hereby dismissed. C. W. P. 2438 of 1980 which challenges the purchase of land by the tenants under Section 18 in consonance with Jagdish and Santu's case (1980 Pun LJ 398) is hereby allowed and the impugned order of the Financial Commissioner is hereby set aside.

22. In view of the conflict of the precedent and the somewhat intricate issues involved the parties are left to bear their own costs.

Order accordingly.

AIR 1982 PUNJAB AND HARYANA 83 FULL BENCH

S. S. SANDHAWALIA, C. J.,

P. C. JAIN AND B. S. DHILLON, JJ.

Atma Ram, Appellant v. Smt. Kala Wati, Respondent.

Letters Patent Appeal No. 135 of 1979. D/- 11-9-1981*.

(A) Hindu Marriage Act (25 of 1955), Ss. 9 and 7 — Decree obtained by husband for restitution of conjugal rights remaining unsatisfied — Petition for divorce by husband — Plea of wife that husband had contracted second marriage — Finding of trial court that second marriage was not proved — Reversal of finding by single Judge — Legality. 1979 Hindu LR 704. Reversed.

A petition filed by the husband under S. 9 for restitution of conjugal rights was decreed by the trial Court in 1971. Appeal filed by the wife before the High Court was dismissed and a L. P. appeal filed by her was also dismissed by the High Court on 10-4-1973. Thereafter, on 11-9-1977 the husband filed a petition for divorce. The divorce was sought on ground that the decree for restitution obtained by the husband remained unsatisfied due to non-compliance by the wife for more than two years. In the written statement the wife admitted that there was a final decree for restitution of conjugal rights in existence but she took a plea that the decree could not be complied with because the husband had entered into another marriage. The trial Court held that the factum of second marriage was not proved and accepted the petition and a decree for divorce was passed. In appeal by the wife a single Judge of the High Court reversed the finding and dismissed the petition for divorce. The husband filed a Letters Patent appeal.

Held, that the finding of fact arrived at by the single Judge was wrong and hence it was liable to be set aside. 1979 Hindu LR 704. Reversed. (Para 13)

Normally, the Letters Patent Bench is reluctant to interfere with the finding of fact arrived at by the single Judge but since the pleadings and the evidence

*Against judgment of Harbans Lal, J. reported in 1979 Hindu LR 704.

KY/LY/F20/81/MVJ

adduced by the respondent wife in the instant case is wholly insufficient to warrant a finding of second marriage, therefore, the Letters Patent Bench would be inclined to set aside the finding of the single Judge in this regard.

(Para 13)

With a view to prove the second marriage, it is necessary to plead as to the form of the marriage between the parties. Until and unless the customary rites and ceremonies applicable to the parties are proved, the finding regarding the second marriage cannot be returned. AIR 1971 SC 1153 Foll.

(Para 10)

(B) Precedents — Judicial precedents — Question of law which does not arise must not be decided.

While sitting in Full Bench it would be laying a wrong precedent to decide a question of law which does not arise in the case. The decision on a point, which does not arise in a case, will be merely in the form of obiter dicta and not a binding precedent. (Para 20)

Cases Referred : Chronological Paras

AIR 1977 SC 2218 : 1977 Cur LJ (Civ)

493 : (1977) 2 SCJ 471 19

AIR 1977 Punj & Har 167 : 1977 Cur LJ

(Civ) 154 : 1977 Hindu LR 272 (FB)

15, 17, 18, 19

1977 Hindu LR 395 : 1978 Marr LJ 1

17

AIR 1971 SC 1153 : 1971 Cri LJ 939 :

1971 SCC 864 10

H. L. Sarin with M. L. Sarin, for Petitioner; Suresh Amba, for Respondent.

B. S. DHILLON, J.:— Atma Ram appellant was married to Kalawati respondent in the year 1964. They lived together as husband and wife for a few years and a daughter was born out of this wedlock on 11-2-1966. Thereafter, Atma Ram allegedly deserted Kala Wati without any reasonable cause. Reconciliation proceedings between the parties could not take place. Atma Ram filed a petition under S. 9 of the Hindu Marriage Act, 1955, (hereinafter referred to as the Act) for restitution of conjugal rights which was decreed by the trial Court on 8-7-71. Appeal against the same was dismissed by this Court on 4-1-1973. Letters Patent Appeal filed by the wife was dismissed vide order dated 10-4-1973. Atma Ram then filed a petition for a decree of divorce on

11-5-1977. Divorce was sought on the ground that the decree for restitution of conjugal rights obtained by the husband had remained unsatisfied due to non-compliance by the wife for more than two years.

2. In the written statement filed by the wife it was admitted that a final decree for restitution of conjugal rights exists. However, it was alleged that the appellant entered into another marriage with one Malagri alias Muglalri, daughter of Sahi Ram of village Harkawala, Tehsil Padampur, District Ganganagar (Rajasthan) on 17-6-1974, and, therefore, the decree for restitution for conjugal rights could not be complied with. It was asserted that the husband could not take advantage of his own wrong in view of the provisions of S. 23 of the Act and thus the petition for divorce was liable to be dismissed.

3. On the pleadings of the parties, the following issues were framed by the trial Court :—

1. Whether the petitioner has contracted second marriage with Malagri alias Muglalri daughter of Sahi Ram on 17-6-1974, and if so, what is its effect?

2. Relief.

4. The learned trial Judge held that the factum of marriage between Atma Ram and Malagri was not proved. The petition was accepted and a decree for divorce was passed.

5. Kala Wati challenged the order of the trial Court in appeal. The learned single Judge vide his judgment dated 9-8-1979 reversed the findings of the trial Court on issue No. 1 and consequently dismissed the petition for divorce.

6. This Letters Patent Appeal was listed for hearing before a Division Bench consisting of S. S. Sandhawalia C. J. and S. S. Kang J. An argument having been raised by the learned counsel for Atma Ram that since there was no resumption of cohabitation between the parties for a period of more than two years of the passing of the decree for restitution of conjugal rights, the cause of action for divorce having arisen, the decree for divorce could not be refused on any ground whatsoever. The learned Judges constituting the Bench having felt that the question of law of general importance is likely to arise in many cases referred the case

to a larger Bench. This is how this Letters Patent Appeal has been listed for hearing before us.

7. Shri Sarin, the learned counsel for the appellant, has challenged the findings of the learned single Judge on issue No. 1 and has vehemently contended on the basis of the averments made in the pleadings and keeping in view the evidence led by the parties on the record of this case, that the reversal of finding of fact recorded by the trial Court by the learned single Judge, is not sustainable in the eyes of law. We find merit in this contention. We have very carefully gone through the pleadings and the evidence on the record and find that it is difficult to sustain the findings of the learned single Judge that Atma Ram had contracted second marriage with Smt. Malagri as averred in the written statement filed on behalf of the wife. There is no averment in the written statement that Smt. Malagri was ever seen residing with Atma Ram appellant as his wife. The only plea taken is that he contracted a second marriage with Smt. Malagri on 17-6-1974. It has further been pleaded in the written statement that the respondent filed a complaint under S. 494 of I. P. C. against Atma Ram and Smt. Malagri in pursuance of which Atma Ram and his second wife were being tried.

8. The evidence led by Kala Wati in support of the plea taken by her consisted of her own statement as R. W. 1 and that of Ram Kishan (R. W. 2) and Bir Bal (R. W. 3). It is clear from her statement that she did not herself witness the second marriage. She was informed by Birbal (R. W. 3), who is the maternal uncle of Kalawati, about the second marriage on the basis of which she filed a criminal complaint under S. 494 of I. P. C. She further deposed that she had seen Malagri with Atma Ram on 3 or 4 occasions during the hearing of the criminal case. According to her Smt. Malagri had a male child of 3 or 4 months' age. She further deposed that she was not prepared to live with Atma Ram because of the second marriage. However, if he turns out Malagri, she was prepared to live with him. Ram Kishan (R. W. 2) deposed that 3½ years ago at about sunset time when he had gone to his field, he saw a marriage party at the house of

Sahi Ram. Atma Ram was the bridegroom and Malagri daughter of Sahi Ram was married to Atma Ram in his presence. According to him four rounds around the fire were taken by the couple instead of seven rounds, according to the prevalent custom. He saw Malagri and Atma Ram on three or four occasions after the marriage. This witness also did not state that he had seen Atma Ram and Malagri living together. Bir Bal (R. W. 3) is the maternal uncle of Kala Wati. According to his statement, he belongs to village Churi Wala Dhanna in district Ferozepore. He happened to go to the house of Lachhman in village Harkewala where he saw the marriage at the house of Sahi Ram being performed in which Malagri was married to Atma Ram.

9. Atma Ram appeared as A. W. 1 and deposed that he did not marry any other woman except Kala Wati. He denied that he had married Malagri as suggested. Surja Ram (A. W. 2) also corroborated the statement of Atma Ram and deposed that no other woman was living in the house of Atma Ram and that he had not performed second marriage with Smt. Malagri.

10. Section 7 of the Act provides that a Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto. It has further been provided that where such rites and ceremonies include the Saptapadi, that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire, the marriage becomes complete and binding when the seventh step is taken. Thus it is to be seen that with a view to prove the second marriage, it is necessary to plead as to the form of the marriage between the parties. In the present case, no averment was made with regard to the form of marriage. Until and unless the customary rites and ceremonies applicable to the parties are proved, the finding regarding the second marriage cannot be returned. Reference in this connection may be made to the decision of their Lordships of the Supreme Court in Smt. Priya Bala Ghosh v. Suresh Chandra Ghosh, AIR 1971 SC 1153. In the present case the pleadings and the evidence regarding the second marriage are wholly insufficient to warrant a finding of second marriage. As already observed,

there is no pleading as regards the form of marriage. The statement of Kala Wati (R. W. 1) is of no consequence as she did not witness the marriage and she only received information from Bir Bal (R. W. 3). Ram Kishan (R. W. 2) did not disclose as to in what circumstances he happened to be present in the house of Sahi Ram. According to his testimony he had gone to his fields where he happened to see the marriage party. His statement that according to the custom, only four rounds and not seven rounds around the fire were necessary, is again of no help. He did not state that either of the parties was governed by such a custom. His statement that he had seen Atma Ram and Malagri on 3 or 4 occasions after the marriage is again a vague statement as he did not mention the time, place and date where they were seen together. He was suggested in cross-examination that he was having enmity with the father-in-law of Atma Ram's brother who is married in village Harkewala, that is, the village of this witness, though he denied the suggestion. This witness did not depose about the presence of Bir Bal (R. W. 3) at the time of the marriage.

11. As regards Birbal (R. W. 3) he is the real maternal uncle of Kala Wati. He did not state that he saw Ram Kishan (R. W. 2) at the time of the marriage. This witness admittedly lives in a village in district Ferozepore in Punjab State and he did not give any reason as to how he happened to be present in village Harkewala at the psychological moment, i.e., at the time of the marriage of Atma Ram with Smt. Malagri. He did not raise any protest at the time of the marriage. In fact his presence at the time and place of the marriage is highly unnatural and it was on the information given by this witness that Kala Wati lodged a criminal complaint under S. 494 of I. P. C. against Atma Ram and his alleged second wife, Smt. Malagri.

12. The learned single Judge was also influenced by the fact that Kala Wati filed a complaint under S. 494 of I. P. C. immediately after having received the information. It has been brought to our notice by the learned counsel for Atma Ram that Atma Ram and Smt. Malagri have been acquitted of the charges under S. 494 of I. P. C.

and a finding has been returned that the alleged second marriage performed by Atma Ram with Smt. Malagri was not proved.

13. The observation of the learned single Judge that Ram Kishan was not cross-examined in detail in our considered opinion is not of much help to the learned counsel for the respondent. Ram Kishan R. W. was suggested in cross-examination that he was inimical to the father-in-law of Devi Lal, brother of the appellant, Atma Ram, who is married in the village of this witness and, therefore, he was deposing falsely. This suggestion would be good enough to negative the argument that this witness was not cross-examined in detail. Normally, the Letters Patent Bench is reluctant to interfere with the finding of fact arrived at by the learned single Judge but since we find that the pleadings and the evidence adduced by the respondent is wholly insufficient to warrant a finding of second marriage, therefore, we are inclined to set aside the findings of the learned single Judge in this regard.

14. The learned counsel for the respondent then contended that even if the second marriage is not proved, since the learned single Judge also recorded a finding that at least Atma Ram and Smt. Malagri were living as husband and wife, therefore, the appellant has disintituled himself from getting a decree of divorce in view of the provisions of S. 23 of the Act. We are unable to agree with this contention. The learned single Judge accorded a categorical finding that the second marriage has been proved which finding is being reversed by us. The observations that Atma Ram and Smt. Malagri were living together as husband and wife, was merely a passing observation made. As already observed, there is nothing on the record either in the pleadings or in the evidence of any of the R. Ws. that any one of the witnesses saw Atma Ram and Smt. Malagri living together as husband and wife at any stage. Therefore, on the basis of the evidence on the record, it cannot be held that Atma Ram and Smt. Malagri were living together as husband and wife. This contention is, therefore, without any merit. We, therefore, reverse the find-

ings of the learned single Judge on issue No. 1.

15. It may not be out of place to mention that the learned counsel for the appellant had also contended that even if Atma Ram had contracted a second marriage, still he would be entitled to a decree of divorce under S. 13 (1A) (i) of the Act as the cohabitation between the two spouses did not take place within a period specified therein. The learned counsel contends that in such a situation, the provisions of S. 23 of the Act would not be attracted. It may be observed that a Full Bench of this Court in *Smt. Bimla Devi v. Singh Raj*, 1977 Cur LJ (Civ) 154: (AIR 1977 Punj 167) to which I was a party, categorically held as follows (at p. 173) :

"It may, however, be observed that it may not be understood to have been held that the provisions of Sec. 13 (1A) are not subject to the provisions of Section 23 (1) (a). But, in fact, what we have held is that a defaulting spouse, who has suffered a decree for restitution of conjugal rights, cannot be held to be taking advantage of his or her own wrong merely because he or she has failed to comply with the decree of restitution of conjugal rights. Human ingenuity being what it is, it cannot be disputed that many cases may arise, where notwithstanding that a ground for divorce exists, there may be something in the conduct of the petitioner which would be so reprehensible that the Court would deny to such a petitioner relief by way of divorce on the consideration that the petitioner was taking advantage of his or her own wrong."

16. O. Chinnappa Reddy J. (as he then was) while agreeing with the conclusions arrived at by me, made further observations in a separate judgment. His Lordship held that it is not permissible to apply the provisions of S. 23 (1) (a) on the concept of wrong-disability to proceedings in which relief is claimed under S. 13 (1A) or S. 13B based as they are on the concept of a broken down marriage. It may be made clear that the observation referred to above made by his Lordship is a minority view and, therefore, has no binding force.

17. Our attention has been drawn to a single Bench decision of mine in *Smt.*

Ranjit Kaur v. Gurbax Singh, 1977 Hindu LR 395, wherein I made the following observations :—

"Without going into the merits and demerits of the arguments advanced by the learned counsel for the parties on this aspect of the case, it appears to me that the appeal is liable to be dismissed in view of the Full Bench decision of this Court in F. A. O. No. 109-M of 1973 (*Smt. Bimla Devi v. Singh Raj*) dated 17th of December, 1975 : (AIR 1977 Punj 167). It has been held in that Full Bench decision that the provisions of Section 23 (1) (a) of the Act cannot be invoked to refuse the relief under S. 13 (1A) (i) of the Act where cohabitation has not been resumed as between the parties to the marriage for a statutory period after the passing of a decree for restitution of conjugal rights in proceedings in which they were parties. It was held that in a case covered under Section 13 (1A) (ii) of the Act, either of the parties can apply for dissolution of marriage by a decree of divorce if it is able to show that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in proceedings in which they were parties. Once this condition is satisfied, the Court will not look into as to which was the party at fault for not resuming cohabitation."

18. These observations of mine are in the context of the facts of the case decided. In the case the plea taken by the appellant was that the husband had failed to make himself available even though the appellant was ready to resume cohabitation. It was in the context of this plea that the above mentioned observations were made that once the condition that there is no restitution of conjugal rights between the parties to the marriage within a period of one year or upwards after the passing of the decree for restitution of conjugal rights, was proved, the Court will not look into as to which was the party at fault for not resuming cohabitation. This judgment of mine nowhere lays down that the provisions of S. 23 of the Act will not be attracted in no case in proceedings for divorce. In the Full Bench decision in *Smt. Bimla Devi's* case (AIR 1977 Punj 167) (supra), it was

categorically held that the provisions of S. 13 (1A) are subject to the provisions of S. 23 of the Act.

19. It may not be out of place to mention that the view taken by the Full Bench in Smt. Bimla Devi's case (supra) finds affirmance by their Lordships of the Supreme Court in Dharmendra Kumar v. Mrs. Usha Kumar, 1977 Cur LJ (Civ) 493 : (AIR 1977 SC 2218). It was held therein that the grounds for granting relief under S. 13, including sub-sec. (1A), continue to be subject to the provisions of S. 23 of the Act. However, it was held that mere non-compliance with the decree of restitution of conjugal rights does not constitute a wrong within the meaning of S. 23 (1) (a) of the Act. It would thus be seen that the view of the Full Bench in Smt. Bimla Devi's case (supra) has been fully affirmed by their Lordships of the Supreme Court in Dharmendra Kumar's case (supra).

20. It was contended by the learned counsel for the appellant that in case a spouse obtains a decree for restitution of conjugal rights and if the cohabitation between the two spouses does not take place within one year thereafter, then even though the said spouse remarries before filing the petition for divorce, the provisions of S. 23 of the Act would not be attracted. This contention need not be gone into in this case as we have come to the conclusion that Atma Ram appellant did not contract a second marriage and thus he is entitled to a decree for divorce. This question, therefore, will be merely of academic discussion. While sitting in Full Bench it would be laying a wrong precedent to decide a question of law which does not arise in the case. The decision on a point, which does not arise in a case, will be merely in the form of obiter dicta and not a binding precedent. This question may, therefore, be gone into in some appropriate case.

21. For the reasons recorded above, this Letters Patent Appeal is accepted, the order of the learned single Judge is set aside and the petition for divorce is allowed with costs.

S. S. SANDHAWALIA, C. J. :—

I agree.

PREM CHAND JAIN, J. :— I also agree.

Appeal allowed.

AIR 1982 PUNJAB AND HARYANA 88

G. C. MITAL, J.

Ram Kishan and another, Appellants
v. Chiranji and others, Respondents.

Second Appeal No. 283 of 1970, D/-
24-9-1981*.

Punjab Pre-emption Act (1 of 1913), S. 15 — Landlord mortgaging property after creation of tenancy — Sale of land by landlord — Mortgage not redeemed — Tenant can still pre-empt sale.

Where the landlord after creating tenancy created mortgages with possession the tenant could pre-empt the sale of the land by the landlord as his tenant even though the mortgages were not redeemed and by fiction of law the tenant became the tenant of the mortgagee on creation of mortgages. By fiction of law, the tenant may be treated as tenant of the mortgagee from the date of creation of the mortgage, but he would not cease to be tenant of the owner. Originally he was tenant of the owner and from the date of mortgages, he would be considered by legal fiction tenant of the owner and mortgagee and will continue to be the tenant of these two persons till the mortgages are redeemed, and the moment the mortgages are redeemed, he would again become tenant of the owner alone.

(Para 3)

M. L. Sarin and H. L. Sarin, for Petitioners; H. K. Gupta, for Respondents.

JUDGMENT :— On 14th Dec. 1966 Kishan sold 24-Kanals 5 marlas of land to Ram Kishan and Randhir for a consideration of Rs. 6,000/-. Charanji filed the present suit to pre-empt the aforesaid sale claiming himself to be the tenant of the vendor on the land sold. The trial court dismissed the suit, but the lower appellate Court found that the plaintiff was able to prove his tenancy with regard to 21 Kanals, 12 Marlas and therefore, passed a decree for possession for the aforesaid area on payment of proportionate price. The vendees have come to this Court in second appeal.

*From decree of Ved Prakash Aggarwal Addl. Dist. J. Gurgaon, Camp at Narnaul, D/- 20-1-1969.

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2. Mr. M. L. Sarin, appearing for the vendees has urged that after Kishan had created tenancy in favour of Charanji plaintiff in Fibi 1964, Kishan created two mortgages with possession in favour of Dhanpat Rai vide mortgage deeds dated 16th Nov. 1964 and 13th July, 1965 vide exhibits D. 2 and D. 3 respectively, in respect of the suit land and, therefore, from the date of the aforesaid two mortgages Charanji plaintiff became tenant of the mortgagee and therefore, on 14th Dec. 1966 when Kishan sold the property, the plaintiff cannot in law be treated tenant of the vendor and as such could not pre-empt the sale. The learned counsel wanted to take support of the definition of 'landowner and tenant' as contained in Punjab Tenancy Act, 1887 and Punjab Security of Land Tenures Act, 1953. The argument is certainly ingenious, but after hearing the counsel of the parties, I am of the view that there is no merit in the same.

3. Under S. 15 of the Punjab Pre-emption Act, the plaintiff could succeed only if he was able to show that he was tenant of the vendor on the date of sale, date of suit and the date of the decree of the trial Court. It is not disputed that the plaintiff became tenant of the vendor in Rabi 1964 and continued to be the tenant of the vendor till he created the two mortgages later on. What the counsel for the vendees wanted to urge was that the moment mortgages were created, the plaintiff ceased to be the tenant of the owner namely Kishan and became tenant of Dhanpat Rai mortgagee and since mortgages were not redeemed on the date of sale, therefore, the plaintiff continued to be tenant of the mortgagee up to the date of sale and thereafter, and therefore, cannot be deemed as tenant of the vendor. The argument is devoid of force. By fiction of law, Charanji may be treated as tenant of Dhanpat Rai mortgagee from the date of creation of the mortgages, but he would not cease to be tenant of the owner, namely Kishan. Originally he was tenant of Kishan and from the date of mortgages, he would be considered by legal fiction tenant of Kishan and Dhanpat Rai and will continue to be the tenant of these two persons till the mortgages are redeemed, and the moment the mortgages are redeemed, he

would again become tenant of Kishan alone. On this basis, I hold that Charanji plaintiff was tenant of Kishan vendor also on 14th Dec. 1966 when he made the sale and continued to be so and therefore, the present suit was correctly filed by him to pre-empt the sale as a tenant of the vendor. The learned counsel for the appellant has failed to show that by creation of the two mortgages the tenancy rights of Charanji plaintiff under Kishan owner came to an end either under any principle of law or on any precedent.

4. On first principles I am of the view that the tenancy rights of Charanji under Kishan would continue so long Kishan has some interest including equity of redemption in his favour. If instead of mortgaging the property Kishan had sold the same to Dhanpat Rai then all rights of Kishan would have vested in Dhanpat Rai at one and the same time and instead of Kishan, Dhanpat Rai would have become his full landlord and, therefore, any sale by Dhanpat Rai could be pre-empted by Charanji as his tenant because at that time he would be the tenant of the vendor. Instead of making a sale to Dhanpat Rai if mortgages had been created in his favour, then what Kishan has done in law is that he has parted with part of rights in the immovable property while retaining some ownership rights namely equity of redemption and in this manner it cannot be said that Charanji plaintiff ceased to be tenant of Kishan.

5. For the reasons recorded above I do not find any merit in this appeal and dismiss the same, but without any order as to costs.

Appeal dismissed.

AIR 1982 PUNJAB AND HARYANA 89

I. S. TIWANA, J.

Gram Sabha, Village Rania and others, Petitioners v. The State of Punjab and others, Respondents.

Civil Writ Petn. No. 4575 of 1974, D/- 23-9-1981.

Punjab Municipal Act (3 of 1911), S. 5 (1) — Extension of Municipal limits — Intention of State Government — Publication of, in 'such other man-
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ner' — Provision mandatory — Determination of other manner of publication — Has to be by State Government in each case.

The provision of S. 5 (1) as to publication of intention of State Govt. to extend the limits of a municipality, in such other manner in addition to publication in Gazette is mandatory. The State Govt. has to determine the other manner of publishing its intention in each and every case having regard to the facts and circumstances of the case. There cannot be any general determination of the method or manner in which the intention of the State Govt. is to be published, C. W. P. No. 2889 of 1975 decided on Sept. 5, 1979 (P & H), AIR 1978 Punj & Har 290, Foll. (Paras 3, 4)

Where the State Government while issuing notification under S. 5 (1) did not determine the other mode of publicising its intention contained in the notification but the contents of the notification were publicised by the municipality by beat of drums and affixation, the notification could be quashed for non-compliance of S. 5 (1) as the decision about the manner of publication and steps as to its compliance have to be taken by the State Govt. and not by the municipal council whose limits are sought to be extended. (Para 5)

Cases Referred: Chronological Paras

1980 Tax LR NOC 11 (Punj & Har) 3
AIR 1978 Punj & Har 290: 80 Punj LR
208 3

Suresh Amba, for Petitioners: Avtar Singh Khaira (for No. 1) and Kulwant Raj Chaudhary, (for No. 2) for Respondents.

ORDER:— These 154 landowners, cultivators and residents including the Gram Sabha and the Sarpanch of village Rania, Tehsil and District Gurdaspur, impugn the notifications issued under sub-secs. (1) and (3) of S. 5 of the Punjab Municipal Act (for short, the Act), Annexures P. 1 and P. 2, extending the limits of Municipal Committee, Dhariwal, leading to the inclusion of 2377 Kanals and 10 Marlas of land of this village within those limits.

2. The primary challenge to these notifications is on the ground of non-compliance of the provisions of sub-sec. (1) of S. 5 of the Act inasmuch as the State Government failed to deter-

mine the other manner in which its intent to extend the Municipal limits was to be published and the lack of such publication. On behalf of respondent No. 1, i.e., the State Govt. it is pleaded in para 1 of the written statement that the notifications, Annexures P. 1 and P. 2, were published in the Government Gazette and for the rest of the compliance of the provisions of sub-sec. (1) it was for respondent No. 2, that is, the Municipal Committee, to carry out the same. In the later part of the said written statement, i.e. para 3 (c), it has been stated that publication was, in fact, made in village Rania by beat of drum on Feb. 22, 1974 informing the villagers to file objections, if any, with the Deputy Commissioner, Gurdaspur, within six weeks from the date of the publication. It is also maintained that notices to that effect were pasted at conspicuous places in the village. The Municipal Committee in its return too maintains that such a publication through beat of drum was carried out and a note recorded by the Secretary of the Municipal Committee (Annexure R. 2) is also produced in support of this stand. In order to appreciate the respective contentions of the learned counsel for the parties it is but necessary to reproduce the contents of sub-sec. (1) of S. 5 of the Act which read as follows:—

"(1) The State Government, may, by notification published in the Official Gazette and in such other manner as it may determine, declare its intention to include within a municipality any local area in the vicinity of the same and defined in the notification whether such area is a municipality or a notified area under this Act or not."

The stand of Mr. Amba, learned counsel for the petitioner is that this sub-section makes it imperative for the Government to publicise its intention about the extension of the municipal limits of a municipality in such other manner or mode (in addition to the publication in the Gazette) as it may determine. Further the learned counsel maintains that this determination has to be in each and every case whenever the State Government makes up its mind to extend the limits of a Municipality. On the other hand, the learned counsel for the respondents maintain that (i) the provisions of sub-s. (1) of S. 5 laying

down that the intent of the Government has to be published in any other manner than the publication in the State Gazette is only directory, (ii) the Government can take a general decision laying down the manner and mode in which it has to be published; and (iii) in the case in hand, such manner and mode was determined and was complied with.

3. After hearing the learned counsel for the parties at length and giving my thoughtful consideration to the entire matter, I find that the contentions raised by the learned counsel for the petitioners are full of merit. The argument of the learned counsel for the respondents stated at No. (i) above was considered in two earlier decisions of this Court in *Gupta Iron & Steel Rolling Mills v. State of Punjab* [CWP No. 2889 of 1975, decided on 5-9-1979: (1980 Tax LR NOC 11)] and *Ram Singh v. State of Haryana*, AIR 1978 Punj & Har 290, and was negatived.

4. So far as the stand of the learned counsel for the respondents stated at No. (ii) is concerned, I find that bare reading of sub-sec. (1) of S. 5 of the Act indicates that the other manner in which the State Government is to declare or publicise its intention about the inclusion of any area within the municipal limits, refers to a particular decision of a notification issued by the Government and this decision has to be taken by the Government and none else. In this view of the matter, there cannot possibly be any general determination of the method or manner in which the intention of the State Government has to be publicised. Such a determination has to be made keeping in view the facts and circumstances of each case.

5. With regard to the submission mentioned at No. (iii), the learned counsel for the State respondent very frankly and fairly concedes that there is no record available with him to show that while issuing notification Annexure P-1, the State Government ever determined the other mode or manner of publication in which the intention specified in this notification was to be publicised. He however, points out that a general decision was taken by the State Government somewhere in the year 1954 whereby it had been laid down that whenever a notification under S. 5 (1) of the

Act is published in the gazette, the contents of the same should be publicised by beat of drum and affixation. At the same time he points out that even that record is not available with him or with the department. In the face of this factual position anything done by the municipal committee even if it has been actually done — though it is being disputed by the learned counsel for the petitioner — would not satisfy the requirement of sub-sec. (1) of S. 5. As already pointed out, the decision about the mode and manner of publication has to be taken by the Government and it is for the Government to see to its compliance. It cannot be left to the municipal authorities to choose the manner in which such publicity has to be made or to satisfy itself that it has actually been so made.

6. In the light of the discussion above, I find that the notification issued under sub-s. (1) of S. 5 of the Act (Annexure P. 1) in so far as it relates to the revenue estate of village Rania, is wholly unsustainable and as a necessary consequence, the notification following it, i. e., Annexure P. 2, issued under sub-s. (3) has also to be quashed to that extent. I order accordingly with no order as to costs.

Order accordingly.

AIR 1982 PUNJAB AND HARYANA 91

S. S. SANDHAWALIA, C. J. AND

D. S. TEWATIA, J.

Umrao Singh and others, Appellants
v. Mehar Chand and others, Respondents.

L. P. A. No. 991 of 1980 in C. W. P. No. 4560 of 1978, D/- 1-9-1981.*

Constitution of India, Art. 226 — Punjab Gram Panchayat Act (4 of 1953), Ss. 13-C and 13-O — Alternative remedy — Election dispute — Efficaciousness of alternative remedy — Expiry of time for availability of remedy is not a ground. C. W. P. No. 4560 of 1980, D/- 24-9-1980 (Punj). Reversed. (Punjab Gram Panchayat Rules (1960), R. 32)

The existence of alternative remedy does not constitute an absolute bar on

*Against judgment of S. P. Goyal J., in Civil Writ Petn. No. 4560 of 1980, D/- 24-9-1980.

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the exercise of the powers under Art. 226. The High Court always retained the discretion to exercise its power under Art. 226 if it found the alternative remedy to be expensive, inadequate or inefficacious. Where alternative remedy has been found to be efficacious and adequate, the Courts have unfailingly relegated the petitioner to the availing of the alternative remedy. (Para 7)

In the instant case, a single Judge of the High Court disallowed the preliminary objection regarding the maintainability of the writ petition on the ground of existence of alternative remedy on two grounds: (1) that the alternative remedy of the regular election petition had become inefficacious because of the passage of time — the election was held in the year 1978 and 2½ years had passed by the time the petition came up for final decision, and (2) that he was doubtful if the election as a whole could be challenged by way of an election petition, for, according to him, the entire election was void ab initio. (Para 8)

Held, that the view of the Judge that the alternative remedy was inefficacious not in itself but because it could no longer be availed — the time to avail it having already expired by the time aggrieved party decided to approach the High Court — is not the correct view. If such would be the view of the efficaciousness of an alternative remedy, then there would be no alternative remedy which could not be rendered inefficacious by a party which does not wish to avail of it by merely waiting and allowing the limitation to expire. C. W. P. No. 4560 of 1980, D/- 24-9-1980 (Punj) Reversed. (Para 9)

Held further, that Section 13-O (1) (d) clearly envisages that if the result of the election in so far as it concerns the elected person has been materially affected by any non-compliance with the provisions of the Act or of any rule made under the Act, the prescribed authority shall set aside the election of the elected person. Under the compliance of the provisions of the Act and the Rules made thereunder, only a person validly appointed as the returning officer could declare a person to be elected under Rule 32 of the Gram Panchayat Rules, 1960. But, if, in fact,

the result was declared either by a person who admittedly was not the returning officer or a person purporting to act as the returning officer although was not legally so appointed, then that would be a clear non-compliance with the provisions of the Act, and therefore, election of such a Panch could have been impugned before the prescribed authority within the prescribed period. (Paras 14, 15)

Cases Referred: Chronological Paras

AIR 1980 SC 1612	10
(1980) Civil Writ No. 4485 of 1978, D/- 25-4-1980 (Punj)	11
1979 Tax LR 1664: (1978) 80 Pun LR 644: 1978 Rev LR 613 (Punj)	10
AIR 1977 SC 1703: (1977) 2 SCJ 305	10
AIR 1975 Punj 115: 1974 Punj LJ 513 (FB)	10, 11, 13
1973 Punj LJ 623: 1973 Rev LR 747	7, 10
1973 Cur LJ 594: 1973 Rev LR 499 (Punj)	7, 10
AIR 1957 SC 242: 1957 SCA 433	13
AIR 1954 SC 513: 1954 All LJ 525: 1955 SCA 41	13

Gopi Chand with Mani Ram, for Appellants; G. C. Garg, for Nos. 1 and 2, for Respondents.

D. S. TEWATIA, J.:— Challenge to the election of Panches, respondents 3 to 7 to the writ petition, met with success with the learned single Judge despite a threshold objection to the maintainability of the writ petition in view of the unavailing of the alternative remedy by the petitioners by way of election petition before the prescribed authority under the Punjab Gram Panchayat Act, 1952 (as adopted by the Haryana State vide Haryana Adaptation of Laws Order, 1968, read with Sec. 88 of the Punjab Reorganisation Act of 1956), hereinafter referred to as the Act. The attack against the judgment of the learned single Judge in this Letters Patent Appeal is confined to this aspect only.

2. Before concretising the rival assertions and resolving them, a few relevant facts, directly bearing upon the contentions advanced on behalf of the appellants, deserve noticing at the very outset.

3. The Haryana Government constituted Nangal Sabha under Sec. 5 of the Act, vide notification dated 15-4-

1977. In that notification, the strength of the executive committee of the Gram Sabha also known as Gram Panchayat, including the Panches and the Sarpanch, was fixed at 6-5 from the general quota and one from the reserved quota to be elected from amongst the members of the scheduled castes. Subsec. (1) of Sec. 5 of the Act envisages election of a woman-Panch and where none is elected, then it provides for co-option of one woman-Panch.

4. From aspirants for Panchship the returning officer, respondent No. 1 to the writ petition, received in all only eleven nomination-papers. Six of them, however, withdrew, with the result that five candidates remained in the field. Under the rules, then operative, there were two separate constituencies — one for the Sarpanch and the other a multi-member single constituency for the Panches. Each elector of the Gram Sabha was to cast two votes — one for the Sarpanch and the other for a Panch of his choice. Four candidates in the general category and one candidate in the scheduled caste reserve category receiving the highest votes in the respective category were to be declared elected as Panches from the multi-member single constituency. In the given situation, since only five candidates, including a scheduled caste candidate, remained in the field and only five Panches were to be elected for five seats, there ought not to have been any election. However, the election was held on 8-6-1978 and the returning officer declared first four, that is, respondents 3, 4, 5 and 7, to be elected as Panches, and Parbhati, who secured the fourth position amongst the general category candidates was declared unsuccessful under a wrong view of the notification dated 15-4-1977 *ibid* that only four Panches including a scheduled caste Panch was to be elected and the fifth Panch — a woman — was to be co-opted.

5. The two petitioners, who were voters of the said Gram Sabha, on 4-11-1978, filed the present writ petition challenging initially the election of the Sarpanch, respondent No. 2, and Panches, respondents 3, 4, 5 and 7, and co-opted woman-Panch, respondent No. 8 but this petition was later on amended on 7-5-1980, and the election of Parbhati, who was declared unsuccessful

by the returning officer but later on was declared elected as member of the Gram Panchayat, Nangal, by the State Government, vide notification No. 53197, dated 13-9-1978, annexure P. 3, was also challenged.

6. At the argument stage, the petition against the Sarpanch, respondent No. 2, was, however, not pressed.

7. The learned single Judge disallowed the preliminary objection with the following observations:—

"Reliance for this contention was placed by the learned counsel on *Pritam Singh v. State of Punjab*, 1973 Pun LJ 623 and *Tarsem Lal v. Buta Ram*, 1973 Cur LJ 594. I am, however, unable to subscribe to the view of the learned counsel because with the passage of time, the remedy of the regular election petition has become inefficacious. The election was held in the year 1978 and two and a half years have passed since then. The term of the Gram Panchayat being five years, if the petitioners are relegated to the ordinary remedy, they are not likely to get any relief by the time the term of the Panchayat expires. Moreover, it is also doubtful if the election as a whole can be challenged by way of an election petition. In these circumstances, I do not think it proper to dismiss the petition because of the availability of the ordinary remedy under the statute."

The concept of alternative remedy as a restraint on the power of the High Court to entertain a given petition in exercise of its extraordinary writ jurisdiction under Art. 226 of the Constitution of India, either when it drew its potency from 'self-control' or call it 'judicial restraint' that the High Court imposed upon itself in the exercise of its power under Art. 226 of the Constitution which otherwise was plenary in its sweep and recognised no such bound or for a brief period from enactment of Forty-second Amendment to the Constitution, when amended Article 226 itself gave recognition to the existence of the alternative remedy as being a bar to the entertainability of writ petitions of certain categories mentioned therein, the judicial opinion has been unanimous that existence of alternative remedy did not constitute an absolute bar on the exercise of the powers under Art. 226 of the Constitu-

tion. The High Court always retained the discretion to exercise its power under Art. 226 if it found the alternative remedy to be expensive, inadequate or inefficacious. Where alternative remedy has been found to be efficacious and adequate, the Courts have unfailingly relegated the petitioner to the availing of the alternative remedy.

8. A perusal of the observations of the learned single Judge would show that he was persuaded to disallow the preliminary objection by two facts: (1) that the alternative remedy of the regular election petition had become inefficacious because of the passage of time — the election was held in the year 1978 and $2\frac{1}{2}$ years had passed by the time the petition came up for final decision, and (2) that the learned single Judge was doubtful if the election as a whole could be challenged by way of an election petition, for according to him, the entire election was void ab initio.

9. The first question that falls for consideration is as to whether the efficaciousness or adequacy of an alternative remedy is to be seen with reference to the nature of the 'alternative remedy' or with reference to the time when the party decides to have his grievance redressed. The learned single Judge appears to think that the alternative remedy was inefficacious not in itself but because it could no longer be availed — the time to avail it having already expired by the time aggrieved party decided to approach the High Court. With respect, that is not the correct view. If such would be the view of the efficaciousness of an alternative remedy, then there would be no alternative remedy which could not be rendered inefficacious by a party which does not wish to avail of it by merely waiting and allowing the limitation to expire.

10. On the contrary, the consensus of judicial opinion expressed in *Pritam Singh v. State of Punjab*, 1973 Pun LJ 623; *Tarsem Lal v. Buta Ram etc.*, 1973 Cur LJ 594; and *Avon Scales Company v. State of Haryana* (1978) 80 Pun LR 644; (1979 Tax LR 1664) is that if a party does not avail of the alternative remedy within the period prescribed by the given statute, then the other party acquires a valuable right and

the High Court would be depriving that party of that right by permitting the aggrieved party to invoke its extraordinary writ jurisdiction after the limitation for seeking the alternative remedy had expired as there- by such a party would have a period longer than the statute had intended for the redress of its grievance. This view has received the seal of authority even of the apex Court, as would be clear from the following observations of Krishna Iyer, J. who delivered the opinion for the Bench in *K. K. Shrivastava v. Bhupendra Kumar Jain*, AIR 1977 SC 1703:—

"It is important to notice what the High Court has overlooked is that the period of limitation prescribed by the rules is 15 days and if writ petitions are to be entertained long afterwards it will stultify the statutory provision....."

Aside from above it deserves highlighting that in regard to the challenge pertaining to election of a candidate, their Lordships expect that 'judicial restraint' exhibited by the High Courts in the exercise of their extraordinary writ jurisdiction should be bordering on total 'self-denial,' as would be evident from the following observations of Krishna Iyer, J. made in *K. K. Shrivastava's case* (supra) (at p. 1704):

"It is well settled law that while Art. 226 of the Constitution confers a wide power on the High Court there are equally well settled limitations which this Court has repeatedly pointed out on the exercise of such power. One of them which is relevant for the present case is that where there is an appropriate or equally efficacious remedy the Court should keep its hands off. This is more particularly so where the dispute relates to an election. Still more so where there is a statutorily prescribed remedy which almost reads in mandatory terms....."

As to the second aspect of the reasoning of the learned single Judge that he was doubtful if the whole election could be challenged by way of an election petition, it may be observed that here again, with respect, he appears to run counter to the judicial consensus which finds expression in the following observations of Krishna Iyer J. in *K. K. Shrivastava's case* (AIR 1977 SC 1703 at p. 1704) (supra):

"There is no foundation whatever for thinking that where the challenge is to an 'entire election' then the writ jurisdiction springs into action."

The above view has been reiterated by their Lordships of the Supreme Court in a recent decision reported in *Bar Council of Delhi v. Surjeet Singh*, AIR 1980 SC 1612, and the following observations of N. L. Untwalia J. who wrote the opinion for the Bench, in this regard can be recalled with advantage (at pp. 1620, 1621):—

"The view that merely because the whole election has been challenged by a writ petition, the petition would be maintainable in spite of there being an alternative remedy being available, so widely put, may not be quite correct and especially after the recent amendment of Art. 226 of the Constitution. If the alternative remedy fully covers the challenge to the election then that remedy and that remedy alone must be resorted to even though it involves the challenge of the election of all the successful candidates....."

What is more, it appears that the view expressed by a Full Bench of this Court in *Zile Singh v. State of Haryana*, AIR 1975 Punjab & Haryana 115, had not been brought to the notice of the learned single Judge, wherein it had been clearly enunciated that an election petition under Sec. 13-B of the Act, as amended and applied in Haryana, calling in question the election of all the Panches elected at one time to a particular Panchayat was competent. The prescribed authority under Sec. 13-C had the jurisdiction to entertain and decide such a petition on merits.

11. Mr. Garg then lastly contended that since the election of Parbhati, who was declared elected by the State Government, vide notification dated 13-9-1978, could not have been challenged before the 'Election Tribunal' and he was elected Panch only on 13-9-1978 — long time after the appellants were declared elected as Panches — so the election of Parbhati had perforce to be challenged on the writ side and if the voter-petitioners, respondents herein, had succeeded in getting his election set aside as they have, vide order dated 25-4-1980 passed in Civil Writ No. 4485 of 1978 (*Shera Ram v. State*

of Haryana and others), and if the High Court had necessarily to set aside the election of other Panches, that is, appellants herein, by virtue of the ratio of *Zile Singh's* case (AIR 1975 Punjab 115) (FB) (supra) then the voter-petitioners could also then justifiably challenge the election of the appellants on the writ side without availing the alternative remedy.

12. The learned counsel, we are afraid, is assuming too much when he says (1) that decision of the High Court setting aside the election of Parbhati by quashing the State Government notification dated 13-9-1978 as being illegal, would have necessarily involved the quashing of the election of other Panches too and, (2) that election of Parbhati could not have been challenged before the 'Election Tribunal.'

13. As regards the first, it may be observed that Parbhati had secured fourth position amongst general category candidates in that multi-member single constituency. Neither in the contingency where either the Election Tribunal or the High Court was to find that Parbhati was wrongly declared unsuccessful by the Returning Officer nor in the other contingency where his election as Panch by virtue of Government notification dated 13-9-1978 was to be set aside by the High Court as a result of the said notification, the election of the other Panches was to be adversely affected much less to be necessarily quashed. It would have been a different matter if his nomination papers had been rejected by the returning officer and the Election Tribunal or the High Court was later on to find that his nomination papers were wrongly rejected, then that fact would have necessarily resulted in the declaration of the election of other successful Panches also as invalid, as held by a Full Bench of this Court in the case of *Zile Singh* (AIR 1975 Punjab 115) (supra) following the ratio of the Supreme Court decisions in *Vashist Narain Sharma v. Dev Chandra*, AIR 1954 SC 513 and *Surendra Nath Khosla v. Dalip Singh*, AIR 1957 SC 242.

14. As regards the second, it may be pointed out that the provisions of Sec. 13-C of the Act, which are in the following terms, in terms clearly en-

visage a challenge to the election of any person as a Panch or Sarpanch on the grounds mentioned in Sec. 13-O of the Act:—

"13-C. (1) Any member of the Sabha may, on furnishing the prescribed security in the prescribed manner:—

(a) where an election was held after the 12th August, 1960, and before the 27th September, 1962, within thirty days of the latter date: or

(b) where an election is held after the 27th September, 1962, within thirty days of the date of announcement of the result thereof:

Present on one or more of the grounds specified in sub-sec. (1) of Sec. 13-O to the prescribed authority an election petition in writing against the election of any person as a Sarpanch or Panch....."

"13-O. (1) If the prescribed authority is of the opinion—

(a) that on the date of his election the elected person was not qualified or was disqualified to be elected under this Act; or

(b) that any corrupt practice has been committed by the elected person or his agent or by any other person with the consent of the elected person or his agent; or

(c) that any nomination has been improperly rejected; or

(d) that the result of the election in so far as it concerns the elected person, has been materially affected;

(i) by the improper acceptance of any nomination; or

(ii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void; or

(iii) by any non-compliance with the provisions of this Act or of any rule made under this Act, the prescribed authority shall set aside the election of the elected person.

* * *

Sub-clause (iii) of cl. (d) of sub-sec. (1) of S. 13-O of the Act reproduced above, clearly envisages that if the result of the election in so far as it concerns the elected person has been materially affected by any non-compliance with the provisions of this Act or of any rule made under this Act, the prescribed

authority shall set aside the election of the elected person.

15. Under the compliance of the provisions of the Act and the Rules made thereunder, only a person validly appointed as the returning officer could declare a person to be elected (see R. 32 of the Gram Panchayat Rules, 1960). But, if in fact, the result was declared either by a person who admittedly was not the returning officer or a person purporting to act as the returning officer although was not legally so appointed, then that would be a clear non-compliance with the provisions of the Act and, therefore, election of such a Panch could have been impugned before the prescribed authority within the prescribed period.

16. For the reasons aforementioned, we allow this appeal and set aside the judgment of the learned single Judge and dismiss the writ petition. However, there would be no order as to costs.

S. S. SANDHAWALIA C. J.:—
I agree.

Appeal allowed.

AIR 1982 PUNJAB AND HARYANA 96

M. M. PUNCHHI, J.

Murari, Appellant v. Pehladi died and represented by L. Rs. Hardevi and others, Respondents.

Second Appeal No. 603 of 1971, D/-14-8-1981*

Bengal Land (Redemption and Foreclosure) Regulation (No. 17 of 1806), Sec. 8 — Notice — Validity — Notice by Court on printed form — Sec. 7 referred — Mortgagor told to pay or tender amount or deposit sum "into this account" meaning thereby into 'Court' — Held mistake did not invalidate notice especially when Sec. 7 had been mentioned. AIR 1934 Lah 436 Rel. on; AIR 1923 Lah 71 (2), (1911) 2 Ind Cas 530 (Lah), AIR 1926 Lah 112, AIR 1926 Lah 215 and AIR 1927 Lah 141, Ref. (Para 11)

Cases Referred: Chronological Paras
AIR 1934 Lah 436: 35 Pun LR 433 10
AIR 1927 Lah 141: 28 Pun LR 153 9
AIR 1926 Lah 112: 89 Ind Cas 475 9

*From decree of P. L. Sanghi, Sr. Sub. J. with enhanced appellate powers Rohtak, D/- 8-2-1971.

KY/LY/F220/81/HR/RSK

AIR 1926 Lah 215: 26 Pun LR 743 9
 AIR 1923 Lah 71 (2): 68 Ind Cas 883 9, 10
 (1911) 12 Ind Cas 530: 1912 Pun LR 3 9

Balwant Singh Gupta, for Appellant;
 S. K. Goyal, for Respondents.

JUDGMENT:— This defendant's second appeal against a judgment and decree of reversal has arisen in these circumstances:—

2. The plaintiff-respondents brought a suit for declaration that they had become the owners of the suit land. It was alleged by them that the land in suit was mortgaged by the defendant Murari (now represented by his legal heirs) in their favour on 15-5-1963 for Rs. 8500/- by conditional sale. The deed contained a stipulation that in case the defendant-mortgagor failed to redeem the land in dispute within six months i. e. by 15-11-1963, the land mortgaged shall be deemed to have been sold to the plaintiffs for the consideration already received by the defendant. It was alleged that the plaintiffs duly served a notice upon the defendant demanding repayment of the consideration, but the latter did not pay it up in the year of grace. Thereafter the plaintiffs claimed to have applied to the District Judge, Rohtak for issuance of notice to the defendant u/s. 8 of the Bengal Regulation No. XVII of 1806 (briefly called the Regulation). Statutory notice was also duly served upon the defendant. The application was filed by the learned District Judge, Rohtak, on 6-8-1966 since the defendant failed to pay the mortgage amount within the time allotted. The plaintiffs thus claimed that they had become the owners of the land in dispute and prayed for the declaration asked for.

3. The defendant, while admitting the transfer, resisted the suit. He denied receipt of any notice of demand as allegedly served by the plaintiffs. He also denied that any notice was served upon him which might have been issued by the District Judge. In the alternative it was pleaded that the notice, if any, issued by the District Judge was not served in the manner required by law inasmuch as no copy of the petition to foreclose or copy of the mortgage deed etc., had been delivered to the defendant as also that the conditions prescribed by Ss. 7 and 8 of the Regu-

lation had not been observed or the proper procedure with regard thereto. He prayed for the dismissal of the suit.

4. On the pleadings of the parties, the following issues were framed:—

1. Whether mortgage mentioned in para 1 of the plaint has been validly foreclosed and the plaintiffs have become owners of the land in dispute?

1-A. Whether the plaintiffs issued a valid notice of demand on the defendant before the foreclosure proceedings and was the service of the defendant validly effect (sic) of the said notice?

2. Relief.

5. The learned trial Court held both the issues against the plaintiffs and in the result dismissed the suit. On appeal, the learned Senior Sub-Judge, Rohtak exercising enhanced appellate powers reversed the finding on both the issues, set aside judgment and decree of the trial Court and decreed the suit leaving the parties to bear their own costs. Now the defendant has approached this Court praying for the dismissal of the suit.

6. Shri Balwant Singh Gupta, the learned counsel for the appellant, maintains that no valid notice of demand was served by plaintiffs upon the defendant before the foreclosure proceedings as also that no proper notice u/s. 8 of the Regulation was served upon the defendant by the learned District Judge. On the other hand Shri S. K. Goyal, the learned counsel for the respondents, repudiates the claim of the defendant and asserts that the lower appellate Court on proper material had come to the conclusion that the requisite notices had been served and those being findings of fact could not be interfered with in second appeal.

7. To appreciate the respective contentions of the parties, it would be appropriate to take a note of the requirements of Ss. 7 and 8 of the Regulation. It is essential for the mortgagee to first make a demand of the payment from the mortgagor. This is a pre-requisite before moving the District Judge u/s. 8 of the Regulation. Here the plaintiffs clearly mentioned in the plaint that the defendant was given a registered notice demanding the payment of mortgage money before the application was made. At the trial they produced Shri Hoshia

Singh Rath, Advocate, Rohtak as P. W. 1 who deposed that before making the application on behalf of the plaintiffs in the Court of District Judge, Rohtak, he had issued a notice of demand to the defendant by registered post and acknowledgement due receipt received back by him carrying the signature of the defendant was Exhibit P. 2 present on the foreclosure file of the District Judge. An office copy kept by him of the notice of demand, as he stated, had been filed with the foreclosure application and was placed on that judicial file. Argument has now been built, as was done in the Courts below, that the copy of the notice was not available on that file and thus it could not be assumed as to what the notice allegedly sent by the plaintiffs purported to be. The lower appellate Court called for the file of District Judge, Rohtak (as has been done now by me) and took note therefrom that the list of documents signed by the counsel for the plaintiffs mentioned of copy of notice dt. 4-2-1966 sent by the plaintiffs to the defendant. Though on the file the postal receipt and original acknowledgement due receipt purported to have been signed by the defendant are present, yet the copy of the notice was found missing from the file. The lower appellate Court also inferred that some pages on the file were missing and it appeared that the original mortgage deed as also a copy of the mortgage deed were produced by the applicants in the Court of the District Judge. From this he inferred the existence of the copy of the notice, and hence on the statement of Shri Hoshier Singh Rath P. W. 1, despatch of notice to the defendant was held a consequence, which could not be overlooked.

8. The learned counsel for the appellant contended that in the absence of the copy of the notice, it could not be assumed what were the contents thereof. The argument indeed is ingenious but loses much of its sheen in the light of the other material available on the record. Undeniably the acknowledgement due receipt bears the signatures of Murari defendant in Urdu. Corroborative with the postal receipt, it proved that some letter was sent by Shri Hoshier Singh Rath to the defendant under registered cover and it was received by him. The defendant did not bring forward the containing documents received within the registered cover to

demolish the case of the plaintiffs. Thus the lower appellate Court rightly inferred from those documents aided by the statement of Shri Hoshier Singh Rath that he had served a valid demand notice on the defendant and to this no fault can be found. The validity of the demand notice was also, challenged on the score that Shri Hoshier Singh Rath had stated that he received power of attorney from the plaintiffs on 21-2-1966, had made an application to the District Judge on 24-2-1966, and that he had not got signed the power of attorney from the plaintiffs earlier. From this it was sought to be urged that Shri Hoshier Singh Rath had not been authorised by the plaintiffs to serve the defendant the requisite demand notice on behalf of the plaintiffs. This argument is also misplaced as an Advocate has the implied authority to act on behalf of his client unless that authority by word, action or conduct is questioned by that party or repudiated by it. Here the plaintiffs have owned the notice served by Shri Hoshier Singh Rath to be their own. Thus in the circumstances execution of a power of attorney in favour of Shri Hoshier Singh Rath was not a pre-requisite for sending the demand notice to the defendant on behalf of the plaintiffs. The view of the lower appellate Court on that score is unassailable.

9. The next argument is built on the requirement of S. 8 of the Regulation. It is contended that the notice issued by the District Judge neither contained reference to S. 7 of the Regulation nor was copy of S. 7 or its translation sent therewith. Even the notice was alleged to be faulty as it did not contain the alternatives as required by law. The counsel for the appellant does not dispute that notice was received from the District Judge but asserts that the same was not a valid notice and to press his point he drew my attention to Exhibit P. 3, the copy of the notice. It is extracted below:—

".....Petitioner has applied to this Court u/s. 8 of Regulation XVII of 1803 for foreclosure of the mortgage and rendering the sale conclusive, as copy of his petition is herewith furnished to you, and you are hereby informed that unless within one year from the date of receipt of this notification you pay or tender to the said petitioner or to his

representative the sum lent under the said sale deed viz. Rs. 8500/- or the balance of the sum remaining undischarged together with such interest as may be due thereon, or unless you pay the said sum into this account within the above period, the mortgage will be foreclosed and the conditional sale will become conclusive....."

It was argued on the strength of *Tara Chand v. Chimani* (1911) 12 Ind. Cas. 530 (Lah) and *Zora v. Chandu* AIR 1923 Lah 71 (2), both decisions rendered by Chevis J., and on later decisions of Behari Lal v. Balmokand AIR 1926 Lah 112; Diwan Singh v. Jiram AIR 1926 Lah 215; Gobind Mal v. Ram Chand, AIR 1927 Lah 141, that all the alternatives provided for in S. 7 of the Regulation had to be mentioned in the notice u/s. 8. Those were that the mortgagor had to be told that he had the option to pay or tender the sum asked for to the mortgagee or his legal representative or in the third alternative to deposit the same within the time specified in the Court within whose jurisdiction the mortgaged property was situated. According to the learned counsel for the appellant, the choice of Court deposit was not made available to the defendant as per recital in Exhibit P. 3 and that defect alone would make the notice and the foreclosure proceedings void altogether.

10. In *Dhum Chand v. Kishan Chand* AIR 1934 Lah 436, a Division Bench of Lahore High Court while interpreting the provisions took note of some decisions afore-quoted and in particular of Chevis J. in *Zora v. Chandu*, AIR 1923 Lah 71 (2), but came to the conclusion in this manner:—

"In my view the requirements of the law were fully complied with by the reference to Sec. 7 in the notice. That such reference is all that is necessary has been frequently decided and the unnecessary addition of the incomplete description of the mode of redemption allowed by Sec. 7 cannot affect the validity of the notice. I can think of no principle of law which justifies any other view."

11. Now here in the notice, mention of Sec. 7 has been made. Options of tender and payment have been enumerated. There is no dispute on that score. The dispute is with regard to "or unless you pay the said sum into this account with-

in the above period" signifying that payment in Court was not suggested in the notice. From the summoned foreclosure file of the District Judge, I have noticed that the original from which copy, Exhibit P. 3, has been prepared is a printed form used by the Court in preparing the notice. This is the official copy kept on the record and the one sent to the defendant has not been produced by him. The official copy is on official stationery and the recital afore-noted is printed there. It contains the signatures of the District Judge. In the Rules and Orders of the Punjab High Court, Vol. VI, Part A-II, there is a form prescribed for notice u/s. 8 of Regulations XVII of 1806 pertaining to petition for foreclosure of mortgage of land. It bears printed form No. 189. Now here the recital afore-noted is a part of that form, but the word is Court instead of account as found in the printed form filled in as the official copy on the foreclosure file of the District Judge. So this is an obvious misprint. The notice sent by the District Judge on such form bearing this patent mistake would not be fatal to the proceedings especially when mention has been made of Sec. 7 of the Regulation in the notice. *Dhum Chand's* case (supra) would lend support to this view. Even otherwise, there is no higher principle for the guidance of the Court than the one that no act of the Court should harm a litigant and it is the bounden duty of the Courts to see that if a person is harmed by a mistake of the Court, he should be restored to the position he would have occupied but for that mistake. This is amply summed up in the maxim "*actus curiae neminem gravabit*." The copy of the notice on the foreclosure file, prepared and signed by the District Judge, could not by itself have misled the defendant for it never reached him. The notice which he received has not been brought on the file to detect if there was any such mistake which misled the defendant. The plaintiffs could not be made to suffer for such a defect in the official copy of the notice found on the District Judge's file. No capital can be made out by the defendant for the printer's error overlooked by the District Judge. The view of the lower appellate Court on this score is unassailable. It is equally unassailable on the question whether the said copy of notice bore the initials

or the signatures of the presiding Officer since it has come to the view that these were his official signatures and not mere initials. That is a finding of fact incapable of being interfered with in second appeal.

12. For the foregoing reasons, there is no merit in the appeal which is hereby dismissed. There would, however, be no order as to costs.

Appeal dismissed.

AIR 1982 PUNJAB AND HARYANA 100

R. N. MITTAL, J.

Gauri Shankar Verma, Petitioner v. State of Haryana and others, Respondents.

Civil Writ Petn. No. 3464 of 1981, D/-9-9-1981.

(A) Constitution of India, Arts. 12, 15 — Admission to medical entrance examination — Maharshi Daya Nand University is 'State' within meaning of Art. 12 — It is entitled to lay down certain income criteria for determining social and educational backwardness of the candidate.

The M. D. University is an autonomous body constituted under a specific enactment and it therefore falls within the four corners of the words "authorities within the territory of India" in Art. 12. It is, thus, a State for purposes of Part III of the Constitution and hence the M. D. University could lay down the income limit for determining social and educational backwardness of the candidates while giving admission to medical entrance examination. (Para 9)

The State can make a special provision for advancement of classes, which it considers socially and educationally backward and that will not be in contravention of clause (I) of Art. 15. Therefore, the State is entitled to lay down the criteria for determining socially and educationally backward classes. M. D. University being the State is also entitled to do so. (Para 9)

(B) Constitution of India, Art. 15 — M. D. University issuing prospectus for medical entrance exam. — Expression "backward classes" — Definition based on some income criteria — Valid.

Where the M. D. University issued a prospectus for medical entrance examination and laid down some income criteria

for determining the backward class candidates it could not be held to be bad.

(Para 11)

While determining social and educational backwardness if income criteria is laid down in addition to caste criteria, it cannot be held to be bad. In clause (4) of Art. 15, the words used are "socially and educationally backward classes". Generally poverty is the root cause for social and educational backwardness. While determining social and educational backwardness, the economic aspect cannot be overlooked. AIR 1964 SC 1823. Followed; AIR 1972 SC 1375 and AIR 1973 SC 930, Disting. (Paras 10, 11)

(C) Constitution of India, Art. 15 — Maharshi Daya Nand University Prospectus for medical entrance exam., 1981-82 Chap. IV, Cl. (I) — Income criteria for falling within "backward classes" — Determination and interpretation of.

The M. D. University authorities intend to give benefit of reservation to the candidate of backward classes whose normal family income did not exceed Rupees 4,200 per annum. The intention of the authorities cannot be that if a candidate belongs to a family whose normal income is much higher than Rs. 4,200 for several years and it came down to Rupees 4,200 prior to the year in which he seeks admission, he will become eligible to seek admission. Similarly, the authorities did not intend that if his family income had been below Rs. 4,200 per annum for several years and had increased to slightly over Rs. 4,200 in the year prior to the year in which admission is sought, he becomes ineligible. In the circumstances, the only criterion can be that the average annual income of the family in the previous years should not exceed Rs. 4,200 per annum. The average income of the past five years will be a reasonable criterion to do so. (Para 15)

(D) Constitution of India, Arts. 15 and 16 — Admission to medical colleges — Reservation of seats for backward classes — Income criteria — Haryana Govt. Instructions dated 17-5-73 deleting income criteria regarding members of backward classes — Members of backward class brought at par with members of Scheduled Castes — Held, that the instructions applied only for recruitment to service and they did not apply to reservation in technical, educational and professional institutions — Educational institutions were not bound to follow them. (Para 8)

Cases Referred: Chronological Paras

AIR 1973 SC 930: 1973 Lab IC 565: (1973)
1 SCC 420 12

AIR 1972 SC 1375: (1972) 1 SCA 214 12

AIR 1968 Ker 42: 1967 Ker LT 266 (FB) 11

AIR 1967 Andh Pra 353: (1966) 1 Andh
WR 403 11

AIR 1964 SC 1823: (1964) 1 SCA 132 10

R. S. Mongia, for Petitioner; R. P. Bhasin and J. L. Gupta, for Respondent No. 3.

ORDER:— Briefly, the facts are that the petitioner being a Sunar, belongs to a backward class in Haryana. In terms of the Government Instructions, dated 7th July, 1981 (copy Annexure P-3), regarding reservation of seats in the educational institutions in Haryana, eight seats were reserved for candidates belonging to backward classes in the Government Medical College, Rohtak. For the purpose of admission to the M. B. B. S. Course in that College, an Entrance Examination was held on 27th/28th June, 1981. The petitioner had passed the Pre-Medical Examination from the Maharshi Daya Nand University, Rohtak (hereinafter referred to as the M. D. University), in April, 1981. He appeared in the Entrance Examination and was placed at number seven on the merit list of the candidates pertaining to the backward classes.

2. The M. D. University has issued the prospectus regarding the Medical Entrance Examination 1981-82. Backward Class candidates have been defined in clause (I) of Chapter IV of the said prospectus. According to this clause, backward classes include all the residents of Haryana State whose family income is less than Rs. 1,000 per annum, irrespective of the fact as to which caste, community or class they belong and what profession they are following, and the candidates belonging to backward classes, as declared by the State Government and whose family income does not exceed Rs. 4,200 per annum. It is alleged that though the latter class in the prospectus is against the Haryana Government instructions dated 17th May, 1973 (Copy Annexure P-4), yet the petitioner attached a certificate from the Sub-Divisional Officer (Civil), Jhajjar, to the effect that the petitioner's family income from all sources was Rs. 9,700 per annum. Consequently, the petitioner was not admitted in the College in spite of his having secured the seventh position in the merit list prepared on the basis of the

Entrance Examination. He has challenged the order rejecting his candidature inter alia on the grounds that clause (I) of Chapter IV of the Prospectus providing the family income of Rs. 4,200 in the case of backward classes, as declared by the Government, is against the Haryana Government instructions applicable to the educational institutions in the State; that the instructions dated 7th July, 1981 (copy Annexure P-3) and dated 17th May, 1973 (copy Annexure P-4) are applicable to the educational institutions and that if the income criteria is taken to be valid, the annual income for the financial year in question and not for the previous years should be taken into consideration.

3. The writ petition has been contested by the respondents. In its written statement respondent No. 1 has admitted that Sunars have been declared as members of the Backward Classes up to 19th August, 1985, and that the instructions dated 17th May, 1973, and 7th July, 1981, were issued by the Government. It has also admitted that there was no Government policy laying down income criteria for reservation of seats for backward classes in the educational institutions. The other allegations in the writ petition were, however, denied.

4. The Director-Principal, Medical College, Rohtak, respondent No. 2, has, in his return, stated that the petitioner submitted an income certificate from the Sub-Divisional Officer (Civil), Jhajjar, that his family income from all sources was Rs. 9,700 per annum, but in cl. (I) (b) of Chapter IV of the Prospectus, it had been provided that the candidates belonging to the backward classes, as declared by the Government, would not be treated as belonging to such classes for the purpose of admission to the College, if their family income exceeded Rs. 4,200 per annum. Therefore, the petitioner was debarred from getting the benefit of the seats reserved for the candidates of backward classes. He has further stated that the instructions dated 17th May, 1973 (copy Annexure P-4), are not applicable for the purposes of admission to the educational institutions. M. D. University has filed a separate return wherein it has taken similar pleas as have been taken by respondent No. 2.

5. It is contended by the learned counsel for the petitioner that the instructions, Annexure P-3 and Annexure P-4, are applicable to the educational institutions. He further submits that even if it is held that the instructions are not

applicable to such institutions, the M. D. University has no authority to lay down the income limit for the declared backward classes by the State Government.

6. I have duly considered the argument of the learned counsel, Annexure P-3 is the letter dated 7th July, 1981, containing instructions from the Commissioner and Secretary to Government, Haryana, Welfare of Scheduled Castes and Backward Classes Department, to all heads of Departments, regarding reservation of seats for Scheduled Castes/Scheduled Tribes and Backward Classes in Technical, Educational and Professional Institutions. By virtue of this letter, the State Government increased the reservation of seats in the technical, educational and professional institutes from 2 per cent to 10 per cent, with a proviso that the total number of seats to be reserved for various categories should not exceed 50 per cent and that the seats reserved for the members of the Scheduled Castes should not be reduced below 20 per cent. Respondents Nos 2 and 3 did not dispute the applicability of these instructions. Rather, the said respondents have admitted that they followed the instructions and increased the seats for the Backward Classes for admission in the College from 2 to 8.

7. Regarding the applicability of the instructions dated 17th May, 1973, Annexure P-4, the categorical stand of the said respondents is that these do not apply to educational institutions and, therefore, they are not bound to follow them. Annexure P-4 contains instructions relating to abolition of the limit of income regarding the reservation in service for the members of the Backward Classes, from the Chief Secretary to Government, Haryana, to all Heads of Departments, etc. Prior to the issuance of the letter, directions had been issued that only those persons whose family income did not exceed Rs. 1,800 per annum would be considered as belonging to Backward Classes for the purposes of reservation in service. No income criteria was laid down for the members of the Scheduled Castes. By this letter, the income criteria regarding the members of the Backward Classes was deleted and they were brought at par with the members of the Scheduled Castes for the purposes of recruitment against reserved posts.

8. The learned counsel for the petitioner has drawn my attention to a sentence in the letter (Annexure P-4) to the

effect that such a limit can be imposed for the grant of scholarship which had also been imposed for the members of the Scheduled Castes, and urged that the letter was of general applicability and did not apply for recruitment to the service only. I am not inclined to accept this submission of the learned counsel. There is no mention in the letter that it also relates to reservations in the technical, educational and professional institutes as was stated in Annexure P-3. If it had to apply to such reservations, that would have been included in it. I consequently reject this submission of the counsel.

9. The next question that arises for determination is as to whether the M. D. University could lay down the income limit for the declared Backward Classes. The Medical College is affiliated to the M. D. University which also holds the Entrance Examination for admission to the College. It has issued Prospectus for the Entrance Examination wherein all the conditions for appearing in the examination have been laid down. Article 12 of the Constitution of India defines the State for the purposes of Part III, according to which it includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India. The M. D. University is an autonomous body constituted under a specific enactment and it therefore falls within the four corners of the words "authorities within the territory of India" in Art. 12. It is, thus, a State for the purposes of Part III of the Constitution of India. Article 15 relates to prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. Clause (1) of that Article says that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Clause (4) is in the nature of a proviso which inter alia provides that nothing in this Article shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. Thus, the State can make a special provision for advancement of classes, which it considers socially and educationally backward and that will not be in contravention of clause (1). Therefore, the State is entitled to lay down the criteria for de-

termining socially and educationally Backward Classes. M. D. University being the State is also entitled to do so.

10. Now, the question is whether the income criteria as laid down by the M. D. University is good or it contravenes Art. 15. In clause (4) of Art. 15, the words used are "socially and educationally backward classes." Generally poverty is the root cause for social and educational backwardness. While determining social and educational backwardness, the economic aspect cannot be overlooked. A similar question arose in *R. Chitralekha v. State of Mysore*, AIR 1964 SC 1823. In that case, the Court was dealing with an order providing that classification of socially and educationally backward classes under Art. 15 (4) be made on the basis of economic condition and occupation. It was stated by the Government that the families whose income was Rs. 1,200 per annum or less and the persons or classes following the occupations of agriculture, petty business, inferior services, crafts or other occupations, involving manual labour, were, in general, socially, economically and educationally backward. It also listed the following occupations as contributing to social backwardness: (1) actual cultivator; (2) artisan; (3) petty businessmen; (4) inferior services, including casual labour and (5) any other occupation involving manual labour. The impugned order did not take into consideration the caste of an applicant as one of the criteria for backwardness. It was observed by Subba Rao, J., speaking for the majority, that the authority concerned may take caste into consideration in ascertaining the backwardness of a group of persons but if it does not, its order will not be bad on that account, if it can ascertain the backwardness of a group of persons on the basis of other relevant criteria. Caste is only a relevant and not a compelling circumstance in ascertaining the backwardness of a class and where it can be done the social backwardness of a group of citizens can be determined without reference to caste at all. If the classification of backward classes of citizens was based solely on the caste of the citizen, it might not always be logical and might perhaps contain the vice of perpetuating the castes themselves. Besides, if the caste of the group of citizens was made the sole basis for determining the social backwardness of the said group, that test would inevitably break down in relation to many sections of Indian So-

ciety which do not recognise castes in the conventional sense known to Hindu society. That is why the caste in relation to Hindus may be a relevant factor to consider in determining the social backwardness of groups or classes of citizens, it cannot be made the sole or the dominant test in that behalf.

11. The above case was followed by a Division Bench of Andhra Pradesh High Court in *Desu Rayudu v. A. P. Public Service Commission*, AIR 1967 Andh Pra 353, and Full Bench of Kerala High Court in *V. Hariharan Pillai v. State of Kerala*, AIR 1968 Ker 42. In the former case, the learned Bench held that any help on the basis of caste may result in assisting even those who do not deserve such assistance merely because they belong to that caste and also denying such help to those who deserve merely because they belong to certain castes not included in the list of 'backward classes'. All those who deserved economic assistance under the previous arrangement for advancement of education would continue to get under the new criteria based on economic considerations. It is only those who were getting the assistance without deserving it that are perhaps left with a grievance. The economic basis, therefore, not only removes the abovesaid defects, but puts the assistance of equitable and socially just basis and extends a helping hand to all those who really deserve such assistance for their advancement in education. The learned Bench consequently rejected the contention that economic considerations cannot be the basis for determining any assistance to be given under Art. 15 (4). The Full Bench in *V. Hariharan Pillai's* case (supra) laid down that poverty or poor economic condition played a great part in the social and/or educational backwardness of a class of people. From the above observations, it is evident that while determining social and educational backwardness if income criteria is laid down in addition to caste criteria, it cannot be held to be bad.

12. The learned counsel for the petitioner placed reliance on the State of Andhra Pradesh v. U. S. V. Baram, AIR 1972 SC 1375, and *Janki Prasad Parimoo v. State of J and K*, AIR 1973 SC 930. In the former case, the Bench observed that if an entire caste is as a fact found to be socially and educationally backward, their inclusion in the list of Backward Classes by their caste name is not violative of Art. 15 (4). A caste is also a class

of citizens and a caste as such may be socially and educationally backward. It has been further held that if after collecting the necessary data, it is found that the caste as a whole is socially and educationally backward the reservation made of such persons will have to be upheld notwithstanding the fact that a few individuals in that group may be both socially and educationally above the general average. In the latter case, it was ruled that mere educational backwardness or the social backwardness does not by itself make a class of citizens backward. In order to be identified as belonging to such a class, one must be both educationally and socially backward. In my view, both the cases are distinguishable and the observations therein were made in a different context. Accordingly, the counsel cannot derive any benefit from those observations.

13. The learned counsel for the petitioner has lastly argued that the petitioner sought admission in the College in the month of May, 1981, and for admission in that month, the income from 1st April, 1980, to 31st March, 1981, is relevant; the annual income of the family of the petitioner for that year is Rs. 3,100 and, therefore, the petitioner is entitled to the admission.

14. I have given my thoughtful consideration to the argument but am not impressed with it. In order to determine the question, it will be relevant to reproduce hereunder clause (I) of Chapter IV of the Prospectus:—

"(1) Backward Classes Candidates: The following categories of persons are included in the backward classes:—

(a)

(b) Candidates belonging to backward classes as declared by the State Government must be from communities such as are special to these backward communities, excluding those whose family income exceeds Rs. 4,200 per annum. They will be entitled to privileges being enjoyed by backward classes. They are required to produce a certificate to the effect in the forms in Appendix B."

The certificate given in Appendix B is as follows:—

"Certificate of Yearly Income of Parents/Guardians.

This is certified that Mr./Miss..... s/o, d/o..... is a permanent resident of Village P. O. Tehsil District (Har-

yana). The yearly income from all sources of his/her parents/guardians is Rs. Seal of the Court Date

Deputy Commissioner/
G. A. to D. C. or Sub-
Divisional Officer
(Civil).

15. In Clause (I) and the pro forma of the certificate, the year for which the income is to be taken into consideration is not mentioned. It cannot be denied that the University authorities want to give benefit of the reservation to the candidates of backward classes whose normal family income does not exceed Rupees 4,200 per annum. The intention of the authorities cannot be that if a candidate belongs to a family whose normal income is much higher than Rs. 4,200 for several years and it came down to Rupees 4,200 prior to the year in which he seeks admission, he will become eligible to seek admission. Similarly, the authorities did not intend that if his family income had been below Rs. 4,200 per annum for several years and had increased to slightly over Rs. 4,200 in the year prior to the year in which admission is sought, he becomes ineligible. In the circumstances, the only criterion can be that the average annual income of the family in the previous years should not exceed Rs. 4,200 per annum. The question arises, how many years' average income should be taken into consideration for determining the eligibility. In my view, the average income of the past five years will be reasonable criterion to do so. If the clause and the certificate are not interpreted in this way, the candidates who seek admission in the College can manage to obtain certificates so that they fall within the purview of candidates belonging to backward classes.

16. It is stated that the University authorities have not taken into consideration the income of the family of the candidate for the year immediately prior to the year in which he was seeking admission. The University had fixed 25th May, 1981, for submitting the application forms, duly completed in all respects. It was specifically said that the applications received after that date would not be entertained. The petitioner submitted the application with the requisite certificate dt. 23rd June, 1981, showing the income of the family as Rs. 9,700 per year. His application was rejected on the ground of family income. He then filed another certificate, Annexure P-5, dated

28th July, 1981, showing the annual income of the family as Rs. 3,100. It is stated that the earlier certificate was not for the relevant year but the later one was, and, therefore, he was entitled to admission. The petitioner submitted the later certificate after his application had been rejected. The University could reject the application being incomplete if the certificate of income relating to the relevant year had not been annexed. It could also reject the application if the income mentioned in the certificate was taken into consideration by it. The petitioner cannot, therefore, make a grievance regarding the rejection of his application. It may also be mentioned that certificate, Annexure P-5 is not in the prescribed form and the authorities were not bound to take it into consideration. Consequently, I reject the contention of the learned counsel for the petitioner.

17. For the aforesaid reasons, I do not find any merit in this writ petition and dismiss the same with no order as to costs.

Petition dismissed.

AIR 1982 PUNJAB AND HARYANA 105

G. C. MITTAL, J.

L. D. Arora, Petitioner v. Smt. Sushila Devi and another, Respondents.

Civil Misc No. 3163 C.II of 1981 and Civil Revn. No. 2075 of 1981, D/- 3-9-1981.*

East Punjab Urban Rent Restriction Act (3 of 1949), S. 16 — Proceedings before Rent Controller — S. 35B, C.P.C. as it is has no application—However as Rent Controller is persona designata he can follow procedure under S. 35B and strike off defence. (Civil P. C. (1908), S. 35B).

In view of S. 16, to proceedings before Rent Controller, S. 35-B, Civil P. C. as it is is not applicable, but the Rent Controller is a persona designata and is entitled to follow any procedure which in law can be termed to be either reasonably correct or can promote justice. Thus, where in an eviction suit, the Rent Controller followed the procedure laid down in S. 35B, C.P.C. and struck off the defence of the tenant it could not be said that the Rent Controller exceeded his jurisdiction. AIR 1981 Punj & Har 269 (FB), Rel. on. (Para-3)

Cases Referred: Chronological Paras
AIR 1981 Punj & Har 269: 83 Pun LR 555 (FB) 3

H. L. Sarin with R. L. Sarin, for Petitioner.

ORDER:— States that the Appellate Authority was in error in coming to the conclusion that no appeal lay before it. Assuming that an appeal lies, the real question to be decided would be whether the order of the Rent Controller can be said to be erroneous.

2. The landlord sought ejectment of the petitioner on the ground of change of user of the premises from residential to non-residential as also on the ground of non-payment of rent. Since tender was made on the first date of hearing, the ground of non-payment probably disappeared. October 16, 1980 was fixed as the date for the filing of the written statement but the tenant did not file the written statement on that date and sought for an adjournment which was granted and the tenant was directed to file written statement by 30th Oct., 1980 on payment of Rs. 15 as costs. Soon after this order was passed, an application was filed by the tenant for directing the landlord to file the rent-note in Court. On Oct. 26, 1980, the tenant filed another application for review of the order dated 16th Oct., 1980 on the ground that the tenant should be asked to file written statement only after the landlord has filed the rent-note in court. A notice on the aforesaid application was given for 30th Oct., 1980 and on that date, the court dismissed the application for review and since the tenant did not pay the costs of Rs. 15 nor filed the written statement on that date, the defence of the tenant was struck off by the impugned order dated 21st Nov., 1980, in view of S. 35-B of the Code of Civil Procedure (hereinafter called the Code). It may be noted that the tenant had filed the written statement on 5th Nov., 1980 although without the permission of the Rent Controller.

3. Under S. 35-B of the Code, the order of the kind passed by the Rent Controller is clearly permissible as held by a Full Bench of this Court in Anand Parkash v. Bharat Bhushan Rai, (1981) 83 Pun LR 555: (1981) 2 Rent LR 249: (AIR 1981 Punj & Har 269). The discretion under S. 35-B of the Code has been exercised by the Rent Controller and it has not been shown how the discretion exercised is palpably erroneous in law calling for interference either in appeal or re-

*Against order of A. S. Carg, Appellate Authority, Chandigarh, D/- 28-7-1981.

vision by this Court. Faced with this situation, Mr. Sarin urges that S. 35-B of the Code is not applicable to the proceedings before the Rent Controller because u/s. 16 of the East Punjab Urban Rent Restriction Act, 1949, as enforced in Chandigarh, the Rent Controller has the same powers of summoning and enforcing the attendance of the witnesses and compelling the production of witnesses as are vested under the Code and as such Section 35-B of the Code is not applicable in proceedings before the Rent Controller. Mr. Sarin is right. Section 35-B is not applicable as it is but the Rent Controller is a persona designata and is entitled to follow any procedure which in law can be termed to be either reasonably correct or can promote justice. S. 35-B is contained in Code which regulates the procedure of civil courts and it is open to the Rent Controller to follow a procedure laid down in any of the statutes for his guidance. Under the circumstances, even if he has followed something written in Section 35-B of the Code to regulate his procedure, it cannot be held that he has exceeded his jurisdiction.

4. Coming to the merits of the case, it is the tenant who knows for what purpose he took the premises on lease because he has been in possession of the premises from the inception of the tenancy. In the written statement he had to plead his case as to whether he took the premises for residential purpose or non-residential purposes or both and the question of the rent-note would have been a matter of evidence. The tenant had the copy of the ejectment petition on the first date of hearing when the rent was tendered by him which was long before 16th Oct., 1980 and he was fully aware of the grounds of ejectment. Therefore, when 16th of Oct., 1980 was fixed for filing of the written statement, the written statement should have been filed on that date. The tenant sought adjournment which was granted by the Rent Controller on payment of costs and instead of paying costs and filing the written statement on the 30th Oct., 1980, which was the adjourned date of hearing for the purpose, the tenant filed two applications, one on the date seeking adjournment for filing of the written statement and another in between, which clearly shows that the endeavour was to prolong the proceedings instead of helping the Court in further progress of the case in accordance with law. Such an attitude of the tenant can by no means be countenanced.

ed. Hence no ground for interference on merits either is made out. Dismissed in limine.

Petition dismissed.

AIR 1982 PUNJAB AND HARYANA 106

G. C. MITTAL, J.

Union of India and others, Appellants
v. Arshad, Respondent.

R. S. A. No. 1814 of 1969, D/- 14-10-1981.*

Administration of Evacuee Property Act (31 of 1950), Ss. 2 (c), 7, 7-A — Two brothers A and B owning equal shares of property in 1947 — A not heard of after 1947 partition disturbances — A's share not declared as evacuee property till 1966 — B being in possession of A's share seeking mutation in his own favour in 1966 as A's next heir — Ownership of both brothers recorded in Revenue papers from 1944-45 to 1965-66 — Sanction of mutation in B's favour is legal. AIR 1980 SC 1206, Relied on. (Evidence Act (1872), S. 108). (Paras 1 and 2)

Cases Referred: Chronological Paras
AIR 1980 SC 1206 2

Prem Singh Kadian, for Appellants;
S. K. Goyal, for Respondent.

JUDGMENT:— Yusuf and Arshad, two brothers, owned the property in equal shares at the time of partition which took place in the year 1947. Arshad continued to be in possession of the share of both till 1966 when he applied to the Revenue Authorities for sanctioning the mutation of the share of Yusuf in his favour on the ground that he (Yusuf) was not heard of for more than seven years and, therefore, he was his next heir. On 25th May, 1966, the mutation was rejected on the ground that may be Yusuf had died in India as suggested by Arshad or may have gone to Pakistan. After the mutation as rejected, Arshad filed the present suit for declaration that he was owner of the share of land once held by Yusuf as during the disturbances of 1947 he had gone to Delhi and died thereafter and since he was not heard of for a long time, therefore, he would be his next heir and that the revenue authorities were in error in rejecting the mutation. The Union of India, through the Custodian Department, was impleaded as defendant to oppose the suit. The trial Court dismissed the

*From decree of Gurnam Singh, D. & S. J., Rohtak, D/- 18-6-1969.

suit on raising a presumption that Yusuf must have migrated to Pakistan due to communal disturbances as he must have thought to adopt this course for his safety. On plaintiff's appeal, the learned District Judge decreed the suit after taking notice of the fact that the ownership of both the brothers was recorded in the Revenue papers right from the year 1944-45 to 1965-66, which clearly goes to suggest that the Custodian Department or the Rehabilitation Department never considered that Yusuf had gone to Pakistan during the disturbances of 1947, otherwise, soon after 1947 his share would have been recorded as evacuee property. It also took notice of the fact that at no point of time till Arshad started proceedings for sanction of mutation in his favour in 1966. Yusuf's share was ever recorded as evacuee property either in the records of the Custodian Department or of the Rehabilitation Department nor any proceedings were taken under Section 7 of the Administration of Evacuee Property Act, 1950. The defendants have come to this Court in second appeal.

2. After hearing the counsel for the parties, I am of the view that the judgment and decree of the learned District Judge is well based in view of Dr. Rajendra Prakash Sharma v. Gyan Chandra, AIR 1980 SC 1206. The facts of the present case, as enumerated above, are much better than the facts of the Supreme Court case. The facts of that case were that although no proceedings were ever taken for declaration of the property in dispute in that case to be evacuee property nor it was ever shown the papers of the Custodian or the Rehabilitation Department till before 29th January, 1969, when the property was put to auction on that date by the Rehabilitation Department under S. 20 of the Displaced Persons (Compensation and Rehabilitation) Act, 1954, and was purchased by the plaintiff in that case in whose favour the sale certificate was issued on 19th March, 1969, it was at that stage that a question cropped up whether the auction sale and the sale certificate really conveyed any title to the auction-purchaser. It was held as follows:—

"Where the property which was never declared as evacuee property under Section 7 of the Administration of Evacuee Property Act, 1950, and thus never formed part of the compensation pool, was sold by the authorities under the 1954 Act, the jurisdiction of the civil court

to get into the question as to the finality of the order of sale is not barred under S. 27. The sale could not be made under the 1954 Act for the reason that it was never declared evacuee property.

Only that property which was evacuee property could be acquired under Section 12 and form part of the compensation pool which satisfies the definition of 'evacuee property' given to Section 2 (c) of the 1954 Act. If the property was never evacuee property, as defined in Section 2 (c), it does not legally form part of the compensation pool and, therefore, cannot be disposed of under Section 20 or the Rules framed under this statute.

The words 'under this Act' occurring in Section 27 are significant. They show that those orders which are not made by any officer or authority in accordance with the provisions of this Act, but outside the provisions of this Act in excess of jurisdiction, can be called in question in the civil court. The language of Section 27 is not as wide as that of Section 46 of the 1950 Act.

In the present case, no proceedings under Section 7 to declare the property in question to be an evacuee property were taken by the Custodian against the person who remained in India at least till 1963. No notification under Sec. 7 (3) was published in official Gazette declaring the property as evacuee property. Nor were any proceedings initiated under Section 7 to declare it evacuee property pending on 7th May, 1954, and the question of saving those proceedings under proviso to Section 7A did not arise.

Held, that after May 7, 1954, the Custodian had no jurisdiction to declare the property in question as evacuee property. The jurisdiction of the civil courts to go into this question was thus not barred by anything in Sections 28 and 46."

Hence, there is no merit in this appeal, which is dismissed but with no order as to costs,

Appeal dismissed.

**AIR 1982 PUNJAB AND HARYANA 108
FULL BENCH**
S. S. SANDHAWALIA, C. J., M. R.
SHARMA AND G. C. MITTAL, JJ.*

M/s. Hari Ram Paras Ram and others,
Petitioners v. State of Haryana, Chandigarh and others, Respondents.

Civil Writ Petn. No. 518 of 1981, D/- 18-9-1981.

(A) Haryana Rice Bran (Distribution and Price) Control Order (1981), Cl. 4 — Validity — Not violative of Art. 19 (1) (g) of Constitution on ground that it interferes with carrying on of the business of rice milling of millers. (Constitution of India, Art. 19 (1) (g)).

M. R. Sharma, J.— The Control Order does not violate the rights of millers to carry on business enshrined in Art. 19 (1) (g) of the Constitution. The total rice bran produced by the millers has not been subjected to price-control, nor is the same being acquisitioned by the State for resale at a higher profit. Only 30% of the rice bran produced by the millers is being earmarked for allotment to poultry farmers and cattle breeders against permits presumably on the basis of their actual needs. Even if the commodity is allotted in bulk to manufacturers of poultry feed and cattle feed, the result would practically be the same because ultimately farmers are going to get the feed at cheaper rates. If the notified price falls within the ambit of the principles contained in the Act, the Control Order tends to ameliorate the lot of poultry farmers and cattle breeders, it cannot be struck down as violative of Art. 19 of the Constitution at the instance of business community which claims a right to earn unlimited profits.

(Para 11)

(B) Essential Commodities Act (10 of 1955), S. 3 (2) (c) — Haryana Rice Bran (Distribution and Price) Control Order (1981), Cl. 4 — Validity of — Fixation of partial control price of the commodity under the Act — Not invalid. AIR 1975 All 272; AIR 1979 Kant 12, Dissented from.

Per Majority. (S. S. Sandhawalia, C. J. contra)—

While promulgating the impugned Control Order the State Government did exercise power vested in it under S. 3 (2) (c)

*The judgments are printed in the order in which they are given in the Certified Copy —Ed.

KY/AZ/F537/81/LGC

of the Act. and it was within its competence to fix the levy price of the rice bran at the rate of Rs. 42/- per quintal plus the cost of containers. The control price under S. 3 (2) (c) of the Essential Commodities Act, 1955 can be for a specified percentage also. AIR 1975 All 272; AIR 1979 Kant 12, Dissented from. (Case law discussed). (Paras 36, 76)

If the non-availability of essential commodities, which grows with the passage of time, has to be checked, then the evil must be nipped in the bud. In other words, if the supply position can be improved by taking less drastic action, the State Government should be allowed to take that action instead of allowing the problem to go out of hands. (Para 20)

(C) Essential Commodities Act (10 of 1955), S. 3 — Haryana Rice Bran (Distribution and Price) Control Order (1981), Cl. 4 — Validity — First part of Cl. 4 which authorises the Director to determine maximum sale price of rice bran from time to time cannot be sustained — It is struck down. (Constitution of India, Art. 245) (Per Full Bench).

(Para 90)

Cases Referred: Chronological Paras

(1980) C. W. No. 6 of 1980, D/- 14-3-1980 (Raj). Chand Behari Lal v. Union of India 32, 88

AIR 1979 Kant 12 31, 61, 65, 85

AIR 1978 SC 1296 : 1978 Cri LJ 1281 30

(1978) C. W. P. No. 31 of 1978, D/- 12-1-78

(Punjab), Krishna Rice Mills Pehowa v. The State of Haryana 5

AIR 1976 Orissa 138 59, 61

AIR 1975 All 272 : 1975 All LJ 307 25,

61, 62, 65, 85

AIR 1975 Andh Pra 84 : (1974) 2 Andh

WR 338 32, 62, 88

(1975) 77 Pun LR 585 : 1975 Rev LR

570 23, 61, 85

AIR 1974 SC 366 10, 22, 28, 53, 61, 71,

85, 87

AIR 1972 All 401 59

AIR 1972 Pat 250 : 1971 Pat LJR 223 59

AIR 1971 Mys 12 : (1970) 2 Mys LJ 224

24, 32, 61, 62, 85

AIR 1968 Punjab & Har 363 59

(1965) Civil Appeals Nos. 1026-1031 of

1963, D/- 27-1-1965 (SC), Sri Krishna

Rice Mills v. Joint Director (Food)

Vijaywada 10

AIR 1960 SC 475 : 1960 Cri LJ 664 : (1960)

2 SCR 627 10

AIR 1959 SC 519 : 1959 SCJ 407 20

AIR 1958 SC 232 : 1958 SCA 209 18

AIR 1954 SC 307 : (1954) SCR 982 28

AIR 1954 SC 465 : (1955) 1 SCR 380 : 1954
Cri LJ 1322 10
AIR 1951 SC 201 : 52 Cri LJ 757 : 1951
All LJ 86 14

R. S. Mittal with Harish Kumar and N. K. Khosla, for Petitioners; Naubat Singh, Sr. Dy. Advocate General, Haryana, Ashok Bhan as Intervener, for Respondents.

M. R. SHARMA, J.:— The petitioners are firms and companies carrying, on the business of rice milling and selling rice at Karnal. They purchase paddy, shell it in their shellers and produce rice, 90% of which has to be compulsorily made over to the State Government under the Haryana Rice Procurement Levy Order and the remaining 10% of the rice is sold in the open market. The petitioners purchased paddy in the months of October and November, 1980, at the rate of Rupees 105/- per quintal which is the procurement price fixed by the Government.

2. In the process of manufacture of rice from paddy, first of all rice husk is removed and the rice is subjected to polishing by which process rice bran is produced. This rice bran is used for various purposes like extraction of oil and the manufacture of poultry feed. The current price of the rice bran, according to the petitioners, was Rs. 120/- per quintal on the date of the filing of the petition.

3. On Jan. 27, 1981, the Haryana State promulgated the Haryana Rice Bran (Distribution and Price) Control Order, 1981 (hereinafter referred to as the Control Order) — This Control Order was promulgated under S. 3 of the Essential Commodities Act, 1955 (hereinafter called the Act). Under Cl. 3 of the Control Order, all the manufacturers, dealers and owners of rice mills were required to sell or offer for sale or supply 30% of the rice bran extracted by them to the poultry farmers of the State of Haryana against the permits to be issued by the District Magistrate or any officer authorised by the Director, Food & Supplies, Haryana, in that behalf. Under Cl. 4 of the Control Order, maximum sale price of rice bran, for the time being, has been fixed at Rs. 42/- per quintal exclusive of the cost of containers and taxes. The Director has been authorised to fix the price from time to time. Cl. 5 of the Control Order makes it obligatory for every rice dealer or owner of a rice mill or a sheller to furnish within seven days of the commencement of this Control Order a report to the District

Food and Supplies Controller of his district regarding the quantity of rice bran so possessed by him. Cl. 6 of the Control Order empowers the District Magistrate or any Officer authorised by the Director, Food and Supplies, Haryana, to require any rice dealer or an owner of a rice mill to furnish such information, return or reports as may be required regarding the rice bran produced or sold by him. These provisions have apparently been made to enable the Director to get the requisite information for giving proper effect to the provisions of the Control Order relating to equitable distribution.

4. In para No. 14 of the petition, the fixation of this price has been challenged in these terms:—

(i) That no control price of rice bran has been fixed under S. 3 (2) (c) of the Act and Cls. (a) and (b) of S. 3 (3) of the Act are therefore not attracted.

(ii) That the only other clause of S. 3 (3) of the Act, namely, Cl. (c) has also not been followed in fixing the price of rice bran in Cl. 4 of the Control Order.

(iii) That there is no material in existence which may justify the fixation of the price of rice bran to be made available to the permit-holders at Rs. 42/- per quintal. The whole matter of fixation of price has been dealt with in an arbitrary manner without caring for the requirement of law.

(iv) That since Cl. 4 of the Control Order is a pivotal clause, without which the Control Order cannot be put into operation and this clause is bad in law being contrary to the provisions of the Act, the whole Order is ultra vires the provisions of S. 3 (3) of the Act.

(v) That the impugned Order interferes with the carrying on of the business of the petitioners and the right guaranteed to them under Art. 19 of the Constitution of India. The petitioners have a right to sell the rice bran at the market price and by this illegal Order the petitioners are deprived to make sales in respect of the rice bran on the market price.

5. This petition came up for motion hearing on Feb. 13, 1981, before a Division Bench of which I was a member, when the Bench passed the following order:—

"The State of Haryana issued Order Annexure P. 1 under which all the millers were obliged to supply 30% of the rice bran produced by their respective mills

to persons to be specified by the licensing authority at the rate of Rs. 42/- per quintal. The petitioners have challenged this Order on the ground that under Section 3 (2) (c) of the Essential Commodities Act, 1955, no control price of this commodity has been fixed and unless that is done, the authority concerned cannot legally, under the aforementioned Order, take action. In support of this view, a Division Bench judgment of this Court in C. W. P. No. 31 of 1978, M/s. Krishna Rice Mills, Pehowa v. State of Haryana decided on 12-1-1978 has been cited. In the impugned Order, levy of 30% has been fixed and the price at which this commodity has to be given to the poultry farmers, has also been mentioned. Prima facie, it appears that where there is a power to do something under a statute and the same thing is done, the action cannot be said to be ultra vires merely because the section under which the action is taken is not expressly mentioned. However, since a Division Bench of this Court has taken a certain view, we are of the view that this case should be admitted to hearing by a Full Bench. Let the papers be placed before my Lord the Chief Justice positively by today for obtaining orders in that behalf, and the case should be listed for final hearing on Feb. 16, 1981. The operation of the impugned Order shall remain stayed meanwhile."

6. This is how the case has come up for hearing before this Full Bench.

7. On behalf of the respondents, affidavit in reply has been sworn by Shri V. P. Dhawan, Joint Director of Food and Supplies, Haryana. It is stated therein—

"that the price under Cl. 4 of the impugned Control Order has been fixed in conformity with the provision of S. 3 (2) (c) of the Essential Commodities Act and having been fixed with the prior approval of the Government of India after taking into consideration the relevant material is perfectly legal and valid. In Punjab too the price fixed under the Punjab Rice Bran (Distribution and Price Control) Order, 1978, is Rs. 30/- per quintal. The said price is considered reasonable. The price of paddy has also been taken into consideration while fixing the said price. In 1977-78 when the price of paddy was Rs. 79/- per quintal, the rate of rice bran fixed by the Government was Rs. 35/- per quintal. In 1978-79 there was no Control Order, yet the dealers/licensees mutually agreed to sell rice bran at Rs. 37.50 per

quintal when the price of paddy was Rs. 87/- per quintal. In 1979-80 again the dealers/licensees agreed to sell and actually supplied rice bran at Rs. 42/- per quintal when the price of paddy was Rs. 95/- per quintal. In 1980-81 season, the price of rice bran has been fixed by the Govt. under the Control Order in question at Rs. 42/- per quintal when the price of paddy per quintal was Rs. 105/- as fixed by the Government of India. The incidence of increase of rate of paddy from 1979-80 to 1980-81 is Rs. 10/- per quintal which stands reflected in the price of rice bran, which is 3% of the paddy and comes to 30 paise per quintal. It may not be out of place to mention that while fixing the price of rice bran at Rs. 42/-, the increase in a few of subsequent months was anticipated and taken into consideration. The price of rice bran fixed by the Punjab State is also taken into consideration. This price of rice bran has been fixed after obtaining the concurrence of the Government of India. The price of rice bran prevailing and likely to prevail in the post-harvest period relevant to the levy order was also kept in view. It was after re'sume' of the above matters that the price was fixed. In view of this, reference to S. 3 (3) of the Act is misconceived. The price fixed conforms generally to provisions of S. 3 (3) (c) as well."

8. It was also denied that the market price of rice bran was Rs. 120/- per quintal. In this connection the State relied upon two photostat copies of the vouchers issued by two rice dealers, which go to show that in one case the rice bran was sold at the rate of Rs. 67.75 per quintal and in the other at the rate of Rs. 70/- per quintal. It was further pleaded that the sale of rice bran through permits had been regulated with a view to ensuring equitable distribution and availability of rice bran at fair price to the poultry and cattle farmers and that the extent of free sale allowed by the Control Order to the petitioners was so large that they could sell most of the rice bran at higher rates to make good their loss, if any, because of the supply of 30% of the rice bran against permits issued under the Control Order.

9. The petitioners availed of the opportunity of filing a replication. The relevant part reads as under:—

"The falsity of the averments made in paragraph 8 of the written statement is

apparent from the contradictory submissions made therein. One contention raised in para 8 of the written statement is that the price fixed under Cl. 4 of the Annexure P-1, has been fixed in conformity with the provisions of S. 3 (2) (c) of the Act and the other is that 'the price fixed conforms generally to the provisions of S. 3 (3) (c) as well.' S. 3 (3) of the Act comes into play only if the Control Order has been made under S. 3 (2) (f) of the Act. Moreover, the perusal of the Control Order Annexure P-1, shows that it deals with the matters provided for in S. 3 (2) (f) of the Act only, namely, requiring persons, holding in stock or producing rice bran to sell a specified part of the commodity according to the direction contained in the Control Order, whereas an order made in exercise of the powers under S. 3 (2) (c) of the Act can only provide for the controlling of the price at which a particular commodity may be bought or sold by everybody purchasing or selling such commodity. So far as the justification of the price fixed is concerned, it is respectfully submitted that there can be no justification for an action which manifestly violates a statutory provision. Moreover, there is no reason to make rice bran available to poultry farmers at a reduced rate of Rs. 42/- per quintal when there is no control on the sale price of poultry products. The other considerations which have been relied upon in para. 8 of the written statement, are irrelevant because the price of a particular commodity can go up if its demand increases and that is what has exactly happened in case of rice bran. A number of oil extraction plants have come up which extract oil from the rice bran and export the oil at high prices. These oil extraction plants have entered into contracts with the petitioners and many others producing rice bran to supply the whole of the rice bran that may be produced by them in this season at the price which is Rs. 120/- per quintal or more."

10. The contentions raised by the parties relevant to the question of the petitioners' right to carry on trade under Art. 19 of the Constitution may now be summed up. The State Government claims to have been impelled to issue this Control Order because rice bran was getting out of the reach of the poultry farmers and rural cattle breeders. On the other hand, the mill owners claim to have also entered into contracts with the oil extractors for the supply of rice bran at the

rate of Rs. 120/- per quintal. In short, on the one side the State Government is trying to help the rural sector and on the other side the business is raising the laissez faire cry of the right of earning maximum profits. In *Shree Meenakshi Mills Ltd. v. Union of India*, AIR 1974 SC 366, it was observed (at p. 378)—

"In an unreported decision in *Sri Krishna Rice Mills v. Joint Director (Food) Vijaywada* (Civil Appeals Nos. 1026-1031 etc. of 1963 D/- 27-1-1965 (SC)) this Court held that S. 3 of the Essential Commodities Act sufficiently specifies the principles on the basis of which price should be fixed. The Central Government fixed the maximum price for sale of rice of certain quantities. The rice millers contended that notification fixing fair price violated Arts. 14, 19 (1) (f), (g) and 31 (2) of the Constitution, and, therefore, they were entitled to the rates prevailing in the market. The contentions on Art. 19 (1) (f) and (g) were repelled on the rulings of this Court in *Hari Shankar Bagla v. State of Madhya Pradesh* reported in (1955) 1 SCR 380 : (AIR 1954 SC 465) and *Union of India v. Bhanamal Gulzarimal* reported in (1960) 2 SCR 627 : (AIR 1960 SC 475 : 1960 Cri LJ 664)".

... ..
... ..
In determining the reasonableness of a restriction imposed by law in the field of industry, trade or commerce, it has to be remembered that the mere fact that some of those who are engaged in these are alleging loss after the imposition of law will not render the law unreasonable. By its very nature, industry or trade or commerce goes through periods of prosperity and adversity on account of economic and sometimes social and political factors. In a largely free economy when controls have to be introduced to ensure availability of consumer goods like foodstuff, cloth and the like at a fair price it is an impracticable proposition to require the Government to go through the exercise like that of a Commission to fix the prices."

11. Herein the total rice bran produced by the millers has not been subjected to price-control, nor is the same being acquired by the State for resale at a higher profit. Only 30% of the rice bran produced by the millers is being earmarked for allotment to poultry farmers and cattle breeders against permits presumably on the basis of their actual needs. Even if the commodity is allotted in bulk to

manufacturers of poultry feed and cattle feed, the result would practically be the same because ultimately farmers are going to get the feed at cheaper rates. If the notified price falls within the ambit of the principles contained in the Act, the Control Order tends to ameliorate the lot of poultry farmers and cattle breeders, it cannot be struck down as violative of Art. 19 of the Constitution at the instance of business community which claims a right to earn unlimited profits. I am of the considered view that it is not open to the petitioners to contend that the Control Order violates their right to carry on business enshrined in Art. 19 (1) (g) of the Constitution.

12. The deck has now been cleared to consider the principal ground of challenge. It has been argued by Mr. Mittal, the learned counsel for the petitioners, that the State Government has not taken any specific action under S. 3 (2) (c) of the Act, in the sense that no price has been fixed at which the commodity as a whole or part thereof may be sold. The Control Order falls under S. 3 (2) (f) of the Act and the price payable to the petitioners has to be determined in accordance with the procedure laid down in S. 3 (3) of the Act. He further submitted that the price mentioned in the Control Order cannot be regarded as the control price, for, if that were so the Government would in every case fix an arbitrary price in the order and when challenged would come forth with a plea that the notified price is the control-price of the commodity.

13. In order to appreciate these submissions, it becomes necessary to note the relevant provisions of the Act. They are—

"Section 3. Powers to control production, supply, distribution, etc. of essential commodities:

(1) If the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, or for securing any essential commodity for the defence of India or the efficient conduct of military operations, it may, by order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein.

(2) Without prejudice to the generality of the powers conferred by sub-s. (1), an order made thereunder may provide—

(c) for controlling the price at which any essential commodity may be bought or sold

... ..

(f) for requiring any person holding in stock any essential commodity to sell the whole or a specified part of the stock to the Central Government or a State Government or to an owner or agent of such Government or to such other person or class of persons and in such circumstances as may be specified in the order;

(3) Where any person sells any essential commodity in compliance with an order made with reference to cl. (f) of sub-sec. (2), there shall be paid to him the price therefor as hereinafter provided;

(a) where the price can, consistently with the controlled price, if any, fixed under this section, be agreed upon, the agreed price;

(b) where no such argument can be reached, the price calculated with reference to the control price, if any;

(c) where neither clause (a) nor cl. (b) applies, the price calculated at the market rate prevailing in the locality at the date of sale."

14. Sub-section (1) of S. 3 vests in the Central Government vast powers for regulating or prohibiting the supply and distribution of essential commodities. The conditions precedent for the exercise of these powers are that the Central Government or the authorised officer forms an opinion that it is necessary or expedient to take the impugned action and the opinion so formed should be bona fide. Sub-s. (2) of S. 3 enumerates some of the components of this wide and plenary power. In other words, the matters contained in cls. (a) to (j) of this sub-section are illustrative in nature. This is precisely what was laid down by the Supreme Court of India in *Santosh Kumar Jain v. The State*, AIR 1951 SC 201. Therein it was observed (at p. 203)—

"It is manifest that sub-sec. (2) of S. 3 confers no further or other powers on the Central Govt. than what are conferred under sub-section (1) for it is 'an order made thereunder' that may provide for one or the other of the matters specifically enumerated in sub-section (2) which are only illustrative as such enumeration is 'without prejudice to the generality of the powers conferred by sub-section (1)."

15. Clause (c) of this sub-section enables the Central Government to fix the

price at which an essential commodity might be, part or whole, sold. Cl. (f) of this Sub-section enables the Central Government to direct a stockholder of the essential commodities to sell them to the Central Government, to the State Government or to an agent appointed by either of them or to a person or a class of persons. Sub-section (3) of S. 3 lays down the procedure for determining the price payable to the stock-holder.

15A. Section 5 of the Act entitles the Central Government to delegate its powers of making orders or issuing notification under S. 3 in relation to such matters and subject to such conditions, if any, as may be specified, to an officer of the Central Government, to a State Government or to an officer or authority subordinate to the State Government. It is not disputed that powers under cls. (c) and (f) of sub-section (2) of S. 3 have been delegated by the Central Government on the Government of Haryana State. In other words, the Government of Haryana State has been empowered to issue an order for controlling the price at which an essential commodity might be sold as also the power to require a stock-holder to sell essential commodities to it or to its agent or to some other persons.

16. The first point to be determined is whether the State Government has in fact passed any order under S. 3 (2) (c) of the Act or not, because it is conceded on all hands that if the order is covered by this Provision, the petitioners would have no case to put forth.

17. The impugned Order, copy of which is Annexure P-1, has the following preamble:—

"Whereas the State Government is of the opinion that it is necessary and expedient so to do for securing equitable distribution of rice bran; Now, therefore, in exercise of the powers conferred by Section 3 of the Essential Commodities Act, 1955 (Central Act 10 of 1955), read with the Government of India, Ministry of Agriculture and Irrigation (Department of Food) Order No. GSB-800, dated the 9th June, 1978, and all other powers enabling him in this behalf, and with the prior concurrence of the Central Government, the Governor of Haryana hereby makes the following order—" (emphasis supplied).

18. Apparently, the Order is somewhat unhappily worded because it purports to

have been issued under S. 3 of the Act and does not make a specific mention of the various powers compartmentalised in sub-section (2) of S. 3 of the Act. Nevertheless, there is clear mention of the fact that all the powers which vest in the State Government for taking the impugned action, namely of promulgating the order, have been pressed into service. The most important consequences which flow from the Order are that 30% of the rice bran has been reserved for allotment to poultry farmers and cattle breeders under permits, the price payable by them has been fixed at Rs. 42/- per quintal and the millers have been obligated to take steps for the proper achievement of the aforementioned task. The action taken by the State Government can be related to a specific source of power under the statute. The only irregularity, as already observed, is that the specific statutory provision which confers power for taking a particular action has not been expressly named in the Order. In *P. Balakotiah v. Union of India* AIR 1958 SC 232, it was observed (at p. 236)—

"It is argued that when an authority passes an order which is within its competence, it cannot fail merely because it purports to be made under a wrong provision if it can be shown to be within its powers under any other rule, and that the validity of an order should be judged on a consideration of its substance and not its form. No exception can be taken to this proposition....."

19. In view of this authoritative pronouncement of law, it is not open to me to hold that the State Government did not invoke its power under S. 3 (2) (c) of the Act while issuing the impugned Control Order. Even otherwise, in para 8 of the affidavit sworn by Shri V. P. Dhawan, Joint Director of Food and Supplies, Haryana, it has been specifically mentioned that the price under Cl. 4 of the impugned Control Order has been fixed in conformity with the provisions of S. 3 (2) (c) of the Act, and I see no ground to disbelieve this affidavit. I, therefore, hold that the State Government did invoke the provisions of S. 3 (2) (c) of the Act while promulgating the impugned Control Order.

20. Mr. Mittal was pretty vehement in submitting that under Section 3 (2) (c) of the Act the price of the entire essential commodity in contradistinction with a part thereof alone can be fixed. Accord-

ing to him, there is no such thing as a partial control of the price. I see no merit in this submission. If the non-availability of essential commodities, which grows with the passage of time, has to be checked, then the evil must be nipped in the bud. In other words, if the supply position can be improved by taking less drastic action, the State Government should be allowed to take that action instead of allowing the problem to go out of hands. If the interpretation suggested by Mr. Mittal is accepted, then the authorities under the Act, would have to wait till the essential commodities become so costly and scarce as to make absolute control of prices the only imperative. Besides, there is a legal maxim *omne majus continet in se minus*—the greater contains the less. This maxim has been referred to with approval in *Atma Ram v. State of Punjab*, AIR 1959 SC 519 — If the State Government has the volition and the right to travel the whole distance, I see no reason why it should be commanded to go further if it exercises an option of stopping midway. It is perhaps not being realised that this argument, if accepted, may bring about much more drastic results for the business community. If the impugned Control Order is struck down on this ground, the State Government may be persuaded to impose a price control on the entire rice bran produced by the millers. In that event, nothing can prevent it from fixing a lower control price or a price equivalent to the one which has been fixed in the bordering State of Punjab. That step, if taken, would certainly be more disadvantageous to the petitioners because in that case they would be obligated to sell the entire rice bran at Rs. 30/- per quintal or so at which rate it is being sold in the State of Punjab. Now they are allowed to sell 30% of it at Rs. 42/- per quintal plus the cost of containers and can sell the rest of it at whatever prices which they can get in the free market.

21. I may now notice some of the cases relied upon on behalf of the petitioners.

22. First of all the reliance was placed by Mr. Mittal on the following observations made by the Supreme Court of India in *Shree Meenakshi Mills Limited case* (AIR 1974 SC 366 at p. 382) (supra)—

"70. The main plank of the petitioner's contention that fair price means a determination with regard to the cost of raw material, manufacturing cost and reasonable return on the capital employed in

the business was founded on the construction that sub-sections (3), (3A); (3B) and (3C) of Section 3 of Essential Commodities Act 1955 constitute a single scheme and what is implicit in sub-section (3) is made explicit in sub-section (3C).

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74. The differences between sub-sections (3) & (3A) on the one hand and sub-sections (3B) and (3C) on the other are these. Sub-sections (3) and (3A) speak of fixing price by agreement consistent with or with reference to controlled price or failing both market rate prevailing in the market during three months preceding the date of the notification. Sub-sec. (3B) speaks either of controlled price or where no such price is fixed the price prevailing or likely to prevail during the post harvest period in the area to which the order applies. In sub-sec. (3C) which relates to sugar price is to be calculated with reference to minimum price of sugarcane, manufacturing cost of sugar, duty, or tax, and a reasonable return and different prices may be provided for different areas or factories or different kinds of sugar.

75. Therefore controlled price fixed under Section 3 (1) read with Section 3 (2) (c) is different from price under sub-sections (3A), (3B) and (3C)."

On this basis, it was argued that the controlled price and the price fixed in the order had necessarily to be different. I am unable to accept this argument. In this case, the Supreme Court of India was only considering the scheme of the Act and was not concerned with a case in which the controlled price of the commodity fixed under Section 3 (1) read with section 3 (2) (c) of the Act and the levy price under sub-section (3B) of S. 3 of the Act had been fixed in a single composite notification.

23. The next case relied upon by Mr. Mittal is a Division Bench judgment of this Court reported as *Bhagwan Singh v. State of Punjab*, (1975) 77 Pun LR 585. Therein the fixation of the price of Wheat (Levy) Procurement Order was successfully challenged on the ground that the fixation thereof had not been made in accordance with sub-section (3B) of the Act, but in that case the Division Bench came to the conclusion that no controlled price of wheat had been fixed under sub-sec. (3) (2) (c) of the Act. The relevant observa-

tion made by the Division Bench reads as under :—

"From the discussion made above, it would emerge that no controlled price of wheat has been fixed under S. 3 (2) (c) of the Act and that the fixation of price under Clause 4 of the Levy Order does not, therefore, fall within the ambit of sub-section (3-B) (i) of S. 3 under which provision the price is alleged to have been fixed. Similarly, there being no data on the record to show that the price was fixed on the basis of the price prevailing or likely to prevail during the post harvest period, the conclusion is inevitable that cl. (ii) of sub-section (3-B) of S. 3 of the Act was also not complied with while fixing the price under S. 4 of the Levy Order."

24. The ratio of *K. B. Jinaraja Hegde v. State of Mysore*, AIR 1971 Mys 12 is distinguishable on similar grounds as is evident from the following passage:—

"As regards the first, namely, the control price, it was submitted on behalf of the petitioners that the State Government had not fixed any controlled price either under the Act or under any other law in force in the State of Mysore. Mr. Puttaswamy, learned Advocate for the State submitted that the price fixed in schedule II of the order was itself the controlled price."

25. In *Sitaram Jwala Prasad v. State of Uttar Pradesh*, AIR 1975 All 272, a Division Bench of the Allahabad High Court considered the legality of price of foodgrains fixed in Uttar Pradesh Coarse Foodgrains (Levy) Order (1974). The challenge was allowed mainly on the ground that the price mentioned in the schedule to the order could not be regarded as its controlled price. The learned Judges were persuaded to take this view because of the reason that the controlled price contemplated by cl. (i) of sub-sec. (3B) had to be with reference to grade of the food-grain or its variety. It has not been suggested at the bar that the rice bran had different grades or varieties. No argument was raised before the Division Bench on the basis of phraseology enshrined in the preamble of that order which might have indicated that the State Government had exercised powers under Section 3 (2) (c) also. The preamble of the order is not quoted in the report and it might well have omitted to mention that the Government while issuing the order had exercised the powers which were vested in

it, to issue the impugned order. Last of all it was found as a question of fact that the price mentioned in the schedule had not been fixed in accordance with the principles contained in sub-sec. (3-B) of S. 3 of the Act.

26. These are some of the distinguishing features of the case. However, after noticing some of the provisions of the statute, the Bench made the following observations, with which I respectfully disagree:—

"If the argument of the learned Advocate-General that the price which the Government in its discretion chooses to pay in respect of the foodgrains which are required to be sold to it, will automatically become the controlled price within the meaning of clause (i) of sub-section (3-B) is accepted, clause (ii) thereof would become redundant. In no case would clause (ii) be then applicable, for the moment the Government requires a particular percentage of foodgrains to be sold at a particular price, clause (i) would automatically become applicable. In fact, if that was the intention of the Legislature in enacting sub-sec. (3-B), it would have been simpler to use the phrase 'there shall be paid such price for the foodgrains, edible oilseeds or edible oils as may be fixed by the Government' in place of the phrase 'there shall be paid as the price for the foodgrains, edible oilseeds or edible oils,' and then to have cls. (i) and (ii) and the Explanation to sub-section (3-B). A similar phraseology could have been used even in sub-section (3-A) in place of sub-clauses (a), (b) and (c) of Cl. (iii) of sub-section (3A). The distinction in the language of sub-section (3-C) which deals with sugar and sub-section (3-B) which deals with foodgrains also makes it clear that the criterion for calculating the price in case of one is altogether different from the other."

27. In order to understand the true import of these observations, sub-s. (3-A) of Section 3 of the Act deserves to be noticed. It reads:

"(3-A) (i). If the Central Government is of opinion that it is necessary so to do for controlling the rise in prices, or preventing the hoarding, of any foodstuff in any locality, it may, by notification in the official Gazette, direct that notwithstanding anything contained in sub-sec. (3), the price at which the foodstuff shall be sold in the locality in compliance with an order made with reference to clause (i)

of sub-section (2) shall be regulated in accordance with the provisions of this sub-section.

(ii) Any notification issued under this sub-section shall remain in force for such period not exceeding three months as may be specified in the notification.

(iii) Where, after the issue of a notification under this sub-section, any person sells foodstuff of the kind specified therein and in the locality so specified, in compliance with an order made with reference to clause (f) of sub-sec. (2), there shall be paid to the seller as the price therefor—

(a) where the price can, consistently with the controlled price of the foodstuff, if any, fixed under this section, be agreed upon, the agreed price;

(b) where no such agreement can be reached, the price calculated with reference to the controlled price, if any;

(c) where neither clause (a) nor cl. (b) applies the price calculated with reference to the average market rate prevailing in the locality during the period of three months immediately preceding the date of the notification.

(iv) For the purposes of sub-cl. (c) of clause (iii), the average market rate prevailing in the locality shall be determined by an officer authorised by the Central Government in this behalf, with reference to the prevailing market rates for which published figures are available in respect of that locality or of a neighbouring locality; and the average market rate so determined shall be final and shall not be called in question in any Court."

28. This sub-section is in the nature of an emergency provision and can be resorted to for meeting a situation arising in a particular locality. As provided in cl. (ii) of this sub-section, the action taken thereunder is in the nature of a short term measure because the relevant notification can be issued only for a period not exceeding three months. An essential commodity may become scarce in a locality whether it has been subjected to a price control or not. In a given case, the State Government may make such a commodity more easily available without its price being controlled. In that case, if a stock-holder is, pursuant to an order passed under Clause (f) of sub-section (2) of S. 3, directed to shed a part or the whole of his stock he will have to be paid the price calculated in accordance with the procedure laid down in clause (c) of sub-sec. (3) of S. 3. If the essential com-

modity is already subjected to a price control or the same is simultaneously imposed when a stock-holder is ordered to part with his stocks, he would be entitled to get a price which can be agreed with, consistent with the controlled price or if no such agreement is possible the one calculated with reference to the controlled price. As noticed earlier, S. 3 invests the Government with vast powers of imposing controls. At one moment price of a commodity may be controlled, and at another the price may not be subjected to control but its distribution may have to be streamlined. But while making a statutory provision, the Legislature thought that the statutory provision enacted should cover as far as possible all the situations in which the Government becomes entitled to take action on the basis of experience. The important point to be considered is whether in a given case the Government has applied its mind and had taken action under S. 3 (2) (c) or not. Once it is shown to have acted under this provision, no objection can be raised if the price, which is payable to a stockholder, is mentioned in the notified order itself. Sub-cl. (a), (b) and (c) of cl. (iii) of sub-s. (3-A) cannot therefore be regarded as redundant. If the Government wishes to deprive a stock-holder of essential commodities for the purpose of making profits, he can certainly raise an objection that the action taken by the Government does not fall within the ambit of the statute. In *Shree Meenakshi Mills' case* (AIR 1974 SC 366 at p. 378) (supra), the Court observed—

"In *State of Rajasthan v. Nathmal*, 1954 SCR 982 : (AIR 1954 SC 307), the authorities were allowed to freeze any stock of foodgrains and no person could dispose of any foodgrains out of the stock so 'freezed' (sic) without the permission of the authority. The order was held to be relatable to the object of the Act, namely, securing equitable distribution and availability at fair prices. The ceiling price of the commodity was Rs. 17-18. The Government procurement price was Rs. 9 per maund. The Court held that it was an unreasonable restriction because the Government was free to sell at a higher price and make a profit. The ceiling price was higher than the fixed price at which the stocks were requisitioned but after requisition, the Government would sell at the higher price. Therefore, that was an unreasonable restriction."

29. For similar reasons, sub-sec. (3-B) cannot be held to be redundant. Sub-section (3-C) relates to sugar and need not be examined in detail.

30. I might also add that the protective umbrella of the Ninth Schedule is available only to the Act and not the orders issued thereunder. This controversy has been finally set at rest in *Prag Ice & Oil Mills v. Union of India*, AIR 1978 SC 1296.

31. The last case relied upon by Mr. Mittal is *Joe Pereira v. Union of India*, AIR 1979 Kant 12. Therein, the fixation of price under the Karnataka Paddy Procurement (Levy) Order (1966) was successfully challenged on the ground that the same had not been fixed in accordance with the procedure laid down in sub-sec. (3-B) of S. 3 of the Act. The learned Judges observed that 'the controlled price once fixed must be applicable to all sales and purchases. It should not be intended to control the price of particular type of transaction.' With utmost respect I am unable to concur with these observations, for, if that be the case, the State Government would not at all be competent to impose partial control of essential commodities. The other conclusion arrived at by the learned Judges that if in fact there is controlled price, the price shall have to be fixed under sub-sec. (3-B) of the Act is unexceptionable. It might be that while promulgating the Karnataka Order the State did not purport to exercise powers under S. 3 (2) (c) of the Act. In this case also no argument seems to have been advanced before the Division Bench on the basis of the phraseology enshrined in the preamble of the Karnataka Order.

32. On behalf of the State, Mr. Naubat Singh relied upon *Sri Venkateswara Rice Mill v. State of Andhra Pradesh* AIR 1975 Andh Pra 84, wherein the view taken in the Mysore case in *K. B. Jinaraja Hegde's case*, (AIR 1971 Mys 12) (supra) was dissented from in these words (at p. 87 of AIR 1975 Andh Pra) :

"We are unable to subscribe to the view expressed by the Mysore High Court in the two cases referred to above. The expression 'control' in S. 3 (2) (c) takes within its ambit restrictions, regulations, curbs, restraints. To control a thing is to have the right to exercise a directing or governing influence over it. (Black Law Dictionary page 399). The object of procuring from millers or dealers by the

Government is to make rice available at reasonable price to the consumers. A dealer or miller is called upon only to sell a portion of the total quantity of each variety of rice at a notified price. It is not the case of the petitioners that the Government while fixing the notified price has not taken into consideration the rate at which a dealer or miller purchased paddy, conversion charges, transport charges and other incidental expenses and also the marginal profit. So, a notified price is fixed only after taking the relevant factors into consideration, that is to say, to see that no dealer or miller suffers loss by his having to sell a portion of the total quantity of the rice which he produces or manufactures. The fixation of the price has not been questioned before us. What Mr. Babulu Reddy contends is that the notified price is not the controlled price and sub-clause (c) of S. 3 (2) only empowers the Government to control prices and not to notify prices. We are unable to see any force in this contention. The word 'control' as has already been observed by us, takes in regulation of the prices also by notifying a particular price. To the extent of sub-clause (1) of clause (3) the price at which levy rice should be sold is controlled. It is not open to a miller or dealer to sell at a rate above the notified price. In other words, the price at which a miller or dealer is to sell is controlled. The expression 'control' is of very wide amplitude. Clause (f) of S. 3 (2), as already seen empowers the Government to require any person holding in stock any essential commodity to sell the whole or a specified part of the stock to the Central Government or the State Government. The procurement order is issued in exercise of the powers conferred upon the Government under sub-clause (f). We see absolutely no merit in the attack on the Procurement Order."

33. I might also add that in this case the price had been fixed after taking into consideration the statutory requirements.

34. Apparently, the petitioners cannot derive any benefit from the observations made in the decided cases.

35. Mr. Naubat Singh conceded that the Central Government had not authorised the State Government to delegate the powers of fixing a controlled price on an officer of the State Government. That being so, clause 4 of the Order which authorises the Director to fix prices from

time to time cannot be sustained. This finding, however, does not affect the merits of the controversy because for the time being the levy price has in fact been fixed by the State Government.

36. For reasons aforementioned, I hold that while promulgating the impugned Control Order the State Government did exercise power vested in it under S. 3 (2) (c) of the Act and it was within its competence to fix the levy price of the rice bran at the rate of Rs. 42/- per quintal plus the cost of containers. The petition deserves to be dismissed and I order accordingly. However, in view of the difficult nature of the questions of law involved therein, the parties are left to bear their own costs.

S. S. SANDHAWALIA, C. J.:— 37. Whether the control price under Section 3 (2) (c) of the Essential Commodities Act, 1955, envisages a uniform and fixed price for the whole of the essential commodity at which it may be bought or sold within the State or in a defined geographical area has come to be the core question before this Full Bench.

38. I have the privilege of perusing the judgment recorded by my learned brother Sharma, J. On the view taken by him S. 3 of the Essential Commodities Act, 1955 (hereinafter called the Act) would warrant fixation of a control price even for some percentage of the essential commodity leaving the rest to be unregulated and floating and fluctuating at the open market prices. In essence it would also clothe the executive Government with the power to fix any price for any percentage of an essential commodity. With the greatest respect I am of the view that neither S. 3 nor the other analogous provisions of the Act envisage the vesting of such unguided and uncanalised power in the Central Government. The meaningful issue herein entails larger ramifications and with the greatest deference to Sharma, J., I feel compelled to record this dissent.

39. In an issue so pristinely legal, the facts giving rise thereto inevitably slide into background. Nevertheless the matrix thereof has to be noticed, albeit briefly, to maintain the homogeneity of this judgment. The twenty nine petitioning firms carry on the business of rice milling at Karnal. They purchase paddy and after shelling it in their shellers produce rice, ninety per cent. of which had to be compulsorily made over to the State Government under the Haryana Procurement

Levy Order leaving the balance to be sold in the open market. The petitioners purchased paddy in the harvesting season of October and November, 1980, at the rate of Rs. 105/- per quintal being the fixed procurement price thereof. The process of converting paddy into rice first of all involves the removal of rice husk and thereafter the inner shell is also removed in the process of polishing which in commercial terms is known as rice bran. This is used for various purposes including extraction of oil as also for poultry feed. The firm stand of the petitioners is that the current market rate of rice bran was Rs. 120/- per quintal.

40. On the 27th of January, 1981, the Haryana State promulgated the Haryana Rice Bran (Distribution and Price, Control) Order, 1981 (annexure P. 1) (hereinafter called the Control Order). This admittedly was promulgated under the powers conferred by S. 3 of the Act, Cl. (3) of the Control Order obliges all dealers and owners of Rice Mills as defined in Cl. (2) (c) to sell or offer for sale 30 per cent. of the rice bran extracted by them to poultry farmers of the Haryana State against permits issued by the District Magistrate or any officer authorised by the Director, Food and Supplies Haryana in this behalf. What the petitioners particularly highlight is the fact that by clause 4 the power to determine the maximum sale price of the rice bran sold against the permits as mentioned in cl. (3), has been vested in the utter discretion of the Director of Food and Supplies, Haryana to be exercised from time to time. What is more is that the present sale price has been arbitrarily fixed at a paltry sum of Rs. 42/- per quintal as against its current price of Rs. 120/- per quintal in the open market. Cls. 5 and 6 of the Control Order vest procedural powers in the authorities to secure reports and to get information with regard to stocks and supplies of rice bran etc.

41. It is the firm stand of the petitioners that no control price of the rice-bran has been fixed under S. 3 (2) (c) and consequently the compulsory purchase price for the rice bran had to conform to sub-sec. (3) of S. 3 of the Act and in particular to Cl. (c) thereof because Cls. (a) and (b) of the said sub-section were not applicable. To buttress their stand that the current market price was Rs. 120/-, annexures P. 2 and P. 3. the cash memos for the sale of 100 quin-

tals of rice bran at the aforesaid price have been annexed to the petition. It is reiterated that the respondent-State has not at all calculated the price with regard to the market rates prevailing in the locality at the date of sale as prescribed by sub-section (3) (c) of S. 3 of the Act. The ridiculously low rate of Rs. 42/- per quintal thus arbitrarily fixed has been spelled out as the primary grievance of the petitioners, and it is further submitted that since there is no control on the price of poultry products produced by Poultry Farmers there is no rationale why the poultry feed should be made available to them at such extremely low prices, to the detriment of the petitioners. The challenge has been primarily laid to the fixation of the price at Rs. 42/- per quintal on the five grounds enumerated in paragraph 14 of the writ petition.

42. The stand of the respondent-State in meeting the challenge to the Control Order is slightly ambivalent. However, the basic position taken is that the price has been fixed in conformity with the provisions of S. 3 (2) (c) of the Act and, therefore, any reference and reliance on S. 3 (3) of the Act on behalf of the petitioners is misconceived. Apparently in the alternative it is vaguely suggested that the price fixed conforms generally to the provisions of S. 3 (3) (c) as well. As regards price; a vague denial about the current price of rice bran being Rs. 120/- has been made but the fact that the market rate was much higher than Rs. 42/- is virtually admitted in the following pleadings in paragraph 13:—

".....The extent of free-sale allowed by the Control order to the petitioners is so large that they can sell most of the Rice bran at rates convenient and preferable to them and make good the loss, if any, by supply of 30 per cent under permits issued under the Control Order."

In the affidavit filed in reply to the replication, the respondent-State in paragraph 4 thereof is more specific in admitting that the market price of rice bran from October to November ranged from Rs. 67.25 to Rs. 70/- per quintal and reliance was placed on cash memos, Exhibits R. 1 and R. 2 thereto. It is also averred that in fixing the price the prior approval of the Government of India was secured as also certain other considerations and relevant materials were taken into account.

43. To clear the deck it may be straightway noticed that the validity of the Control Order has not at all been challenged on the basis of Art. 19 (1) (f) and (g) nor on any other provision of the Constitution. The sole challenge on behalf of the petitioners is on the basis of the alleged infraction of Section 3 of the Act and in particular sub-section (3) thereof. Since the controversy must inevitably revolve around the relevant provisions of the Control Order it is apt to read them at the very outset.

"Whereas the State Government is of the opinion that it is necessary and expedient to do for securing equitable distribution of rice bran;

Now, therefore, in exercise of the powers conferred by S. 3 of the Essential Commodities Act, 1955 (Central Act 10 of 1955), read with the Government of India, Ministry of Agriculture and Irrigation (Department of Food) Order No. GSR-800 dated the 9th June, 1978, and all other powers enabling him in this behalf, and with the prior concurrence of the Central Government, the Government of Haryana hereby makes the following order, namely:—

1. Short title, extent and commencement — (1) This order may be called the Haryana Rice Bran (Distribution and Price) Control Order, 1981.

(2) It extends to the whole of the State of Haryana.

(3) It shall come into force with immediate effect.

2. Definitions: In this Order, unless the context otherwise requires,—

xx xx xx xx xx xx xx."

3. Issue of permits

All the dealers and owners shall sell or offer for sale or supply 30 per cent. rice bran extracted by them to the poultry farmers of the Haryana State against permits issued by the District Magistrate, or any officer authorised by the Director in this behalf.

4. Sale price:

The maximum sale price of the rice bran sold against permits as mentioned in Cl. 3 shall be as determined by the Director, from time to time. For the present the sale price fixed at rupees forty two per quintal exclusive of the cost of containers and taxes."

44. Before adverting to the contentions raised on behalf of the parties it is apt to notice three salient features about

which there is no dispute. It is the common case that Cl. (3) of the Control Order draws its legal sanction from Section 3 (2) (f) of the Act. This provision expressly warrants the making of an order for requiring any person engaged in the business of buying or selling or the production of any essential commodity or on holding the same in stock to sell the whole or specified part of such essential commodity to the Government or to such other person or class of persons as may be specified in the order. There is no manner of doubt that Cl. (3) in terms conforms to the requirements of S. 3 (2) (f) of the Act and has been issued thereunder.

45. Again it is undisputed that Cl. (4) pertaining to the sale price is inextricably and integrally linked to the preceding Cl. (3) and expressly mentions that the maximum sale price pertains to the rice bran sold against permits. Consequently Cl. (4) provides for the fixation of price of the essential commodity directed to be compulsorily purchased or sold under S. 3 (2) (f) of the Act. Thirdly, it is the common case that by the Control Order or otherwise no control price for the whole of the commodity of rice bran has been fixed under the Act as envisaged in S. 3 (2) (c) of the Act.

46. Against the aforesaid admitted background, learned counsel for the petitioner launched an incisive two pronged attack. Firstly, it is contended that the control price envisaged under S. 3 (2) (c) of the Act is a thing far apart from the one provided for under S. 3 (3) of the Act. The sharpest distinction is sought to be drawn betwixt the general control price of the whole of the commodity contemplated by S. 3 (2) (c) of the Act as against the compulsory purchase price determined and payable under either of the Cls. (a), (b) and (c) of sub-sec. (3) of S. 3 of the Act to a person who has been obliged to sell an essential commodity in compliance with an order made with reference to S. 3 (2) (f) of the Act. According to counsel the two concepts are wholly distinct and apart and the twain can never meet.

47. The second contention of the learned counsel for the petitioners which is indeed a limb or an integral part of the first one is that the general control price envisaged under S. 3 (2) (c) of the Act is one fixed uniform price beyond which an essential commodity cannot be allowed to

be bought or sold. It provides for a polestar ceiling limit for the price of the whole of the commodity. It cannot be bifurcated into a percentage or divided into smithereens. Either there is a control price for the whole of the commodity or there is none. According to the learned counsel for the petitioners there cannot be a control price under S. 3 (2) (c) of the Act for only a part of the essential commodity leaving the rest to be unregulated or floating or fluctuating in the open market.

48. Though the two contentions aforesaid, at certain points, dovetail into each other, it is best for clarity's sake to deal with them individually. Adverting to the first one, the two legal questions tersely put is whether the control price fixed under S. 3 (2) (c) of the Act is distinct and different from the compulsory purchase price payable under Cls. (a), (b) and (c) of S. 3 (3) of the Act.

49. Ere one comes to grips with the aforesaid issue, it is both apt and instructive to view it first in the larger perspective of the legislative history of the provisions as also the larger scheme of the statute manifest from the interlinked provisions of S. 3 (3), (3-A) (3-B) and (3-C) of the Act.

50. For our purposes it is unnecessary to travel beyond the predecessor statute namely, the Essential Supplies (Temporary Powers) Act, 1946. This was succeeded by the present Essential Commodities Act, 1955. However, a spate of amendments have followed thereafter, some of which call for notice as clear pointers of the legislative intent in this regard. Sub-section (3) of S. 3 of the Act not only formed part of the Act as originally enacted in 1955 but in fact corresponds with if not is in pari materia with the earlier S. 3 of the Essential Supplies (Temporary Powers) Act, 1946. This provision expressly provided for the payment of a price in accordance with Cls. (a) (b) and (c) to any person directed to sell an essential commodity in compliance with an order made with reference to S. 3 (2) (f) of the Act. However, at that stage the provisions of sub-sections (3-A), (3-B) and (3-C) were significantly absent from the statute. It was by the Essential Commodities (Amendment) Act, 1957 (Act No. 13 of 1957) that sub-sec. (3-A) was inserted in the statute. It was in the nature of an emergency provision for controlling the

rise in prices and the preventing of hoarding of foodstuffs in any locality and the notification issued thereunder was not to extend beyond a period of three months. Even herein also Cls. (a) (b) and (c) of sub-sec. (3-A) (i) specifically provided for the statutory determination of price for any person obliged to sell the foodstuffs under an order under Section 3 (2) (f) of the Act. Nearly a decade later by the Essential Commodities (Amendment) Act, 1966, (Act No. 25 of 1966) and the Essential Commodities (Second Amendment) Act, 1967 (Act No. 36 of 1967), sub-sections (3-B) and (3-C) were then added to the statute. Herein again sub-sec. (3-B) which pertains specifically to foodgrains, edible oil seeds and edible oils, expressly provided for the statutory price payable to the person from whom the compulsory sale or purchase was made under S. 3 (2) (f) of the Act. Again sub-sec. (3-C) which was the specific provision for all kinds of sugar was more explicit in spelling out the statutory guidelines for the payment of such a price to the person required to sell under S. 3 (2) (f) vide Cls. (a), (b), (c) and (d) thereof. To make the true intention of the legislature more explicit, an amendment of sub-sec. (3-B) was introduced inter alia by the Essential Commodities (Amendment) Act, 1971. The Statement of Objects and Reasons for this amendment is instructive for it highlights the fact that the control price and the price payable under sub-section (3-B) were distinct:—

"Sub-section (3-B) of S. 3 of the Act lays down the procedure for fixing prices of foodgrains, edible oil seeds or edible oils sold in pursuance of an order made under S. 3 (2) (f) of the Act. Such price is to be fixed having regard to— (i) the controlled price of foodgrains, edible oil seeds or edible oils fixed under that section or by or under any other law; and, (ii) the price of the foodgrains, edible oil seeds and edible oils prevailing or likely to prevail during the post-harvest period in the area to which the order applies. The question of assessing the prevailing price or the price likely to prevail during the post-harvest period will arise only when there is no controlled price. It is, therefore, proposed to amend sub-sec. (3-B) suitably to make this clear."

The legislature's concern and decision in this context is then evident from the Essential Commodities (Amendment) Act,

1976 which substituted the present sub-sec. (3-B) in place of the earlier one. The Statement of Objects and Reasons in this regard was as follows:—

"(iii) Sub-section (3-B) of S. 3 is being substituted to provide for the procedure for fixing the price in the case of levy on foodgrains, edible oilseeds or edible oils, and further to provide for the criteria for the fixation of such price."

By this amendment, the criteria for fixing the statutory price were made even more precise by inserting Cls. (a), (b), (c) and (d) with regard to which the same was to be determined.

51. I have painstakingly adverted to the aforesaid legislative history to highlight the solicitude of the legislature at each step in chronological order to lay down meticulously the criteria on which the price for compulsory purchase under S. 3 (2) (f) of the Act was to be determined. Whilst on the one hand the legislature conferred wide ranging powers of regulation and even compulsory acquisition of essential commodities, it provided equal safeguards that the price payable to the citizen for such compulsory purchases was a just equivalent thereof and was not left to the whim of the executive but was to be determined by the clear mandates of the legislature itself. The larger historical conspectus of the legislation on essential commodities is that it is a beneficent (barring certain special and express provisions to the contrary) regulatory measure and was in no way designed to be either expropriatory or confiscatory.

52. Apart from the aforesaid historical perspective of the statute, the larger scheme of S. 3 of the Act and the wide spectrum of guidelines provided therein for the determination of the price payable to the person from whom an essential commodity is compulsorily acquired calls for notice on a broader canvas. Whilst the plenary power to determine a ceiling control price for the whole of the essential commodity at which it may be bought or sold at a particular stage flows from S. 3 (2) (c) of the Act, the legislature, in its wisdom has laid out different and precise criteria for the quantum of price to be paid for an essential commodity when it is compulsorily acquired from its owners under the different sub-sections whose insertion or substitution at different times has been noticed earlier. It is perhaps apt to notice these

provisions in extenso because they point an unerring finger to the legislature's intent to prescribe adequate and precise guidelines for determining the crucial issue of payment of price for compulsory purchases or acquisition of an essential commodity:—

"3. (3) x x x x

(a) where the price can, consistently with the controlled price, if any, fixed under this section, be agreed upon, the agreed price;

(b) where no such agreement can be reached, the price calculated with reference to the controlled price, if any;

(c) where neither cl. (a) nor cl. (b) applies, the price calculated at the market rate prevailing in the locality at the date of sale.

(3-A) (i) to (iii) x x x x

(a) where the price, can, consistently with the controlled price of the foodstuffs, if any, fixed under this section, be agreed upon, the agreed price;

(b) where no such agreement can be reached, the price calculated with reference to the controlled price, if any;

(c) where neither cl. (a) nor cl. (b) applies, the price calculated with reference to the average market rate prevailing in the locality during the period of three months immediately preceding the date of the notification.

(iv) x x x x

"(3-B) x x x x

(a) the controlled price, if any, fixed under this section or by or under any other law for the time being in force for such grade or variety of foodgrains, edible oil-seeds or edible oils;

(b) the general crop prospects;

(c) the need for making such grade or variety of foodgrains, edible oil seeds or edible oils available at reasonable prices to the consumers, particularly the vulnerable sections of the consumers, and

(d) the recommendations, if any, of the Agricultural Prices Commission with regard to the price of the concerned grade or variety of foodgrains, edible oil-seeds or edible oils."

"(3-C) x x x x

(a) the minimum price, if any, fixed for sugarcane by the Central Government under this section;

(b) the manufacturing cost of sugar;

(c) the duty or tax, if any, paid or payable thereon; and

(d) the securing of a reasonable return on the capital employed in the business

of manufacturing sugar,

and different prices may be determined from time to time for different areas or for different factories or for different kinds of sugar. x x x x x"

Even a bare glance at the aforesaid provisions collectively would hardly leave any manner of doubt that the larger scheme of S. 3 intended by the legislature is not to leave it to the fist of the executive authority to declare any price for an essential commodity when it decides to compulsorily purchase or acquire it under S. 3 (2) (f) of the Act and the other wide ranging powers given to it by the rest of the provisions. In each specific category of the essential commodities generally, with regard to foodstuffs in a particular locality as an emergency measure, with regard to any grade or variety of foodgrains, edible oilseeds, and edible oils, and in the context of every kind of sugar, the legislature has meticulously laid down the firm criteria on the anvil of which the price payable for compulsory purchase is to be determined. It has not been and perhaps it cannot be left to the whim of the executive authority alone to fix any price which it may choose for even compulsory acquisition because if it were so, the provision might well get tainted with uncanalized and unguided powers and attract the vice of unconstitutionality by violating Art. 14 or 19 of the Constitution. The broad scheme of sub-secs. (3), (3-A), (3-B) and (3-C) when viewed collectively would therefore, negative the stand that the price payable for compulsory purchase and acquisition may be arbitrarily determined without reference at all to the aforesaid provisions which ever may be applicable.

53. What appears to be plain on principle is equally sanctified by the precedent of the final Court. The inter-relationship of the aforesaid provisions was noticed and accepted in the *Shree Meenakshi Mills Ltd. v. Union of India*, AIR 1974 SC 366 by Chief Justice Ray speaking for the Constitution Bench with the following observations (at p. 382):—

"The main plank of the petitioner's contention that fair price means a determination with regard to the cost of raw material, manufacturing cost and reasonable return on the capital employed in the business was founded on the construction that sub-secs. (3), (3A), (3-B) and (3C) of Section 3 of Essential Commodities Act, 1955 constitute a single

scheme and what is implicit in sub-s. (3) is made explicit in sub-section (3-C)."

54. Now it appears to me that some confusion and the resultant fallacy stems from the use of loose terminology applied to the price under S. 3 (2) (c) of the Act and what is to be determined as payable for compulsory acquisition under S. 3 (3) of the Act. Whilst the price fixed under S. 3 (2) (c) of the Act has obviously and plainly been styled as the controlled price, generally of the whole commodity, it is in my view an error to use the same and similar terminology to the amount payable and determined under S. 3 (3) of the Act. The nature of the two is completely different. The amount fixed under S. 3 (3) of the Act can more aptly be described as the compulsory sale price or in the alternative compulsory purchase price. In a particular case it can indeed be the determination of the price of one particular transaction where the essential commodity is acquired under S. 3 (2) (f) of the Act from a single individual, in sharp contradistinction to general control price of the whole commodity, which must be general, that is, either country-wide or State-wide or at least locality-wide application.

55. Faced with the inherent weaknesses of his stand Mr. Naubat Singh, the learned counsel for the respondent-State had in the last resort attempted to argue that herein also there is only one price and the price mentioned and determined to be payable under S. 3 (3) of the Act is also the controlled price under S. 3 (2) (c) of the Act. Subscribing to such a submission would patently render cls. (a), (b) and (c) of sub-section (3) to be totally nugatory and otiose. If the price arbitrarily mentioned in the control order is to be dubbed as the control price under S. 3 (2) (c) of the Act then what indeed are the guidelines in cls. (a), (b) & (c) of sub-s. (3) of the Act meant for? It is plain that the submission made on behalf of the respondent-State in fact begs the whole question. A plain reading of cls. (a) and (b) aforementioned would make it manifest that the legislature had laid down as a mandate that the price to be paid hereunder rests on the foundation of an already existing control price, if any. To say that the price arbitrarily named in the control order ipso facto becomes the control price under S. 3 (2) (c) amounts to no more than attempting to define a circle as being circular. In fact clauses (a) and (b) proceed on the basic postulate that there

already exists a control price on the basis of which the payment for a compulsory acquisition is to be determined. In the case of an existing control price for the commodity it is to be determined by an agreement of the parties consistent with the control price under cl. (a) and in case of failure to reach any such agreement, the price is to be calculated by the authority but still on the basic criteria of the existing control price. Therefore the very sine qua non for determining the price under cls. (a) and (b) is an existing control price. When the provision talks of being consistent with or in reference to a price it obviously pre-supposes the existence of such a thing. In such a context to say that the price determined under Section 3 (3) would by itself become the control price, appears to be patently illogical because consistency and reference are relevant in two things and not in a single one.

56. In providing for the situation and the absence of an existing control price the provision is clear and its mandate plain. Herein clause (c) would come into play and price must then be determined at the market rate prevailing in the locality on the date of the sale. Clearly, therefore, a mere arbitrary fixation of price in the control order is a patent violation of clauses (a), (b) and (c) for compulsory acquisition of an essential commodity and cannot be raised to the pedestal of being the general control price itself under S. 3 (2) (c) of the Act.

57. Confronted with the limitations and the circumscribing of the power by the statute under S. 3 (2) (c) and 3 (3) of the Act a last desperate throw was attempted on behalf of the respondents. It was sought to be argued that if neither of these two provisions could justify the arbitrary fixing of the price in the Control order then it must be presumed to have been so done under the generality of the power given by sub-section (1) of S. 3 of the Act. This appears to me as an argument of desperation. When sub-section (2) of S. 3 expressly provides for the specific situations spelled out in the detail in cls. (a) to (j) thereof it would be vain and indeed illogical to argue that despite these special and specific provisions they can all be conveniently ignored and wiped off the statute book and resort should be deemed to have been made to the generality of the power under sub-section (1) irrespective of the conditions and restrictions imposed thereon by the statute

itself for their exercise. Such a construction would render the whole of sub-section (2) as also sub-sections (3), (3A), (3B), (3C), (4), (4A) and (4B) wholly redundant and otiose. It seems manifest to me that when the statute expressly provides for a thing to be done in accordance with Section 3 (2) (c) or 3 (2) (f) then the provisions thereof must be complied with and they cannot be set at naught by any assumption of or a resort to the generality of the power under S. 3 (1) of the Act.

58. Again the lie direct to the aforesaid stand sought to be taken by the respondent-State is given by the fact that the power here is not being exercised by the Central Government but merely by the State Government as a delegate of the Central Government strictly within the confines of such delegation. It deserves highlighting that the Control order has not been issued by the Central Government purporting to act under S. 3 (1) of the Act but expressly by the State Government under the power delegated to it by virtue of S. 5 and the delegation made thereunder by Order G. S. R. 800 dated the 9th of June, 1978. In order to appreciate this aspect of the case it becomes necessary to read both of them:—

Section 5. Delegation of powers: The Central Government may, by notified order, direct that the power to make or issue notifications under S. 3 shall, in relation to such matters and subject to such conditions, if any, as may be specified in the direction, be exercisable also by:—

(a) such officer or authority subordinate to the Central Government, or

(b) such State Government or such officer or authority subordinate to a State Government, as may be specified in the direction."

Order

"New Delhi, the 9th June, 1978 G. S. R. 800.— In exercise of the powers conferred by Section 5 of the Essential Commodities Act, 1955 (10 of 1955), and in supersession of the Order of the Government of India in the late Ministry of Agriculture (Department of Food) No. GSR 316 (E), dated the 20th June, 1972, the Central Government hereby directs that the powers conferred on it by sub-sec. (1) of S. 3 of the said Act to make orders to provide for the matters specified in clauses (a), (b), (c), (d), (e), (f), (h), (i), (ii) and (j) of sub-sec. (2) thereof shall, in relation to foodstuffs be exercisable also by a State Government subject to the conditions—

(1) that such powers shall be exercised by a State Government subject to such directions, if any, as may be issued by the Central Government in this behalf;

(2) that before making an order relating to any matter specified in the said cls. (a), (c) or (f) or in regard to distribution or disposal of foodstuffs to places outside the State or in regard to regulation of transport of any foodstuff, under the said clause (d), the State Government shall also obtain the prior concurrence of the Central Government; and

(3) that in making an order relating to any of the matters specified in the said clause (j) the State Government shall authorise only an officer of Government." Now a plain reading of the aforesaid Order makes it manifest that what has been delegated to the State Government expressly is only the making of Order to provide for the matter specified in clauses (a), (b), (c), (d), (e), (f), (h), (i), (ii) and (j) of sub-section (2) of S. 3. There is no delegation of the powers vested in the Central Government under Section 3 (1). The State Government or its minion, the Director, therefore cannot arrogate to itself the plenary and the generality of powers vested in the Central Government under S. 3 (1), if any. Equally it deserves highlighting (which would be of greater relevance in another context later) that the delegation is expressly in favour of the State Government and to any officer or authority subordinate thereto. Nor has the State Government even by the remotest implication been authorised to further delegate such powers to the Director or any officer. For this manifest reasons also any purported resort to the generality of the powers under S. 3 (1) of the Act in this context by the State Government itself or by the Director would be wholly impermissible and unwarranted.

59. The aforesaid legal proposition appears to be plain but if authority was needed for the same it is available in the following words of the Division Bench in Bijoy Kumar Routrai v. State of Orissa. AIR 1976 Orissa 138, where a similar contention was repelled (at p. 147):—

"What has been delegated to the State Government under the above notification is, therefore, the power of the Central Government under sub-section (1) of Section 3 to make an order in regard to matters specified in the clauses (a) to (j) excepting (g). As the delegate, the State Government is not entitled to fall back

upon the wide powers of sub-section (1) and must exercise power within the field of delegation. The decisions of the Supreme Court are of no avail to the State and unless the order is within the frame of delegation, it cannot be sustained."

For the aforesaid view the Bench had placed reliance on *Sujan Singh v. State of Haryana*, AIR 1968 Punj and Har 363; *State v. Suraj Bhan*, AIR 1972 All 401, and *T. M. Prasad v. State*, AIR 1972 Pat 250.

60. In the light of the foregoing discussion on the basis of both principle and the relevant statutory provisions, I would hold that the general control price of the whole commodity fixed under S. 3 (2) (c) of the Act is distinct and a thing apart from the compulsory purchase price payable in accordance with S. 3 (3) of the Act.

61. The aforesaid view receives conclusive support from binding as also persuasive precedent. In *Shree Meenakshi Mills Ltd.'s case* (AIR 1974 SC 366) (supra), Chief Justice Ray, after adverting to all the relevant provisions under Section 3 of the Act concluded as follows:—

"74. The differences between sub-sections (3) and (3A) on the one hand and sub-sections (3B) and (3C) on the other are these. Sub-ss. (3) and (3-A) speak of fixing price by agreement consistent with or with reference to controlled price or failing both market rate prevailing in the locality during three months preceding the date of the notification. Sub-sec. (3B) speaks either of controlled price or where no such price is fixed the price prevailing or likely to prevail during the post harvest period in the area to which the order applies. In sub-section (3C) which relates to sugar price is to be calculated with reference to minimum price of sugarcane, manufacturing cost of sugar, duty or tax, and a reasonable return and different prices may be provided for different areas or factories or different kinds of sugar."

"75. Therefore controlled price fixed under Section 3 (1) read with S. 3 (2) (c) is different from price under sub-ss. (3A), (3B) and (3C)".

I am inclined to the view that the categorical conclusion in paragraph 75 is clearly conclusive on the point and binding on us. Apart from the above, it would appear that there is an equally unbroken line of precedents on the point holding that the general control price under S. 3 (2) (c) of the Act is something

distinct and apart from that determined and payable under sub-secs. (3), (3-A) (3-B) and (3-C) of S. 3 of the Act. In *Bhagwan Singh v. State of Punjab*, (1975) 77 Pun LR 585, the validity of Clause 4 of the Punjab Wheat (Levy) Procurement Order arbitrarily fixing price of Rs. 105/- per quintal for the compulsory acquisition of wheat in the Order itself was struck down as ultra vires of S. 3 (3-B) of the Act because the same had not been determined in conformity therewith. A similar argument that this itself was the control price was categorically repelled in the following terms:—

"The third contention of Mr. Wasu that the price mentioned in Cl. 4 of the Levy Order was in fact the controlled price under S. 3 (2) (c) of the Act and the licensed dealers could, therefore, be asked to sell wheat at this price under sub-section (3-B) (i) of S. 3 is, in my opinion an argument of frustration, as it loses sight of the distinction between the controlled price fixed under S. 3 (2) (c) and the price to be paid to a person holding in stock any essential commodity who is required to sell the whole or a specific part of the stock in terms of cl. (f) of sub-sec. (2) of Section 3. Starting from sub-section (3) of the Act, in all the sub-sections, which relate to the fixation of price when an order is passed under S. 3 (2) (f) requiring any person to sell any essential commodity, a reference to the controlled price is made indicating it as something distinct from the price which has to be paid to the person from whom the stock is acquired by the Central or the State Government. The price to be paid in such case may be the same as the controlled price or may have relation to the controlled price, but these provisions clearly envisage the existence of a controlled price independent of the price to be fixed under sub-secs. (3), (3-A), (3-B) or (3-C) of S. 3 of the Act. Controlled price could be the basis for fixing the price when an order under S. 3 (2) (f) is passed, but there is no room for contending that the price at which the Central Government or the State Government could require a person to sell the stock would be the controlled price, without an order having been passed by the Central Govt. or the State Government under Section 3 (2) (c) of the Act....."

Coming now to the other High Courts in *K. B. Jinaraja Hegde v. State of Mysore*

AIR 1971 Mys 12 a similar fixation of price by the Control Order itself in the Mysore Paddy Procurement (Levy) Order 1966, was struck down as being violative of S. 3 (3B) of the Act. The identical argument raised on behalf of the respondents was specifically rejected with the following conclusion (para 5):—

".....Mr. Puttaswamy, learned Advocate for the State, submitted that the price fixed in Schedule II of the order was itself the controlled price. We are unable to agree with this submission. The controlled price has necessarily reference to the object of the State fixing up a maximum price beyond which sale cannot be legally made by the grower or the dealer. The price fixed under Schedule II is not such price. It is common knowledge, and that factor is not disputed by the State, that paddy is sold at much higher price in the open market both by the growers and the dealers than the price mentioned in the Schedule. We cannot therefore call this price as the controlled price, as contemplated by cl. (i) of sub-section (3-B) of S. 3 of the Act. The wording of the Levy Order leaves no doubt in our mind that the price that has been fixed in Schedule II is the 'purchase price' and not the controlled price."

In Bijoy Kumar Routrai's case (AIR 1976 Orissa 138) (supra), the validity of the Orissa Paddy Procurement (Levy) Order, 1974 was challenged inter alia on the ground of the fixation of the declared price prescribed therein itself. Striking the same as violative of sub-section (3-B) of the Act, it was observed as under (at p. 143):—

".....Without examining the matter any further, it is sufficient to indicate here that the scheme of the Act requires payment of a price which is intended to be a just equivalent because the mode as indicated in S. 3 (3-B) of the Act is payment of the prevailing market price on the date when the direction for sale is made or the price which is likely to prevail in the post-harvest period. If what is offered as price does not satisfy the requirement of the Act, there would be a statutory infraction and the requirement to sell at a price inadequate enough would not be enforceable. As the Act does not intend any expropriatory measure the order cannot make a provision essentially for such a purpose,....." and again (at p. 153):—

"We have already noted the huge gap between the actual prevailing price or the price which was likely to prevail in the post-harvest period on one side and the declared price on the other. Accordingly to us, it could not have been the intention of the Parliament to fix such a price in exercise of powers under S. 3 (3-B) (ii) of the Act. Therefore, the direction to sell at a price not in terms of the Act is an infraction and beyond the authority of delegation."

To the same effect are the following observations of the Division Bench in Sitaran Jwala Prasad v. State of Uttar Pradesh, AIR 1975 All 272, (to which detailed reference would be necessary on the Second question):—

"* * *. The controlled price contemplated by cl. (i), therefore, has to be with reference to either the grade of foodgrain or its variety. If the Government issues a direction, as in the instant case, that 50 per cent of the foodgrains are to be sold to it, it will have to pay to the seller a price as contemplated either by cl. (i) or cl. (ii) of sub-section (3-B). It cannot say that whatever price it chooses to mention in the order as price payable in respect of the stock requisitioned by it would automatically become the controlled price of the grade or variety of the concerned foodgrain, as contemplated by cl. (i)." Lastly in the recent judgment in Joe Pereira v. Union of India, AIR 1979 Kant 22, the Division Bench similarly struck down the arbitrary fixation of the price in the Karnataka Paddy Procurement (Levy) Order 1960, as patently violative of sub-sec. (3-B) of S. 3 of the Act by holding that the price fixed in the Levy Order could not automatically become the controlled price of the commodity.

62. In fairness to the learned counsel for the respondents, it becomes necessary to advert to their attempted reliance on Sri Venkateswara Rice Mill v. State of Andhra Pradesh, AIR 1975 Andh Pra 84. What is significant in this context is that the issue of fixation of price in the Control Order was not even remotely challenged on behalf of the petitioners and the question was, therefore, never before the Bench. Indeed it was the common case that the notified price in the order had been fixed in accordance with the provisions of the statute. This is evident from the following observations therein of the learned Chief Justice :—

"* * *. So, a notified price is fixed only after taking the relevant factors into consideration, that is to say, to see that no dealer or miller suffers loss by his having to sell a portion of the total quantity of the rice which he produces or manufactures. The fixation of the price has not been questioned before us."

That being so, I fail to see how this case would be of any aid to the respondents in the present context where the whole challenge is directed to the arbitrary fixation of price by the Control Order. It is, however, necessary to notice that the learned Judges of the Division Bench in Venkateswara Rice Mill's case chose to differ from the view of the Mysore and Allahabad High Courts in K. B. Jinaraja Hegde (AIR 1971 Mys 12) and Sitaram Jwala Prasad's cases (AIR 1975 All 272) (supra), with which I have already expressed my respectful agreement. If the Division Bench in Venkateswara Rice Mill's case intended to lay the law contrary thereto I must respectfully record my dissent therefrom in view of the reasons already recorded above. Reliance on behalf of the respondents was also placed on the unreported judgment of the Rajasthan High Court in M/s. Chand Behari Lal v. Union of India — C. W. No. 6 of 1980 decided on 14th March, 1980, in the context of a Sugar Control Order coming within the specific provisions of S. 3 (3-C). However, the following concluding observations in the said judgment itself give the lie direct to the stand taken by the respondents:—

"Of course, for the purposes of fixing price for clause (f) which includes levy, the order will have to specify and give effect to sub-section (3) of S. 3 and if that is not done and if the Central Government stops only by fixation of the price, ignoring sub-section (3) of S. 3, a citizen can have the grievance that S. 3 (3) has been violated. Therefore, sub-cl. (c) read with S. 3 (3) would certainly require the Central Government to further give directions under sub-cl. (sic) 3 (3) but those directions will have certainly great bearing on the controlled price in case cls. (a) and (b) of sub-sec. (3) are to be applied." Indeed the aforesaid observations in a nut-shell summarise the argument on behalf of the petitioners and greatly advance their case. Nevertheless there is no gainsaying that certain other observations in the said judgment, if read in isolation, do seem to take a view contrary to the one to which I have subscribed. It would

be repetitive to list my reasons afresh and for those already recorded above, I would respectfully dissent therefrom.

63. To conclude on the first question I am firmly of the view, on the basis of the weight of precedent, the relevant statutory provisions, and on principle, that the general control price of the whole commodity envisaged under S. 3 (2) (c) of the Act is a class and thing apart from the compulsory purchase price payable in accordance with sub-sec. (3) of the said section.

64. Now once the aforesaid conclusion has been made the answer to the second question — whether the general control price envisaged under S. 3 (2) (c) of the Act is one fixed uniform price beyond which the whole of the essential commodity cannot be allowed to be bought or sold — is relatively easy to arrive at. Inevitably one must first turn to the relevant statutory provisions of S. 3 (2) (c) and (f):—

"Section 3. (2) Without prejudice to the generality of the powers conferred by sub-section (1) an order made thereunder may provide—

(a) & (b) x x x x

(c) for controlling the price at which any essential commodity may be bought or sold

(d) & (e) x x x x

(f) for requiring any person holding in stock, or engaged in the production, or in the business of buying or selling, of any essential commodity—

(a) to sell the whole or a specified part of the quantity held in stock or produced or received by him, or

(b) in the case of any such commodity which is likely to be produced or received by him, to sell the whole or a specified part of such commodity when produced or received by him,

to the Central Government or a State Government or to an officer or agent of such Government or to a Corporation owned or controlled by such Government or to such other person or class of persons and in such circumstances as, may be specified in the order.

Expln. x x x
x x x."

Now a plain reading of S. 3 (2) (c) above makes it manifest that it is primarily and wholly directed to the fixation of a price at which any essential commodity may be bought or sold. Its provisions are general in nature. It obviously visualises a fixed

or a ceiling price for the whole commodity and not for a part or percentage thereof. The contention on behalf of the petitioners is sound that in the context in which S. 3 (2) (c) is set it visualises a control price for the whole of the commodity which is uniformly fixed providing a ceiling beyond which it cannot be lawfully permitted to travel. It deserves notice that essential commodities are not things (as for instance in the case of foodgrains) in which every grain whereof is either identifiable or separable. To prescribe that 30 per cent of an essential commodity would be priced at one level and the remaining 70 per cent should be priced at another level or for that matter be left completely unregulated would pose problems which are beyond the pale of solution. One cannot easily imagine that the legislature has led itself to create a situation which would be patently illogical by prescribing different control prices for different percentages of an essential commodity. The present Control Order is itself an illustrative example. On the stand of the respondent-State it seems to visualise one price for 30 per cent of the essential commodity, namely, Rs. 42/- per quintal and an altogether different price for the remaining 70 per cent, may be as high as Rs. 120/- per quintal — indeed not even one price but any price for the rest. Again cl. (3) of the Control Order is applicable only to all the dealers and the owners of the Rice Mills. Apparently no control price either partial or total would arise in the case of the rice bran stocks in the hands of persons other than dealers and owners of the Rice Mills specified in the said clause. This would create a situation that the same commodity of the rice bran would have one control price for the 30 per cent of the commodity in the case of dealers and mill-owners and another price for the remaining 70 per cent in their hands and no control price at all with regard to the rest. With the greatest respect it appears to me that this would make a mockery of what one visualises as the uniform price of a controlled essential commodity.

64-A. The aforesaid view is then strengthened when a comparison of Secs. 3 (2) (c) and 3 (2) (f) is made. It deserves highlighting that cls. (a) and (b) of S. 3 (2) (f) in express terms mention the whole or a specified part of an essential commodity. It is plain, therefore, that where the legislature intended as under S. 3 (2) (f) that the power to acquire either

the whole of the stock or a part thereof from any person it has specifically said so. S. 3 (2) (c) on the other hand does not talk of the control price being either for the whole of the commodity or any specified part thereof. For this added reason also it would be unwarranted to construe Section 3 (2) (c) as providing for the control price of certain percentages or specified parts of an essential commodity. As the statute is now worded it visualises a uniform control price of the whole of the essential commodity at which it may be bought or sold and not a partial control price therefor. If the legislature was so minded it could have expressly appropriated to itself such a power under the statute but it has not chosen to do so in this context and in sharp contrast to the other provisions which expressly provide for dealing in a specified part of the essential commodity.

65. The aforesaid view which I take is buttressed conclusively by the Division Bench judgment in M/s. Sitaram Jawala Prasad's case (AIR 1975 All 272) (supra). Indeed this case appears to be virtually on all fours with the present one. Therein also the U. P. Coarse Foodgrains (Levy) Order (1974) required the licensed dealers to deliver 50 per cent of the coarse grain in their stock at the scheduled price arbitrarily fixed in the Order itself. The remaining 50 per cent was apparently left free of control and floating in the market. Striking the provisions down and repelling an identical argument, which was raised before us, their Lordships observed as follows (at p. 275):—

"It was urged by the learned Advocate-General that since only 50 per cent of the coarse foodgrains were required to be sold to the State Government, it was open to the dealers to sell the remaining 50 per cent of the foodgrains at any price which they liked to enable them to compensate themselves for any loss that they may suffer on account of the 50 per cent of the foodgrains being sold to the Government at the rate of Rs. 74/- per quintal. According to him, in this view of the matter, on the one hand, the dealers will not be put to any appreciable loss and, on the other, at least 50 per cent of the foodgrains would be available to the consumers at a comparatively much lower price. This argument of the learned Advocate-General, based on economic equity, does not in our opinion help us in interpreting the meaning of the word 'controlled price' as used in cl. (i) of S. 3 (3-B).

Moreover, the Legislature has achieved the aforesaid object in the case of stock of sugar required to be delivered in pursuance of an order made under S. 3 (2) (c) by enacting Section 3 (3-C) and wording it differently. If what the learned Advocate General urges was the real intention of the Legislature it would have enacted sub-section (3-B) or lines similar to sub-section (3-C) but it has not done so. Accordingly, we are of opinion that even though the State Government had full authority to require 50 per cent of the foodgrains to be sold to it as contemplated by the impugned order, it was not open to it to have fixed Rs. 74/- per quintal as the price payable in respect of such foodgrains. If the State Government desires to purchase 50 per cent of the foodgrains as contemplated by the Order, it must pay its price as contemplated by sub-section (3-B)".

An identical view has then been taken by the Division Bench in *Joe Peraira v. Union of India*, AIR 1979 Kant 12 in the following terms (at p. 14) —

"From these observations, it becomes clear that the controlled price is a price which is required to be determined by taking into consideration all the circumstances like interest of the grower, the consumer and the general public. It must be fair from the point of view of the producer and also from the point of view of the consumer. It has to be determined in such a way that the producer does not perish and the consumer is not crippled. The controlled price once fixed must be applicable to all sales and purchases. It should not be intended to control the price of a particular type of transaction. The price which the State Government fixed in the Levy Order or paid to the petitioners was evidently intended to govern the particular type of transaction, i. e. compulsory sale by the grower to the State. Such a price, in our opinion cannot automatically become the controlled price as contended for the State Government."

66. Both on principle and precedent one must conclude that what S. 3 (2) (c) envisages is a uniform and fixed ceiling price for the whole of the essential commodity on which it may be bought or sold and not for some parts and percentages thereof. The answer to the question posed at the very outset is thus to be rendered in the affirmative.

67. Once the two core questions in the case have been answered in the terms aforesaid, their application would leave little doubt that Cl. 4 of the Control Order is plainly unsustainable in law. The issue indeed narrows down on the pleadings of the respondent-State itself. It is hardly in dispute that Cls. 3 and 4 draw their sanction from S. 3 (2) (f) and inevitably, therefore, S. 3 (3) would be directly attracted to the situation. In practical terms, therefore, the question boils down to this whether the fixation of the price of Rs. 42/- by the Control Order is something which is warranted by the closely circumscribed power in this regard under clauses (a), (b) and (c) of S. 3 (3) of the Act. It is the common stand that no uniform fixed price for the whole of the essential commodity of rice bran has been promulgated. That being so, clauses (a) and (b) which directly postulate the existence of a controlled price already cannot obviously have any application. Therefore, cl. (c) only would be applicable which mandates that the price calculated at the market rate prevailing in the locality on the date of the sale would be payable for the acquisition under Section 3 (2) (f) of the Act. Admittedly the respondents' case itself is that they were far from fixing the price in accordance with the prevailing market price. It is virtually admitted that such a price may well be as high as Rs. 120/- per quintal if the sales are made for the commercial purposes of extracting oil from the rice bran and in any case the State has itself relied on annexures R. 2 and R. 3 of the affidavit indicating that the market price ranged between Rs. 70/- to Rs. 80/- per quintal. Consequently in terms the respondents' own stand is that the price paid is not being fixed in accordance with S. 3 (3) (c) of the Act. Indeed the tall claim is that the arbitrary price of Rs. 42/- fixed by the Control Order would itself become the control price of the commodity.

68. There is no manner of doubt that the issuing of the orders under the Essential Commodities Act including the impugned Control Order here is a subordinate legislation. This must necessarily conform to the mandate and the limitation prescribed by the parent statute itself. The moment it travels beyond the same it must be struck down as violative of the source from which it flows. It must, therefore, be held that the fixation of the price at Rs. 42/- being in direct violation

of the provisions of Cls. (a), (b) and (c) of S. 3 (3) are ultra vires of the Essential Commodities Act and have to be necessarily struck down.

69. Apart from the aforesaid fatal infirmity the Achilles heel of clause 4 is the vesting of an unguided and uncanalised power in the Director to determine the price of rice bran from time to time without any limitation. If the stand of the respondent-State were to be accepted that the arbitrary fixation of price by the Control Order is itself the control price then according to its terms it would follow that the Director can from time to time keep on varying the same. Indeed the language of Cl. 4 indicates that in essence it is the Director who will determine the price and only as a temporary measure for the present the sale price has been fixed at Rs. 42/- per quintal exclusive of the cost of containers and taxes. Now one cannot easily imagine that the control price of an essential commodity under S. 3 (2) (c) all over the State may be left to the whimsicality of the Director that at any time he may choose to fix it without the least reference to the provisions of S. 3 (2) (c) or to those under S. 3 (3) of the Act. A reference to the delegation made by the Central Government vide Order G. S. R. 800 dated 9th June, 1978 (quoted earlier in paragraph 20) makes it plain that this has been done only in favour of the State Government itself and not in favour of any officer or authority subordinate thereto. Neither S. 5 nor the Order making the delegation even remotely empowers the State Government to further delegate its powers on to the Director. On general principles it is well-settled that a delegate himself cannot further delegate unless otherwise expressly authorised to do so or where such delegation may in terms be deduced from the language of the statute itself. Here both these things are totally lacking. Viewed from any angle, therefore, the vesting of the power to determine the crucial issue of the price in the Director by Cl. 4 appears to be totally unwarranted and unauthorised by law. In fact the learned counsel for respondents faced with this intractable situation had to concede half-heartedly that at least the vesting of the power in the Director could not be easily validated by the strict delegation made in favour of the State. Inevitably, therefore, the clothing of the Director with the unlimited power to fix any price at any time is manifestly illegal and has to be necessarily struck down.

70. Now once the aforesaid finding has been arrived at an equally fatal and added infirmity attaches to Cl. 4. A reading thereof would show that the same is an indivisible and integral whole. Indeed the core thereof is the vesting of the power to determine the sale price of rice bran in the Director from time to time. It is only as a temporary and a pragmatic measure that the present sale price of rice bran is fixed thereby. It has to be kept in mind that the Control Order is no temporary measure but is intended to retain its statutory force till the State Government thinks otherwise. Consequently, once it is held that the vesting of the power to determine the price in the Director is ultra vires of the Act, Cl. 4 as a whole must similarly be held to be so. As has been said earlier the vesting of the power to determine the price in the Director is literally and figuratively the head of Cl. 4 and once it is severed the same must fall to the ground like a headless body. On this additional ground as well Cl. 4 cannot be allowed to remain as a limb of the main statute.

71. In fairness to the learned counsel for the petitioners, it is necessary to advert to another aspect and the more so because of certain passing observations of approval which have fallen from the pen of my learned brother Sharma, J. It was half-heartedly contended on behalf of the respondents that S. 3 (2) (c) of the Act gave wide ranging powers to the authorities to fix any control price for an essential commodity and consequently the State Government could determine it at Rs. 42/- per quintal or even less for the whole of the commodity. This, it was argued, would be even more disadvantageous to the petitioners as they would be obligated to sell the entire rice bran at that low price (whether Rs. 42/- or Rs. 30/- per quintal) instead of merely 30 per cent thereof as provided under the Control Order. This argument suffers from the fallacy of the assumption that the power to determine the control price under S. 3 (2) (c) is wholly arbitrary or unguided which in fact it is not. Undoubtedly, the statute confers a wide ranging and effective power to determine the control price of the whole commodity in the authorities, but therefrom it does not follow that it can be exercised whimsically with impunity. The fixation of such a price under S. 3 (2) (c) of the Act has again to satisfy the tests on the anvil of its reasonableness. It is unnecessary to elaborate the matter on.

principle because the following observations of the final Court in *Minakshi Mills Ltd.'s case* (AIR 1974 SC 366) (supra), completely covers the issue (para 76):—

“The control of prices may have effect either on maintaining or increasing supply of commodity or securing equitable distribution and availability at fair prices. The controlled price has to retain this equilibrium in the supply and demand of the commodity. The cost of production, a reasonable return to the producer of the commodity are to be taken into account. The producer must have an incentive to produce. The fair price must be fair not only from the point of view of the consumer but also from the point of view of the producer, ...”

72. It is obvious from the above that the fixation of a uniform control price for the whole of the commodity under Section 3 (2) (c) of the Act has also to satisfy the test of reasonableness and is therefore, challengeable in law. It must be clarified that it was never the stand of the learned counsel for the petitioner that the fixation of price under S. 3 (2) (c) of the Act is beyond challenge or if it is whimsically done, he would not assail the fixation of such a price. His whole stand and rightly so was that under the Control Order no uniform control price for the whole of the commodity, (which alone in law can be termed as a control price) has been fixed under Sec. 3 (2) (c) and the Control Order merely envisages a compulsory sale price as such. It was, therefore, that he confined his stand to assailing this compulsory purchase price as being violative of S. 3 (3) (a), (b) and (c). Indeed, it was not and possibly could not be his stand that any and every control price howsoever whimsically fixed under S. 3 (2) (c) is unassailable or that it would always be acceptable to him.

73. In the light of the aforesaid exhaustive discussion, I must conclude that cl. 4 of the impugned Control Order is glaringly violative of S. 3 of the Essential Commodities Act and is, therefore, invalid. It was not even argued before us that Cl. 4 is separable from the rest of the impugned Control Order and that it can still hold the field ceteris paribus. Indeed this clause is a pivotal cause without which the Control Order cannot be put into operation. It would be inconceivable that any compulsory sale of rice bran would be possible under Cl. 3 without any provision whatsoever for the quantum

of price payable therefor. The whole of the Control Order, therefore, must fall because of this fatal infirmity and is hereby struck down.

74. The writ petition is, therefore, allowed. In view of the intricate questions of law arising herein the parties are left to bear their own costs.

GOKAL CHAND MITAL, J.:— 75. On perusing the judgments of the learned Chief Justice and learned brother M. R. Sharma, J., with due respect to the learned Chief Justice, I am inclined to agree with the ultimate conclusion arrived at by Sharma, J., that the writ petition is without any merit and should be dismissed for my own reasons which I wish to record separately.

76. As rightly put by the learned Chief Justice, the first and the foremost point which arises for consideration before the Full Bench is whether the control price under S. 3 (2) (c) of the Essential Commodities Act, 1955 (hereinafter called the Act), envisages a uniform price for whole of an essential commodity at which it may be bought or sold or can be for a specified percentage thereof. I am of the considered view that it can be for a specified percentage also.

77. The constitutionality of all the clauses of S. 3 of the Act has been upheld by the highest Court of the land as such is beyond the pale of controversy. S. 3 (1) of the Act gives legislative power to the Central Government which power has further been delegated by the Central Government to the State Government under S. 5 of the Act, by order G. S. R. 800 date 9th June, 1978, as reproduced by the learned Chief Justice in para 20-A of his judgment. By this order, the Central Government has empowered the State Government to make orders to provide for all matters specified in cls. (a), (b), (c), (d), (e), (f), (h), (i), (ii) and (j) of sub-sec. (2) of S. 3. The two relevant clauses which fall for our consideration are cl. (c) for controlling the price at which food stuffs may be bought or sold and cl. (f) for requiring any person holding such foodstuffs to sell the whole or a specified part thereof to such authority or person or class of persons as may be specified in the order. In exercise of the powers under S. 3 of the Act, the State Government issued the Haryana Rice Bran (Distribution and Price) Control Order, 1981 (hereinafter called the Control Order), Annexure P-1. Therefore, the question arises whether the State Government, while fix-

ing the control price of 30% of the rice bran by the impugned order annexure P-1 has in any way exceeded its legislative functions. It is no doubt true that control price could be fixed for the entire rice bran but a power to legislate for the whole includes power to legislate for a part and on this principle alone, I am inclined to hold that the State Government could control the price of part of the rice bran which is a foodstuff. The fixation of the price of part of the commodity, if had been challenged by the petitioners on the basis of Art. 14 of the Constitution or on the ground of reasonableness, the matter could have been gone into, but, there is no challenge to the same because it was assumed by the petitioners that the control price could only be fixed for the entire commodity and not for a part thereof. Therefore, unless the fixation of control price of part of the commodity is challenged on some permissible basis, the matter cannot be gone into further except by recording a finding that the power to legislate for the whole includes the power to legislate for part of it also.

78. For the aforesaid reasons I hold that in this case the control price fixed by Order annexure P-1 would be the control price for 30% rice bran in respect of which the Control Order has been issued as the State Government had the power to legislate by issuing the Control Order fixing the price under S. 3 (3) (c) of the Act.

79. Once it is held that the State Government could legislate to control the price of part of rice bran, the next question would be whether the price of Rupees 42/- per quintal fixed by the State Government under Cl. 4 of the Order, is reasonable or not. In the writ petitions, the reasonableness of the price has not been challenged as no data or basis has been provided to show that price fixed is below its cost price. The sole basis to challenge the fixation of the price in the writ petition was that because for the entire rice bran no control price has been fixed under S. 3 (2) (c) of the Act, therefore, for the rice bran to be sold under S. 3 (2) (f), the price would be payable under S. 3 (3) (c) of the Act, which has to be the market price and since Rs. 42/- per quintal fixed in the Control Order was far below the market price, it was contrary to S. 3 (3) (c) of the Act. As already held above, since the State Government can fix the control price under S. 3 (2) (c) of the Act even for part of the price bran, Rs. 42/- would be taken as the

control price of 30% of the rice bran. The petitioners challenged the fixation of Rs. 42/- as the control price and if data had been provided in the writ petition to show that the same was unreasonable or below the cost price of the petitioners, the matter would have been gone into but since no basis has been laid in the writ petitions, the control price of Rs. 42/- fixed by the State Government will have to be upheld on the facts of this case. However, a reading of the reply filed by the State Government, as reproduced by M. R. Sharma, J., at page 4 of his judgment, clearly goes to show that in Punjab under a similar order of 1978, Rs. 30/- per quintal was fixed as the price for rice bran and in the subsequent year, when there was no Control Order, the dealers/licensees had agreed to sell rice bran at the rate of Rs. 37-50 per quintal, which in the subsequent year was increased to Rs. 42/-. In conclusion, it was stated that several factors were taken into consideration while fixing the price of the rice bran at Rs. 42/- per quintal. In spite of such a reply, in their replications the petitioners could have pleaded that all relevant factors were not taken into consideration and those factors could be highlighted and it could be shown that Rs. 42/- per quintal was much less than the cost price or the reasonable price. It cannot be disputed that the control price is not to be the market price but one may reasonably argue that the control price should be reasonable, consistent with the cost price. Accordingly, in the absence of any data, on the facts of the present case it is held that the price of Rs. 42/- per quintal is reasonable and has to be upheld.

80. This brings me to the consideration of the precise argument about S. 3 (3) (c) of the Act raised by the counsel for the petitioners. A reading of S. 3 (3) shows that when any person sells any essential commodity in compliance with an order made with reference to S. 3 (2) (f) of the Act, then he has to be paid the price thereof as provided by cl. (a), (b) or (c) which are mutually exclusive. In the present case, the order annexure P-1, issued by the State Government is also an order under S. 3 (2) (f) of the Act. Therefore, the counsel for the petitioners is right that the price for the rice bran which they have to sell under the impugned order annexure P-1 has to be paid in accordance with S. 3 (3). At this stage, it has become relevant to reproduce S. 3 (3) with its three clauses:

"3 (3). Where any person sells any essential commodity in compliance with an order made with reference to cl. (f) of sub-section (2), there shall be paid to him the price therefor as hereinafter provided—

(a) where the price can, consistently with the controlled price, if any, fixed under this section, be agreed upon, the agreed price;

(b) where no such agreement can be reached, the price calculated with reference to the controlled price, if any;

(c) where neither clause (a) nor clause (b) applies, the price calculated at the market rate prevailing in the locality at the date of sale."

The three clauses can be divided into two parts. If there is a controlled price for the commodity for which order under S. 3 (2) (f), is issued, then the price will have to be paid, firstly under clause (a) on the basis of agreement of the parties, which shall be consistent with the controlled price. which means it may even be more or less than the controlled price. If agreement is not reached between the parties, then Cl. (a) will cease to apply and under Cl. (b), the price will have to be calculated with reference to the controlled price. Rs. 42/- per quintal alone will not be paid which is the control price in this case but the control price of Rs. 42/- will be kept in view and then the local taxes, if any, incidental charges like packing or transportation may have to be added in case the supply is to be made in bags and has to be transported to any particular place. If it is to be supplied without the gunny bags or containers and is not to be transported and no sales tax etc. is payable, then it may be the control price of Rs. 42/- alone at which the payment may be made to the person selling the rice bran under S. 3 (2) (f) of the Act. In short, the price which will be paid under S. 3 (3) (b) will be with reference to the control price. In case there is no control price of the commodity in respect of which the order is issued, then alone Cl. (c) will apply under which the price will have to be calculated at the market rate prevailing in the locality on the date of sale. Therefore, there is no dispute that the price with regard to the commodity in respect of which an order has been issued under S. 3 (2) (f) has to be calculated under S. 3 (3), and whether Cl. (a) or Cl. (b) will come into operation or Cl. (c) will apply,

will depend firstly on the fixation of the control price and secondly if there is a control price, whether there has been an agreement as to the price failing which the price payable would be calculated with reference to the control price. Therefore, it is abundantly clear that Cl. (c) will come into operation in the situation where there is no control price. As held above, there is a control price fixed in the present case and Cls. (a) and (b) alone will come into operation and the petitioners will be paid the price in accordance therewith and not simply at Rs. 42/- per quintal because it was sought to be argued on behalf of the petitioners that their 30% rice bran is being confiscated at a whimsical price fixed by the Government at Rs. 42/- without any reference to S. 3 (3) of the Act under which the price is payable. The control price of Rs. 42/- per quintal has also not been found to be whimsical.

81. An argument was raised that while S. 3 (2) (c) provides for controlling the price at which an essential commodity may be bought or sold, S. 3 (2) (f) specifically mentions that any person holding the essential commodity may be required to sell whole or a specified part of the commodity and, therefore, it is clear that under S. 3 (2) (c) of the Act, the control price has to be of the entire commodity whereas under S. 3 (2) (f), a person may be required to sell the whole or part of the essential commodity. From this, the counsel for the petitioners, wanted to deduce that the control price under S. 3 (2)(c) has to be fixed of the entire essential commodity. otherwise under S. 3 (2) (c) it would have been provided that control price may be fixed for whole or part of the same. I have not been persuaded to agree with this contention. On the plain rule of interpretation, whole includes part and, therefore, when it is provided in Cl. 3 (2) (f) for requiring any person to sell whole or a specified part, it is only illustrative. The making of such a provision in S. 3 (2) (f) for part also, cannot be used to reasonably argue that S. 3 (2) (c) should be read to mean that the control price can be fixed for the entire essential commodity and not for part thereof. As already observed by me in the earlier part of the judgment, both the functions under S. 3 (2) (c) as well as under S. 3 (2) (f) are legislative functions and may be exercised in respect of whole or part thereof. Accordingly, it

is held that even if Cl. (f) provides for making an order with regard to whole or part of an essential commodity, it in no way lends support to the argument that while interpreting Cl. (c), the control price must be fixed for the entire essential commodity.

82. Even otherwise, I do not find the fixation of control price for part of the commodity to be unreasonable or violative of Art. 14 of the Constitution. If the State Government or the Central Government, as the case may be, is of the opinion that the control price of 30% of an essential commodity would serve the purpose, I do not find any reason as to why it should not be allowed to do so. If at a later stage the Government is of the opinion that the control price of still higher percentage of an essential commodity deserves to be fixed, instead of the entire, it can do so and finally when the State Government forms an opinion that it is necessary to control the price of the entire essential commodity, it can resort to that also. As already observed, if any petitioner is able to provide some date or material to the satisfaction of the Court that the fixation of control price in a particular case, whether of part or of whole, is violative of Art. 14 of the Constitution or is so unreasonable being below the cost price, the Court may interfere in that case, but, on the facts of the present case, it cannot be held that the control price of 30% of the rice bran is in any way illegal or unreasonable.

83. It was then urged that Cl. 4 of the Order, under which the price is sought to be fixed, is wholly illegal because this clause empowers the Director/Joint Director/Deputy Director, Food and Supplies, Haryana, to fix the maximum sale price of the rice bran from time to time, which may far exceed the price of Rs. 42/- or may even be less and as such it cannot be said that there is any control price fixed for the rice bran or any part thereof. In order to appreciate the argument, Cl. 4 of the Order deserves to be reproduced below:

"Sale price — The maximum sale price of the rice bran sold against permits as mentioned in Cl. 3 shall be as determined by the Director, from time to time. For the present the sale price is fixed at rupees fortytwo per quintal exclusive of the cost of containers and taxes."

The first part of the aforesaid clause certainly supports the argument of the learn-

ed counsel. The learned counsel for the State conceded that the Central Government has not authorised the State Government to further delegate the power of fixation of control price under S. 3 (2) (c) of the Act. Hence, the first part of Cl. 4 has been issued by the State Government in excess of its Legislative function and is struck down. It was then urged by the counsel for the petitioners that the whole of Cl. 4 is so inextricably mixed up that if the first part is quashed, the remaining cannot stand, I am wholly unable to agree with this contention. The second part, which is an independent clause by itself, clearly shows that the State Government for the present has fixed the sale price of rice bran at Rs. 42/- per quintal exclusive of the cost of containers and taxes. Therefore, till a further order is issued, Rs. 42/- would be the control price of rice bran to the extent of 30% and this part is clearly severable from the first part and while doing so, it is held that the second part of Cl. 4 is a valid piece of legislation issued under S. 3 (2) (c) of the Act fixing the sale price of rice bran to the extent of 30% at the rate of Rs. 42/- per quintal. If orders under Ss. 3 (2) (c) and 3 (2) (f) are issued simultaneously by one and the same order or by two separate orders of the same date, then also the price of the goods covered by S. 3 (2) (f) will have to be calculated in accordance with S. 3 (3) (a) or (b) as the case may be. If the order under S. 3 (2) (f) is issued first and under S. 3 (2) (c) later, then in that situation, the price will be paid of the goods covered by S. 3 (2) (f) for the period before the order u/s. 3 (2) (c) was issued in accordance with S. 3 (3) (c) of the Act and for the remaining goods the supply of which would be made after the issue of order under S. 3 (2) (c), the price would be calculated on the basis of Section 3 (3) (a) or (b), as the case may be. Similarly, suppose the State Government was to delete Cl. 4 from the Control Order at any time, while retaining the remaining part of the order which has reference to S. 3 (2) (f), in that situation, from the date of deletion of Cl. 4 under which the control price is fixed, the price payable henceforth would be on the basis of S. 3 (3) (c) but before the date of deletion, it would be under S. 3 (3) (a) or (b), as the case may be. Hence, I do not find any merit in this contention either.

84. The matter may be viewed from another angle, Suppose, the State Gov-

ernment were to issue an order specifically saying that for rice bran the price under S. 3 (2) (c) of the Act was fixed at Rs. 42/- per quintal and by another clause of the same order the whole of the rice bran was required to be sold under S. 3 (2) (f) to the persons classified in that order. In such a situation, the price of the rice bran will be paid to the dealers in accordance with S. 3 (3) (a) or (b) as the case may be. With this proposition, the counsel for the petitioners had no quarrel. He had also no quarrel with the proposition if the price of whole of the rice bran was fixed at Rs. 42/- per quintal under S. 3 (2) (c) but under S. 3 (2) (f) only 30% was required to be sold by the dealers to specified persons. If that is so, then I fail to understand how an order fixing price of 30% of the rice bran under S. 3 (2) (c) can be held to be without legislative sanction. Suppose, the Government considers that it has become necessary to control the price of 30% of an essential commodity and issues an order fixing price under Section 3 (2) (c) for that essential commodity and no order is issued under S. 3 (2) (f). That very order further provides that out of the existing stock or stocks to be produced from time to time 30% of the commodity will be separately kept to which the control price would apply and a direction is made that the sale of such 30% would be made at the control price on first come first served basis, according to the quantity specified for each person, and the remaining 70% of the commodity would be sold at the price the dealer may like to sell. To my mind, there is no legal infirmity in the same either from the point of legislative sanction or

(contd. on Col 2)

Before amendment

(3-B). Where any person is required by an order made with reference to Cl. (f) of sub-sec. (2) to sell any grade or variety of foodgrains, edible oilseeds or edible oils to the Central Government or a State Government or to an officer or agent of such Government and either no notification in respect of such foodgrains, edible oilseeds or edible oils has been issued under sub-sec. (3-A) or any such notification having been issued has ceased to remain in force by efflux of time; then notwithstanding

from the point of Art. 14 of the Constitution of India. Therefore, I am of the view that the State Government had the power under S. 3 (2) (c) to fix the control price of 30% of the rice bran and if an order under Section 3 (2) (f) is also issued, then the price payable to the dealer for the same will have to be calculated under S. 3 (3) (a) or (b) as the case may be with reference to the controlled price. S. 3 (3) (c) will come into play only if there is an order under S. 3 (2) (f) but no price is fixed under S. 3 (2) (c).

85. This brings me to the consideration of the decided cases cited by the counsel for the parties. The counsel for the petitioners had placed reliance on the following reported decisions:—

(i) Bhagwan Singh v. State of Punjab, (1975) 77 Punj LR 585;

(ii) K. B. Jinaraja Hegde v. State of Mysore, AIR 1971 Mys 12;

(iii) Sitaram Jwala Prasad v. State of Uttar Pradesh, AIR 1975 All 272;

(iv) Joe Pereira v. Union of India, AIR 1979 Kant 12; and

(v) Shree Meenakshi Mills Ltd. v. Union of India, AIR 1974 SC 366.

The first four decisions relate to payment of price with regard to grade or variety of foodgrains, edible oil seeds or edible oils covered by S. 3 (3B), regarding which orders under S. 3 (2) (f) were issued. In all those cases the price had to be paid for the goods covered by S. 3 (2) (f) according to the various clauses of Section 3 (3B), as it prevailed before the amendment made by Act 92 of 1976. The relevant provisions before and after the amendment, which had to be taken into consideration for fixing the price, are being reproduced hereunder:—

After amendment.

(3B). Where any person is required, by an order made with reference to Cl. (f) of sub-sec. (2), to sell to the Central Government or a State Government or to an officer or agent of such Government or to a Corporation owned or controlled by such Government any grade or variety of foodgrains, edible oilseeds or edible oils in relation to which no notification has been issued under sub-sec. (3-A), or such notification having been issued, has ceased to be in force there shall be paid to the person



ing anything contained in sub-sec. (3), there shall be paid as the price for the foodgrains, edible oilseeds or edible oils—

(i) The controlled price, if any, fixed under this section or by or under any other law for the time being in force for such grade or variety of foodgrains, edible oilseeds or edible oils; or

(ii) where no such price is fixed, the price for such grade or variety of foodgrains, edible oilseeds or edible oils prevailing or likely to prevail during the post-harvest period in the area to which that order applies.

Explanation:— For the purposes of this sub-section, 'post-harvest period' in relation to any area means a period of four months beginning from the last day of the fortnight during which harvesting operations normally commence."

A reading of the unamended provision would show that the price of goods covered by S. 3 (2) (f) had to be paid at the controlled price, if any, fixed under sub-sec. (3) of the Act or under any other law for the time being in force and in the absence of any such price having been fixed, according to the price prevailing or likely to prevail during the post-harvest period in the area to which the order applied. All the four decided cases are on the unamended provision of sub-sec. (3-B) and it was held that the price fixed in the order could not be treated as a price under S. 3 (2) (c) of the Act and the dealers had to be paid at the market price under the second clause. The view I have expressed above is clearly contrary to the view taken in the aforesaid four cases. Accordingly, *Bhagwan Singh v. State of Punjab* (1975-77 Pun LR 585) (supra), is overruled and the other three decisions are dissented from.

86. Sub-section (3B), as it stands now, clearly shows that the price which is payable for the goods covered by Section 3 (2) (f) will have to be fixed by the State Government, with the previous approval of the Central Govt. which could be

concerned, notwithstanding anything to the contrary contained in sub-sec. (3), an amount equal to the procurement price of such foodgrains, edible oilseeds or edible oils, as the case may be, specified by the State Government with the previous approval of the Central Government having regard to—

(a) the controlled price, if any, fixed under this section or by or under any other law for the time being in force for such grade or variety of foodgrains, edible oilseeds or edible oils;

(b) the general crop prospects;

(c) the need for making such grade or variety of foodgrains, edible oilseeds or edible oils available at reasonable prices to the consumers, particularly the vulnerable sections of the consumers; and

(d) the recommendations, if any, of the Agricultural Prices Commission with regard to the price of the concerned grade or variety of foodgrains, edible oilseeds or edible oils."

an amount equal to the procurement price of such foodgrains, edible oilseeds or edible oils. Having regard to the four sub-clauses, namely, (a) to (d), which provide for taking into consideration the controlled price, if any, then general crop prospects, the need for making such grade or variety of foodgrains etc., available at reasonable prices to the consumers and the recommendations, if any, of the Agricultural Prices Commission. Now, if sub-sec. (3) and sub-sec. (3B) are compared, it will be seen that under sub-sec. (3), no price is to be fixed by the State Government but while making payment the price has to be calculated in the manner provided by Cls. (a) to (c), as the case may be, but under sub-sec. (3B) the State Government has to fix the price keeping in view the ingredients contained in Cls. (a) to (d), which has to be an amount equal to the procurement price. Therefore, the two provisions are entirely different.

87. As regards *Shree Meenakshi Mills* case (AIR 1974 SC 366) (supra), our pointed attention was drawn to paragraphs 70, 74 and 75 of the report. A reading of the same shows that the controlled price fixed under S. 3 (1), read with S. 3 (2) (c)

is different from the price under sub-sections (3A), (3B) and (3C). The view which I have taken above is in full consonance with the aforesaid decision of the Supreme Court, for I have held that the controlled price under S. 3 (2) (c) would be different from the price payable under S. 3 (3) in the present case because the price will have to be calculated with reference to the controlled price, unless agreed upon consistently with the controlled price which means it may be more or less than the controlled price. Hence this decision does not advance the case of the learned counsel any further.

88. On the other hand, the counsel for the State has placed reliance on a Division Bench judgment in *Sri Venkateswara Rice Mill v. State of Andh. Pra.*, AIR 1975 Andh Pra 84, in support of the argument that the control price of even percentage of an essential commodity can be fixed under S. 3 (2) (c) in respect of which an order under S. 3 (2) (f) is also issued. I am in complete agreement with the reasoning adopted in this decision. Reliance was also placed on a single Bench judgment of the Rajasthan High Court in *C. W. P. No. 6 of 1980, Chand Behari Lal v. Union of India*—decided on 14th March, 1980. The aforesaid decision of the Andhra Pradesh High Court has been followed in this case. A passage from the aforesaid judgment has been reproduced by the learned Chief Justice in his judgment to show the inconsistency in the decision of the Rajasthan High Court. Barring the quoted passage, I am in full agreement with the other reasoning of the Rajasthan High Court.

89. For the reasons recorded above, although the first part of Cl. 4 of the impugned order is struck down as void, but since no relief can be granted to the petitioners, the writ petition is dismissed with no order as to costs.

ORDER OF THE COURT

90. It is unanimously held that the first part of Cl. 4 of the Haryana Rice Bran (Distribution and Price) Control Order, 1981, which is in the following terms, be and is hereby struck down:—

"The maximum sale price of the rice bran sold against permits as mentioned in Cl. 3 shall be as determined by the Director from time to time."

Held by majority that the remaining part of Cl. 4 as also the Control Order

as a whole is valid and constitutional. The writ petition is dismissed without any order as to costs.

Petition dismissed.

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D. S. TEWATIA, J.

Prithipal Singh, Petitioner v. Magh Singh and others, Respondents.

Civil Revn. No. 521 of 1981, D/- 1-10-1981.*

(A) Civil P. C. (5 of 1908), Ss. 92, 15 — Suits under Sec. 92 — Institution and trial of — Jurisdiction — Gradation and distribution list of officers of Judicial Deptt. prepared and published by State Government — All subordinate Judges exercising powers in respect of such suits — Suits can be tried by subordinate Judges.

Suits under S. 92 can be instituted both in the Principal Civil Court of Original Jurisdiction as also in any other Court empowered in that behalf by the State Government within the local limits of whose jurisdiction the whole or any part of the subject matter of the trust is situated. Provisions of S. 92 do not envisage that such other Courts are to be empowered by a gazette notification. Empowering by a gradation and distribution list of officers in the judicial department which is prepared and published by the State Government is sufficient compliance. When such a list empowers all subordinate Judges to try such suits under S. 92, then in view of S. 15 such suits should be instituted only in the Courts of subordinate Judges. AIR 1965 Punj 472 (FB), Referred. (Paras 7, 8, 12)

(B) Civil P. C. (5 of 1908), S. 92 — Suit under S. 92 — Grant of leave to file is condition precedent — Right cannot be waived by defendant — Court granting tacit permission — There is compliance of S. 92.

Grant of leave to file suit is not a mere irregularity which can be cured but is a condition precedent. The provisions of S. 92 are mandatory in nature in that respect and the defendant cannot waive that right and confer jurisdiction on a Court. A defendant who has filed a written statement cannot be taken to have

*Against order of Sh. Harbans Lal P. C. S. Sub. J. Zira, D/- 19-1-1981.

KY/LY/F531/81/AGM/MVJ

waived his right to question the filing of the suit. (Para 15)

Where the Court while deciding preliminary issues observes that the plaintiff has its permission to file the suit, it is from that stage that the trial of the suit would proceed. To that extent the granting of permission is prior to the filing of the suit and therefore the requirements of S. 92 are complied with.

(Paras 16, 17)

(C) Civil P. C. (5 of 1908), S. 92 — Leave to file suit — Order granting leave is administrative in nature — Reasons need not be given in order granting leave.

In regard to the granting of leave to file a suit under S. 92, the Court does not have to write a reasoned order. It does not even have to give a notice to the defendant of an application for leave to file as the order granting leave is of an administrative nature. (Para 19)

Cases Referred : Chronological Paras
AIR 1965 Punj 472 : (1965) 67 Pun LR 592:
ILR (1965) 2 Punj 81 (FB) 5, 6

Satya Parkash Jain, for Petitioner;
J. S. Randhawa and A. S. Randhawa, for Respondents.

ORDER :— The respondents along with the plaintiff moved an application in compliance with the requirement of S. 92 Civil P. C. seeking the requisite permission for filing the suit for the removal of Prithipal Singh petitioner herein from the Managership of the Dharamshala Kohala Tahsil Zira, and for restraining him from alienating in any way the land attached to it measuring 113 Kanals 13 Marlas and bearing Khasra numbers mentioned in the plaint.

2. Petitioner-defendant filed the written statement to the plaint on 6th Dec., 1980. The case was adjourned to 13th Dec., 1980 for framing of issues and for the reply of the petitioner-defendant to the application for grant of leave to the filing of the suit. On 13th Dec., 1980, reply to the said application was filed. The stand taken by the petitioner-defendant in the reply to the application was that the Court could not grant any permission regarding the filing of the suit under S. 92 Civil P. C., mandatory provision of the said section had been violated by the plaintiffs, as they did not obtain the requisite permission of the Advocate General before filing the suit. An objection to the jurisdiction was also taken. This led

to the framing of the following two preliminary issues as under :—

1. Whether the Court has got any jurisdiction to try this suit?

2. Whether the approval of the Court or Advocate General is necessary before filing the suit?

3. Both the issues were decided against the petitioner defendant and preliminary objections were thus overruled.

4. It was argued before the trial Court in regard to the jurisdiction of the Court that only District Judge as the principal Court of Civil Jurisdiction, had the competence to try the suit.

5. Mr. Jain, counsel for the petitioner has reiterated the very submission and has canvassed that unless there was any notification empowering the trial Court in question, the trial Court could not try the suit. He has sought sustenance from a decision of this Court reported in *Gangagir Chela v. Rasal Singh*, (1965) 67 Pun LR 592 : (AIR 1965 Punj 472) and drew pointed attention to the finding that under S. 92 Civil P. C. it is not only the institution of the suit but its subsequent trial and disposal also must take place in the Court of the District Judge, that however, under S. 21 of the Punjab Courts Act or S. 76 of the Pepsu Judicature Ordinance the District Judge can assign a part of the business pending before him to the Additional District Judge and when he does so, the latter can exercise the same powers and functions which the District Judge could, and that a suit under S. 92 of the Code must be instituted in the Court of the District Judge but there is no bar or prohibition against the exercise of his powers assigning the business to the Additional District Judge and once such suits are assigned to him he would be as competent to deal with it as the District Judge.

6. In my opinion there is no merit in the contention advanced on behalf of the petitioner. *Gangagir's* case (AIR 1965 Punj 472) (supra) was a case which was tried by the Additional District Judge, his competency to try the suit was questioned and it was in that context that it was said that the suit had not only to be instituted assuming that the suit could only be instituted in the Court of principal Civil Court of original jurisdiction, i. e., the District Judge but had also to be tried by him unless he exercised authority conferred on him under the provisions of S. 21 of the Punjab Courts Act and S. 76 of the Pepsu Judicature Ordinance and was to

transfer the case for trial to the Additional District Judge. Relevant provision of S. 92 of the Code is in the following terms:—

"92 (1). In the case of an alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate, General, or two or more persons having an interest in the trust and having obtained the leave of the Court may institute a suit, whether contentious or not in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the State Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate to obtain a decree:—

- (a) removing any trustee;
- (b) appointing a new trustee;
- (c) vesting any property in a trustee;
- (cc) directing a trustee who has been removed or a person who has ceased to be a trustee, to deliver possession of any trust property in his possession to the person entitled to the possession of such property;
- (d) directing accounts and inquiries;
- (e) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust;
- (f) authorizing the whole or any part of the trust property to be let, sold, mortgaged or exchanged;
- (g) settling a scheme; or
- (h) granting such further or other relief as the nature of the case may require."

7. A perusal of the same would show that the suit under S. 92 of the Code can be instituted both in the Principal Civil Court of original jurisdiction as also in any other Court empowered in that behalf by the State Government within the local limits of whose jurisdiction the whole or any part of the subject matter of the trust was situated. Section 15 of the Code which is in the following terms envisages that every suit shall be instituted in the Court of lowest grade competent to try it:—

"15. Court in which suit is to be instituted.— Every suit shall be instituted in the Court of the lowest grade competent to try it."

8. In view of the provisions of Sec. 15 if there was any choice to institute a suit

either in the principal Court of Civil original jurisdiction, i. e., the District Judge, or any other Court then the plaintiff was to file a suit in the lowest Court.

9. It was then argued by Mr. Jain, that there has been no notification empowering any other Court and unless such a notification is there the suit had to be instituted and tried in the Court of the District Judge.

10. On behalf of the respondent attention of the Court is drawn to the gradation and distribution list of officers of the Judicial Department of Punjab issued by the Punjab Government and in particular to para 7 of the list which specifically deals with the powers to hear suits by Courts under S. 92 Civil P. C. Therein it is mentioned that the powers are exercised ex-officio by all subordinate Judges in the State of Punjab.

11. It deserves highlighting that such a provision has been in the gradation list all through. Mr. Jain, however argued that the gradation list cannot take the place of a specific notification by the Government.

12. Provisions of S. 92 of the Code do not envisage that other Courts are to be empowered by a gazette notification. Since the gradation list and its contents are prepared and approved by the Government and it is a Government publication and it mentions that the powers are exercised by all Subordinate Judges of Punjab ex-officio, the same must be considered sufficient proof of the act of empowering by the Government of all Subordinate Judges including the trial Court in question, to receive the complaints and try the suits under S. 92 Civil P. C.

13. As regards the question of granting of leave a perusal of S. 92 of the Code supplies the answer in regard to the authority which has the power to grant leave. It envisages that both the Civil Court of original jurisdiction or other Court can grant the requisite leave for filing of the suit and, therefore, the stand of the defendant-petitioner that the Court was not competent to grant leave under S. 92 of the Code is not correct.

14. It has been next argued that leave being a condition precedent to the filing of the suit, so the leave ought to have been granted first before the filing of the suit.

15. There is no dispute with the proposition that the grant of leave is the condition precedent to the filing of the suit and that the provisions of S. 92 of the Code are mandatory in nature in that re-

spect and a defendant cannot waive that right and thus confer jurisdiction on a Court. The trial Court in the present case was certainly not right in observing that the granting of leave is a mere irregularity which can be cured or that the defendant having filed the written statement should be taken to have waived his right to question the filing of the suit.

16. The trial Court however, further observed that it has granted tacit permission to the plaintiff. So the question that calls for consideration is as to whether the granting of tacit permission satisfies the requirement of S. 92 Civil P. C. in other words whether the procedure followed was a proper procedure.

17. In my opinion the procedure followed by the trial Court was the correct procedure. The plaintiff-respondents had moved an application for the grant of leave, wherein they have mentioned that the grounds of removal are those which are mentioned in the plaint. It so happened, that, as already pointed out, the defendant questioned the power of the Court to grant leave as also the competence to try the suit. In the circumstances the Court had to frame two preliminary issues and while deciding the two issues it observed that the plaintiffs have its permission to file the suit and it is from that stage that the trial of the suit would proceed. To that extent the granting of permission is prior to the filing of the suit.

18. Mr. Jain argued that there had been no application of mind by the trial Court to the requirement of the provision of S. 92 in regard to the granting of leave in that it does not give any reason as to why the granting of leave was justifiable.

19. There is no merit in this contention as well. The Court does not have to write a reasoned order. It does not even have to give a notice to the defendant of such an application as the order granting leave is of an administrative nature.

20. For the reasons aforementioned there is no merit in this petition and the same is dismissed but with no order as to costs.

Petition dismissed.

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**S. S. SANDHAWALIA, C. J. AND
S. P. GOYAL, J.**

Harbhajan Singh and others, Petitioners
v. State of Punjab and others, Respondents.

Civil Writ Petn. No. 3838 of 1980, D/-
29-7-1981.

Punjab Police Rules (1934), R. 19.14 — Rule is directory — Hence non-holding of Refresher Course cannot even remotely affect validity of selection made for Lower School Course. 1978 SLWR 318 (Punj), Overruled.

Mere use of the word 'shall' does not render R. 19.14 mandatory. The non-holding of a Refresher Course is neither penalised in any provision in the Police Rules nor results in any adverse consequence whether revocable or irrevocable. This is in itself a pointer that the provisions are not mandatory in nature. Further, the failure to hold the Refresher Course in no way defeats the main purpose of selection to the Lower School Course. The qualification, the eligibility, the method of holding the test and the passing thereof is more than amply spelled out in R. 13.7 itself and the supplementary standing orders framed in this regard. In this context, R. 19.14 is meant only as a mere guideline for giving some benefit of training before the final selection is undertaken. The holding of the Refresher Course or not holding the same, does not in any way materially affect the main thrust of the provision, namely, their subsequent selection for deputing them to the Lower School Course at the Police Training College. Again, R. 19.14 merely mentions about the men being called in to the Lines for a short Refresher Course of Drill and Instructions in the Headquarter School. Neither it prescribes the duration, nor exactly the curriculum, or precise syllabi has been spelled out therein. No administrative instruction or standing order whatsoever with regard to this Refresher Course is in existence. The Refresher Course is to be held at the district level. Therefore, its duration may vary according to the whimsicality of each local administration and even the place where such a course is to be held at the headquarter, can hardly be pin-pointed. No provision for the allocation of marks for this Refresher Course and the result thereof seems to have been made out. All

this would tend to show that the provisions of R. 19.14 of the Police Rules, in particular with regard to the holding of the Refresher Course are merely procedural and cannot be raised to the pedestal of mandatory provisions whose mere infraction, without more, would vitiate the meaningful process of selection to the Lower School under R. 13.7 of the Police Rules. A mandatory construction of R. 19.14 of the Police Rules requiring every eligible constable to be called in to the Police Lines for a long Refresher Course, may apart from being impracticable, might well pose a hazard to the maintenance of law and order which is the primary duty of the Police Force. Thus, it is evident from above, that the provisions of R. 19.14 of the Police Rules and in particular, with regard to the Refresher Course are plainly directory in nature, and, consequently, the non-holding of a Refresher Course cannot even remotely affect the validity of the selection made for the Lower School Course. AIR 1967 SC 276 Rel. on; AIR 1976 Punj & Har 69 (FB), Applied; 1978 SLWR 318 (Punj), Overruled.

(Paras 6, 7, 8, 9, 12, 13)

Cases Referred: Chronological Paras

1978 SLWR 318 (Punj)	3, 14
AIR 1976 Punj & Har 69 (FB)	10
AIR 1967 SC 276 : 1967 Cri LJ 285	6

J. L. Gupta, for Petitioners; S. K. Sayal, Addl. Advocate General, for Respondents.

S. S. SANDHAWALLA, C. J.:— The solitary though somewhat significant question which alone has been agitated herein is — whether the provisions of R. 19.14 of the Punjab Police Rules, 1934 are mandatory or directory in nature.

2. In view of the pristinely legal nature of the aforesaid question, the facts would obviously pale into insignificance and therefore, may be noticed with relative brevity. All the 38 petitioners, in this joint petition are constables serving in the Punjab Police Force. A test for selection to the promotion post for constables, conveniently labelled as Lower School Course, was held by the authorities in Jan., 1980. Therein amongst others, respondents Nos. 4 and 5 were selected. It is the petitioners' claim that both of them ranked junior to all the petitioners and their selection as also that of the other constables has been challenged on a number of grounds.

3. This case first came up before my learned brother S. P. Goyal, J., sitting

singly. The primary ground pressed was with regard to the non-compliance of the provisions of R. 19.14 of the Punjab Police Rules, 1934, (hereinafter referred to as 'the Police Rules'), and it was the stand that this rule being mandatory, the whole selection was consequently vitiated. Reliance on behalf of the petitioners was primarily placed on a single Bench decision of this Court in C. W. P. No. 1592 of 1978 (Om Parkash v. Union Territory of Chandigarh) decided on Sept. 25, 1978*. In view of the significance of the issue and apparently doubting the correctness of the earlier view, the case has been referred for decision to the Division Bench.

3-A. At the very outset it may be noticed that Mr. J. L. Gupta, the learned counsel for the petitioner has very fairly stated that the only material issue pertains to the mandatory nature or otherwise of R. 19.14 of the Rules. Inevitably the whole controversy revolves around the relevant statutory provisions and it is apt to read Rr. 13.7 and 19.14 of the Rules which are complementary at the outset:—

"13.7. (1) List 'B' Form 13.7 shall be maintained by each Superintendent of Police. It will include the names of all Constables selected for admission to the promotion course for Constables at the Police Training College. Selection will be made in the month of January, each year and will be limited to the number of seats allotted to the districts for the year with a twenty per cent reserve. Names will be entered in the list in order of merit determined by the Departmental Promotion Committee constituted by the Inspector-General of Police on the basis of tests in parade, general law (Indian Penal Code, Criminal Procedure Code, Indian Evidence Act and Local and Special Laws) interview and examination of records.

(2) All Constables;

(a) who are middle pass and have put in more than four years of service; or

(b) who are at least matriculates and have put in more than three years of service; or

(c) who obtain first class with credit in the Recruits Course specified in R. 19.2; will be eligible to have their names entered on the aforesaid list, if they are not above thirty years of age on the first day of July in the year in which the selection is made;

Provided that no Constable who has been awarded a major punishment within

*Reported in 1978 SLWR 318.

a period of three years preceding the first day of January of the year in which selection is made will be eligible for admission to this list and if any Constable whose name has been brought on this list is not sent to the Police Training College in that year he will be required to compete again with the new candidates, if he is still eligible for admission to the said list under the rules.

(3)-(4) x x x x

"19.14. The selection of constables made under R. 13.7 shall be made at least three months before the men are due at the Police Training School. It shall be made after the men competing have been called into lines and put through a short "refresher" course of drill and instruction in the headquarters school, at the end of which they shall be examined in competition. After regard has been had to those candidates nearing the age limit, selection shall be made, as far as expedient, according to the result of this competition. The men selected shall be posted to police stations as assistants to station clerks or on similar duty until they are due to be sent to the Police Training School."

4. The main thrust of Mr. J. L. Gupta's contention on behalf of the petitioners is that R. 19.14 prescribes the qualifications for and lays down a condition for the eligibility of constables for selection to the promotion Course. On these premises it was sought to be submitted that R. 19.14 of the Rules should be construed as mandatory in nature.

5. It would appear that apart from other things, the very factual basis for the above submission seems to be totally lacking. On a close analysis of R. 13.7 of the Police Rules as also the supplementary standing orders passed in this regard, it is plain that neither the aforesaid rule nor the standing order either expressly or even by remote implication prescribes that the attendance at the refresher course contemplated under R. 19.14 of the Police Rules is a pre-condition for taking the competitive test for selection to the Lower School Course. The learned counsel for the petitioners could draw our attention to nothing whatsoever which may be even remotely analogous to the prescription of a qualification or inflexible conditions of eligibility in R. 19.14 of the Rules. On the other hand, a plain reading of R. 13.7 of the Rules would indicate that some of the conditions for eligibility are spelled out in sub-sec. (2) thereof and the constitution

of the Departmental Promotion Committees for holding the test and the general syllabi thereof are referred to in sub-rule (1) of R. 13.7 of the Rules. In sharp contrast thereto R. 19.14 of the Rules does not even remotely advert to either the prescription of necessary qualifications or of laying down the conditions of eligibility. This position is further buttressed when reference is made to the standing orders made in this regard. This has been appended to the written statement as annexure R/3. The very heading and the object thereof may be noticed in extenso :—

"Standing order under R. 13.20 of Punjab Police Rules Vol. II Governing Selection of Constables by the Departmental Promotion Committee for List B-1 for Undergoing Lower School Course".

OBJECT:

The object of this Standing Order is to prescribe the composition of Departmental Promotion Committee at various levels for selection of Constables to be sent to the Lower School Course at PTC Phillaur and to lay down the syllabus and to qualifying marks for various tests, as envisaged in R. 13.20 of Punjab Police Rules, 1934 (as amended by First Amendment, 1972). Apart from the above, the remaining parts of the standing order provide in detail for the composition of departmental committees, the eligibility of constables, to sit in the test, the marking system to be adhered to and the marks to be allotted to qualifications and commendation certificates as also for the interview apart from providing for other matters as well. Reading R. 13.7 of the Police Rules with the supplementary provisions of the standing orders, it is manifest that both the prescription of the qualifications and the requisite conditions of eligibility are spelled out therein. R. 19.14, in my view does not even remotely pretend to do so. The primary argument on behalf of the petitioners, therefore, does not stand the test of serious scrutiny and has to be rejected.

6. Adverting now to the intrinsic language of R. 19.14, it is no doubt true that the word 'shall' has been employed therein. However, it is now a legal adage to say that a provision, though couched in terms mandatory, may yet in fact be directory in nature. In this context without multiplying authorities, it suffices to refer to the following observations in *State of Madhya Pradesh v. Azad Bharat Finance Co.*, AIR 1967 SC 276 (at p. 278) :—

".....It is well settled that the use of the word "shall" does not always mean that the enactment is obligatory or mandatory; it depends upon the context in which the word "shall" occurs and the other circumstances....."

It would thus be obvious that the mere use of the word "shall" is very far from being conclusive in this context.

7. Again, one of the tests for adjudging the mandatory nature of a provision is whether the violation thereof is visited by a serious penalty or its infraction results in irrevocable adverse consequences. Tested on this anvil also, R. 19.14 of the Police Rules does not even remotely meet the requirements. The non-holding of a Refresher Course is neither penalised in any provision in the Police Rules nor any adverse consequence far from the same being irrevocable could be pointed out on behalf of the petitioners. Negatively speaking, this consequently is in itself a pointer that the provisions are not mandatory in nature.

8. Yet another test for determining the mandatory nature of the provision is whether its infraction would frustrate the very purpose of the provision. Herein also, I am unable to see how the failure to hold the Refresher Course in any way defeats the main purpose of selection to the Lower School Course. As has already been noticed, the qualification, the eligibility, the method of holding the test and the passing thereof is more than amply spelled out in R. 13.7 itself and the supplementary standing orders framed in this regard. In this context, R. 19.14 is meant only as a mere guideline for giving some benefit of training before the final selection is undertaken. The holding of the Refresher Course or not holding the same, does not in any way materially affect the main thrust of the provision, namely, their subsequent selection for deputing them to the Lower School Course at the Police Training College at Phillaur.

9. Equally, the merely procedural and the wholly ambivalent nature of the provisions of R. 19.14 with regard to the holding of a Refresher Course, again militate against the same being mandatory. The provision merely mentions about the men being called in to the Lines for a short Refresher Course of Drill and Instructions in the Headquarter School. Neither it prescribes the duration, nor exactly the curriculum, or precise syllabi has been spelled out therein. It was further conceded before us that no admin-

istrative instruction or standing order whatsoever with regard to this Refresher Course is in existence. The Refresher Course is to be held at the district level. Therefore, its duration may vary according to the whimsicality of each local administration and even the place where such a course is to be held at the headquarter, can hardly be pin-pointed. No provision for the allocation of marks for this Refresher Course and the result thereof seems to have been made out. All this would tend to show that the provisions of R. 19.14 of the Police Rules, in particular with regard to the holding of the Refresher Course are merely procedural and cannot be raised to the pedestal of mandatory provisions whose mere infraction, without more, would vitiate the meaningful process of selection to the Lower School under R. 13.7 of the Police Rules.

10. Without overly dilating on this aspect or the tests for determining the mandatory nature of a provision, it would suffice to mention that some of them are well spelled out in the Full Bench judgment in *Guru Nanak University v. Dr. Iqbal Kaur Sandhu*, AIR 1976 Punj & Har 69. Applying those here would again make it manifest that R. 19.14 does not satisfy either of them.

11. Indeed the directory nature of this rule is evident from the cavalier fashion with which the authorities who have to implement it, seem to be treating this provision. In Para. 3 of the Return on behalf of the respondent, it is averred as follows:—

"..... It is, however, incorrect to say that the selection under R. 13.7 can be made only after the men competing have been called in to Lines and put through a short Refresher Course of Drill and Instructions in the Headquarters School at the end of which they shall be examined in competition. New Standing Order under Police Rule 13.20 has done away with the provisions of P. P. R. 19.14. It may also be mentioned that P. P. R. 13.7 does not envisage the calling of prospective competitors in the Lines....."

As at present advised, we are sceptical whether the statutory provisions of the Police Rules can be thus repealed or done away with by a mere standing order. However, the aforesaid averment is indicative of the sanctity which the respondent-State itself attaches to the provision and at least is a pointer to the fact that

it considers it not as merely directory but something which can be completely by-passed.

12. Lastly, in this context, the argument *ab inconvenienti*, may also be noticed. It has been expressly averred in the Return as follows:—

".....As many as 353 constables of this district out of the posted strength of 1331 constables appeared in the test held in Jan., 1980. It may therefore, be seen that such a large percentage of the force cannot be withdrawn as it would render the functioning of the force impracticable. At the same time, it may be added that no prejudice is caused to any of the petitioners. All the competitors had equal opportunity and no course was run in the Lines at the Headquarters."

It is evident from the aforesaid averment that a mandatory construction of R. 19.14 of the Police Rules requiring every eligible constable to be called in to the Police Lines for a long Refresher Course, may apart from being impracticable, might well pose a hazard to the maintenance of law and order which is the primary duty of the Police Force.

13. For all the aforesaid reasons, it appears to me as plain that the provisions of R. 19.14 of the Police Rules and in particular, with regard to the Refresher Course are plainly directory in nature. Nevertheless, this should not be misunderstood that these can be violated with total impunity or be considered as if they are non-existent. However, this much is clear that a mere infraction of the Rules with regard to the non-holding of a Refresher Course cannot even remotely affect the validity of the selection made for the Lower School Course.

14. It now remains to advert to Om Parkash's case (1978 SLWR 318) (*supra*) on which basic reliance was placed on behalf of the petitioners. An analysis of the judgment would disclose that the crucial issue of the mandatory or the directory nature of R. 19.14 of the Police Rules was neither pointedly raised nor adequately debated and it seems to have been almost assumed that the rule was mandatory. There seems to be no discussion on principle nor any reference to authority in arriving at the cryptic conclusion that a bare reading of the rule would show that the same is mandatory. The issue was not examined from the viewpoint that this provision does not either prescribe the

tion for the eligibility of constables to the promotion course. The relevant standing orders passed under R. 13.7 of the Police Rules were not even adverted to. The basic tests for determining the mandatory or directory nature of a statutory provision do not find the least mention in the judgment. The other factors to which I have made reference above, seem to have not been at all canvassed, and are conspicuous by the absence of their consideration. With the greatest respect, I am of the view that Om Parkash's case (*supra*) is not correctly decided and has to be necessarily overruled.

15. The solitary and the basic issue herein having been decided against the petitioners, the writ petition is without merit and has to be dismissed. However, in view of the earlier precedent in favour of the writ petitioners, we would decline to burden them with costs.

Petition dismissed.

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J. V. GUPTA, J.

Mehar Chand and another, Petitioner v. Tilak Raj Girdhar, Respondent.

Civil Revns. Nos. 909 and 910 of 1980, D/- 14-8-1981.*

East Punjab Urban Rent Restriction Act (3 of 1949), S. 13 — Eviction on ground of arrears of rent from 1-8-1968 to 17-9-79 — Landlord taking false pleas regarding rate of rent — Appellate Court passing eviction order on ground that rent was due at least from 18-8-1975 — Held in view of false pleas no ejectment order could be passed much less a new case could be made out as was done by appellate Court. (Para 4)

C. B. Goel, for Petitioner; P. N. Aggarwal, for Respondent.

ORDER:— This order will dispose of Civil Revision Petitions Nos. 909 and 910 of 1980, as the facts are identical in both of them and the landlord is also the same.

2. Tilak Raj Girdhar, landlord, sought the ejectment of his tenants Mehar Chand and his son Dalip Kumar in rent application No. 2-1 of Sept. 17, 1977 and that of his other tenant, Dewan Chand in rent application No. 51-R of 1977, on the ground

*To revise order of Sarup Chand Gupta, Appellate Authority Faridkot, D/- 13-3-1980.

of non-payment of rent. Against Mehar Chand and his son Dalip Kumar, it was alleged that the shop, in dispute, was on rent with them at a monthly rent of Rs. 130/-; they were liable to pay the same on the first of each month and that they had not paid the rent from Oct. 1, 1968, till the date of the application which was instituted on Sept. 17, 1977, and as such, they were liable to be evicted from the demised premises. The tenants-petitioners admitted the relationship of the landlord and tenant between the parties, but pleaded inter alia that the rate of rent was Rs. 60/- and not Rs. 130/- per month, as alleged by the landlord and that they had paid the rent up to July 31, 1977. However, the rent from Aug. 1, 1977 to Dec. 31, 1977, amounting to Rs. 300/- at the aforesaid rate of Rs. 60/- per month together with Rs. 10/- as interest and Rs. 30/- as costs were tendered on Jan. 12, 1978, the first date of hearing. However, the amount so tendered was refused by the landlord. It was further pleaded that the landlord never issued any receipt after receiving the rent and he had also filed an application for ejectment earlier through one Lal Singh who claimed himself to be mortgagee under the landlord, which was dismissed on Aug. 18, 1975 and that order of dismissal was upheld in appeal on Apr. 3, 1976 by the Appellate Authority.

In the application against Dewan Chand, tenant, the rent was claimed at the rate of Rs. 120/- per month from Oct. 1, 1965, that is, from the same date as in the case of Mehar Chand and his son Dalip Kumar. In reply to this application, the same plea was taken by the tenant, viz., the rate of rent was Rs. 60/- and not Rs. 120/- per month and the rent had been paid up to July 31, 1977 whereas the rent from Aug. 1, 1977 to Dec. 31, 1977, amounts to Rs. 300/- at the rate of Rs. 60/- per month, Rs. 10/- as interest and Rs. 30/- as costs, in all Rs. 340/-, were tendered on Jan. 12, 1978, the first date of hearing but refused by the landlord. On the pleadings of the parties, the Rent Controller framed the following issues in both the cases:

1. What is the rate of rent of the premises, in dispute?
2. Whether the respondent has made a valid tender? If not, its effect?
3. Whether the respondent is in arrears of rent as alleged in the application? Relief.

In both the cases, the learned Rent Controller decided issue No. 1 in favour of the tenants and came to the conclusion that the monthly rent was Rs. 60/- and not the one as claimed by the landlord. He further found that the rent had also been paid up to July 31, 1977, and the tender made from Aug. 1, 1977 to Dec. 31, 1977, was a valid tender. As a result of these findings, the applications for ejectment of the tenants were dismissed. In appeal, the findings of the learned Rent Controller on issue No. 1, that the rent was Rs. 60/- per month and not as claimed by the landlord, were upheld, but on the other issues which were discussed together, the Appellate Authority came to the conclusion that the tenants were in arrears of rent at least from Aug. 18, 1975 and the tender made on the first date of hearing from Aug. 1, 1977 to Dec. 31, 1977, was not a valid one. Consequently, the orders of the Rent Controller, dismissing the ejectment applications, were set aside, and the ejectment applications were allowed and the tenants were ordered to vacate the premises within one month. Aggrieved against the same, the tenants have come up in revision to this Court.

3. The learned counsel for the petitioners contended that the Appellate Authority has absolutely made out a new case for the landlord which was not even set up by him in his ejectment applications. According to the landlord, the arrears of rent were due from Aug. 1, 1968, whereas the Appellate Authority has found that at least from Aug. 18, 1975, the arrears of rent were due. According to the learned counsel, this was never the case set up by the landlord either in the ejectment applications or anywhere in his statement. It was further contended that it cannot be believed that the landlord did not receive the rent since 1968 and he waited for the same for nine years up to 1977, without taking any steps for the recovery of the same during that period. He also brought to my notice the statement of the landlord who himself appeared as A. W. 2, wherein he has stated that one month's rent, in advance, was received by him, but no receipt was issued therefor. Under these circumstances, it was submitted, that when it has been concurrently held by both the authorities below that the landlord was claiming excessive rent, it could not be held that the tenants were in arrears of rent, as alleg-

ed by the landlord. On the other hand, the learned counsel for the landlord submitted that whether the rent has been paid or not, the onus to prove the same is always on the tenant and the Appellate Authority on the appreciation of the evidence on the record, has come to the conclusion that in any case, the tenants failed to pay the rent, at least from Aug. 18, 1975, and it being a finding of fact, could not be interfered with by this Court in the exercise of its revisional jurisdiction.

4. After hearing the learned counsel for the parties, I find force in the contentions raised by the learned counsel for the petitioners. The plea of the landlord that the rate of rent was Rs. 130/- per month as alleged in rent application No. 2-1 of Sept. 17, 1977, and Rs. 120/- per month in rent application No. 51-R of 1977, has been found to be false by both the Courts below. Even in the earlier eviction proceedings, which were instituted by one Lal Singh, claiming himself to be the mortgagee under Tilak Raj Girdhar, landlord, it was held by the Rent Controller that the mortgage was a paper transaction and, therefore, the said Lal Singh, never become a landlord qua the tenants. Tilak Raj Girdhar, landlord, had also appeared as a witness in support of the claim of Lal Singh in that application. In appeal, the finding of the Rent Controller was upheld by the Appellate Authority as well in that case. Thus, it is apparent that the pleas of the landlord in the earlier ejectment application filed by Lal Singh, and the pleas of the landlord in the present eviction applications about the rate of monthly rent, have been found to be false by both the authorities below. Under the circumstances to hold that the rent was at least due from Aug. 18, 1975, which was never the case set up by the landlord was not only improper, but also wholly illegal. It may also be mentioned here that in the earlier ejectment application filed by Lal Singh in Aug. 1974, no arrears of rent were claimed therein against the tenants. The approach of the Appellate Authority that though the landlord had not spoken the whole truth before the Court but the maxim, 'Falsus in uno falsus in omnibus' is no longer applied unqualifiedly even to criminal cases and it was now well settled that it is the duty of the Court to find out where the truth lies after separating the grains from the chaff, is wholly misconceived. If once it is held by the Court that the landlord is not coming with clean hands and has taken false

pleas, no order of ejectment can be passed in his favour much less a new case can be made out for him, as has been done by the Appellate Authority in the present case.

5. It is also pertinent to mention here, that no receipt was ever issued by the landlord to the tenants on account of the payments of rent received by him, as has been admitted by him in his statement, while appearing as A. W. 2. Under these circumstances, the tenants' claim that the rent had been paid by them up to July 31, 1977, at the rate of Rs. 60/- per month had to be accepted particularly when no such claim was made since 1968 till he filed the eviction applications. Ordinarily, no landlord will wait for such a long time in case the tenant was in arrears of rent for such a long period. All these circumstances go to prove that the claims set up by the tenants were proved and the landlord had intentionally taken false pleas which have been so found by both the Courts below. The order passed by the Appellate Authority is not only illegal, but also improper as it has gone out of the way to hold that the tenants were in arrears in any case at least from Aug. 18, 1975 when the earlier ejectment application filed by Lal Singh in 1974, was dismissed by the Rent Controller on 18-8-1975.

6. Under these circumstances, the revision petitions are accepted and the orders of the Appellate Authority are set aside and that of the Rent Controller dismissing the ejectment applications is restored with special costs which are assessed at Rs. 500/- in each case.

Revisions allowed.

AIR 1982 PUNJAB AND HARYANA 146

J. V. GUPTA, J.

Jagdish Rai and others, Appellants v. Dalip Singh and others, Respondents.

Ex. S. A. 132 of 1970 treated as Civil Revn. No. 1932 of 1981, D/- 4-8-1981.*

Civil P. C. (5 of 1908), S. 115 — Revisional jurisdiction — Finding by lower appellate Court that land over which judgment-debtor had encroached did not form part of decree for mandatory injunction but evidence on record showing otherwise — Held lower appellate Court acted illegally and with material irregularity

*To revise order of J. C. Nagpal, Addl. Dist. J. Rohtak, D/- 30-9-1978.

KY/LY/F25/81/HR/RSK

calling for interference under S. 115. AIR 1971 SC 2324, Ref. (Para 4)

Cases Referred: Chronological Paras
AIR 1971 SC 2324 : (1971) 1 SCJ 108 4

Balwant Singh Gupta, for Appellants;
Ram Singh Bindra, Sr. Advocate (Rajiv Bhalla with him), for Respondents.

JUDGMENT:— The decree-holder-appellants have filed this appeal against the order of the Additional District Judge, Rohtak, dt. 30th Sept., 1978, whereby the order of the executing Court, dismissing the objection petition filed on behalf of the judgment-debtors, was set aside.

2. The decree-holders got a decree for possession, mandatory injunction and prohibitory injunction against the judgment-debtors from the Court of the learned District Judge, in appeal, on 29th July, 1958. R. S. A. No. 680 of 1958 filed on behalf of the judgment-debtor Dalip Singh was dismissed on 14th July, 1961. Subsequently, even the L. P. A. No. 314 of 1961 was also dismissed on 16th July, 1969. On 12th Jan., 1972, an application for execution under O. 21, R. 32 of the Civil P. C. was filed, in which the judgment-debtors filed an objection petition. The executing Court inspected the spot on 14th Apr. 1974 and also recorded the evidence of the parties in support of their contentions. Ultimately, vide its order dt. 10th May, 1974, the executing Court came to the conclusion that the judgment-debtors had contravened the decree by placing wooden-structure thereon. It was, therefore, directed that the judgment-debtors should obey the decree and remove the wooden stall within the time allowed. Feeling aggrieved against this order, the judgment-debtor Dalip Singh filed an appeal, which was allowed by the learned Additional District Judge, Rohtak, by order dt. 30th Sept., 1978, now under appeal.

3. The sole question in this case to be determined is whether the land, on which the judgment-debtor has placed his wooden structure, as alleged by the decree-holders, forms part of the decree for permanent injunction granted in their favour. The executing Court, after considering the evidence led by the parties and perusing the copy of the decree sheet, with reference to the site plan and the inspection note dt. 14th Apr., 1974, came to the conclusion that "the site where the J. D. has put in a wooden stall is covered by the decree and the J. D. has no right to instal any stall there and the alleged panchayat

has no right to give that site on rent to the J. D. unless it establishes its right by bringing a separate suit." The learned Additional District Judge though has reproduced the decree passed by the learned District Judge, Rohtak on 29th July, 1958, but it is unfortunate that he has failed to give the boundaries of the courtyard, which are very much there given in the decree. He has proceeded on the assumption that the decree only related to the site marked by letters 'FF-HG', whereas the decree not only related to the site 'EF-HG', but the defendant-judgment-debtor was further restrained permanently from interfering with the possession of the plaintiffs over the suit land or from raising any structure on the courtyard bounded below:—

East: Shops of plaintiffs and defendants
2 to 26.

West: Thoroughfare and road.

South: Road and thoroughfare.

North: Shops of defendants and Mst. Manbhari plaintiff.

4. According to the learned counsel for the decree-holders, the judgment-debtor has placed a wooden stall in the said courtyard bounded as given in the decree-sheet, which very much forms part of the decree. After going through the decree-sheet and the plan filed in the suit, Exhibit P-10, a copy of which has been placed on the execution file as Exhibit DH/2, it is apparent that the whole vacant land, the boundaries of which have been given in the decree-sheet Exhibit DH/3, does cover the land over which the judgment-debtor has made alleged encroachment. The executing Court in its inspection note dt. 14th Apr. 1974 has stated:—

"Towards the West of the Piao there is a window for serving water to the public. There is a chabutra all along the piao towards the West. The Khokha in dispute is towards the West of the piao up to the thoroughfare and towards the North extending up to the line of two steps of the piao from the wall after leaving the space in front of the window for the public to take water. There is some vacant space towards the Chabutra in front of the window of the piao and the thoroughfare, for the public to reach the Chabutra and window from the road. There is a ventilator in the piao in each of the Eastern and Southern walls of the piao. The name scribed is fixed in the Western wall of the piao over the window."

Thus, from the evidence on the record, no other conclusion is possible except the one that the land over which the judgment-debtor has encroached upon did form part of the decree for mandatory injunction and the lower appellate Court has acted illegally and with material irregularity in the exercise of its jurisdiction, causing great injustice and irreparable injury to the decree-holders, who fought up to the L. P. A. Bench in the High Court. However, the learned counsel for the judgment-debtor contended that if this appeal is to be treated as a revision petition because of the amended C. P. C. as prayed in this appeal, then there is no ground to interfere u/s. 115 of the C. P. C. In support of his contention he referred to *M/s. D. L. F. Housing and Construction Co. (P) Ltd. v. Sarup Singh*, AIR 1971 SC 2324. The proposition of law is well settled and cannot be disputed but as observed earlier, after going through the decree-sheet and the plan I find that no other conclusion is possible except the one that the judgment-debtor has encroached upon the land which forms part of the courtyards, the boundaries of which have been given in the decree-sheet. The lower appellate Court has not only misconstrued the decree, but has failed to notice the boundaries of the courtyard given therein and has proceeded with the assumption that the decree only related to the site marked by letters 'EF-HG'. I am of the considered opinion that it is a fit case where this Court will interfere in the exercise of its revisional jurisdiction u/s. 115 of the C. P. C. and set aside the order of the lower appellate Court. Consequently, treating this appeal to be a revision petition, this petition is allowed and the order of the lower appellate Court is set aside and that of the execution Court is restored with costs.

Revision allowed.

AIR 1982 PUNJAB AND HARYANA 148
GOKAL CHAND MITAL, J.

Chhaju Ram (deceased) represented by L. R., Petitioner v. State of Haryana and others, Respondents.

Civil Writ Petn. No. 3609 of 1970, D/- 15-7-1981.

East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (50 of 1948), S. 42 — Order in petition under — Validity — Allotment of certain plots to

IIY/JY/E333/81/AAJ/SNV

"A" on repartition. — Writ petition by "A" on ground that irrigation authorities unauthorisedly started digging through those plots — Consolidation Authorities categorically stating that there was no water-course running through fields allotted to "A" nor it was intended to dig one till the plot was acquired — Petition under S. 21 filed after 7 years, allowed on erroneous finding that water-course was already in existence and water was running and that in repartition the same should have been protected — Held, on these facts, petition was clearly without jurisdiction and to allow it on such erroneous finding after lapse of 7 years, amounted to abuse of power of Court. (Para 7)

Cases Referred: Chronological Paras
AIR 1981 Punj & Har 204 : 83 Pun LR 472 4, 6
(1965) 67 Pun LR 276 4

Atul Lakhanpal, for Petitioner; Sushil Kumar Goyal, (for Nos. 1 and 2) and M. L. Sarin, (for No. 3), for Respondents.

ORDER:— Chhaju Ram petitioner is a right-holder in village Mittha Thal, tehsil Bhiwani, which was previously in district Hissar but now in district Bhiwani. Consolidation operations were taken in that village and the scheme of partition was confirmed on 5th of May, 1962 and after completion of repartition, the records were consigned. In repartition, besides other numbers, the petitioner was allowed Khasra Nos. 264, 265 and 270 of which possession was given to him. In the year 1969, the irrigation authorities unauthorisedly started digging through the aforesaid three Khasra numbers allotted to the petitioner and, therefore, he filed Civil Writ No. 2303 of 1969 in this Court to challenge the same. After notice was issued to the State, an affidavit was put in, to the effect that no digging operations had yet been undertaken by the Department and that they had no intention of digging the same till the land was acquired. After the aforesaid affidavit was put in, the counsel for the petitioner pointed out that in fact some part of the land of the petitioner had been dug up and the Department may not interfere when he may try to fill the same and that the Department should pay compensation to the petitioner for digging his land. Keeping the entire matter in view, the following operative order was passed by this Court on 22nd Sept., 1969:—

"In view of the statement of the learned A. G., Haryana, the petitioner is fully

competent to restore the land to its original position, if any digging has taken place therein, and to seek his remedy for damages against the Department or the individuals who have interfered with his property."

The petitioner again brought the disputed portion under cultivation. A month after the order of this Court, somewhere in Oct., 1969, the Gram Panchayat of village Mittha Thal filed a petition under S. 42 of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948 (hereinafter referred to as the Act), before the State Government for modification of the consolidation proceedings. In that application, it was pleaded that the extension of Gujrani canal minor should have been provided for in the consolidation scheme which had inadvertently been omitted and prayed that the same be provided now by passing a fresh order. The power of the State Government under S. 42 of the Act was delegated to an Assistant Director who considered the matter and by order dated 11th June, 1970, (annexure 'B') came to the conclusion that the canal minor was already in existence through the three disputed Khasra numbers which had been allotted to the petitioner besides other Khasra numbers and ordered many changes in the allotment of Khasra numbers. As regards the petitioner, Khasra Nos. 264, 265 and 270 were withdrawn from him and he was allotted Khasra No. 260 of an equal area. The petitioner again came to this Court in the present writ petition under Arts. 226 and 227 of the Constitution of India to impugn order annexure 'B'.

2. The grounds of attack pleaded by the petitioner are as follows:—

1. That the repartition was completed in the year 1962 and the records had been consigned and the petition under S. 42, which could be filed within six months, was filed after lapse of seven years and hence was not competent.

2. That it was categorically stated before this Court in the earlier writ petition that no digging operations were being carried out through the three Khasra numbers belonging to the petitioner and if the same would be required by the Canal Department it would be duly acquired. At that stage, it was never the case of the canal authorities that the minor was already in existence. Rather, a reading of the affidavit filed on behalf of the Irrigation Department in the earlier writ

petition shows that there was some proposal for extension of the canal minor through the Khasra numbers which ultimately were allotted to the petitioner and, therefore, the very basis of the order annexure 'B' that the canal minor was already in existence and water was running through it is erroneous and as such the same cannot be sustained.

3. The second contention deserves to be declined first. The very basis of the order annexure 'B' is that the water-course was running at site and the same should have been kept intact during consolidation. The learned counsel for the petitioner has strenuously urged that the aforesaid basis of the order annexure 'B' was wrongly assumed and was against facts and he has invited my attention to the file of C. W. P. 2303 of 1969 and particularly the affidavit by Divisional Canal Officer, Western Jamuna Canal. A reading of affidavit on the record of the aforesaid writ petition shows that a scheme had been prepared for the extension of the minor and the work of extension had not been started and it was categorically stated in Para 11 as follows:—

"No digging was done by the Department in the land of the petitioner. The work will be started only along the approved alignment after acquiring the land of the petitioner."

If the water-course was also in existence and water was running through it there was no question of carrying out any digging work after acquiring the land of the petitioner. The aforesaid quotation when read along with the other paragraphs of the affidavit of the Divisional Canal Officer, Western Jamuna Canal filed in the earlier writ petition, shows that there was a proposal for the extension of the minor through the land of the petitioner but the canal minor did not pass through the land of the petitioner nor water was running through it. Even before the Division Bench the stand taken by the learned Advocate General which is clear from the copy of the order ultimately passed (Annexure 'A') was that neither there was any canal in existence through the land of the petitioner nor any water was running through it. After the petitioner succeeded in earlier petition, it seems that some reports were obtained from the Consolidation Officer that the water was running through the land of the petitioner which fact is clearly contrary to the affidavit of the Divisional Canal Officer filed in the earlier writ petition as also the

stand taken before this Court in that case. Since no canal minor existed in the three disputed numbers when they were allotted to the petitioner, the question of re-opening the case after seven years did not arise on the ground that the canal minor already existed and water was running through it. Accordingly, I hold that the order of Assistant Director who passed order under S. 42 is clearly erroneous being against facts which were placed before this Court in the earlier writ petition. If the Canal Department wanted to extend the Canal Minor through the land of the petitioner as proposed the only course open was to acquire the land and after paying compensation to him to dig the canal minor. Hence the impugned order annexure 'B' deserves to be quashed on this ground.

4. Coming to the first argument of limitation, the learned counsel for respondent No. 3 has invited my attention to a Division Bench decision of this Court in *Haqiqat Singh v. Addl. Director, Consolidation of Holdings, Punjab, Chandigarh*, AIR 1981 Punj & Har 204 and has urged that whenever a petition under Section 42 is filed against repartition the provision of limitation contained in R. 18 of the Rules framed under the Act is not applicable. A reading of the facts of *Haqiqat Singh's* case (supra) shows that a right-holder had not been provided with a path to his qurrah during the preparation of the Scheme or in repartition and later a petition under S. 42 was filed long afterwards and on those facts it was held that the provision of limitation contained in R. 18 would not be applicable. The cases relied upon by the Division Bench also show that the applicant under S. 42 wanted a path to his qurrah which was not provided for either in the scheme or during the repartition. On facts, the present case is entirely different. Here, in repartition, the petitioner was provided the three disputed khasra numbers and, therefore, whosoever was aggrieved therefrom was entitled to challenge the same either by filing objections or under any of the Section 21 (3) or 21 (4) as also under Section 42 of the Act. This would bring me to the consideration of Secs. 20 and 21 of the Act. A reading of S. 20 shows that after a Draft scheme is confirmed, the process of repartition starts under S. 21. Under S. 21 (1) the Consolidation Officer is to carry out the repartition after obtaining the advice of the land-owners of the estates which has to be published in

the prescribed manner in the estate concerned. Within 15 days of the publication of the proposed repartition any aggrieved person can file objections under sub-section (2) before the Consolidation Officer who is to hear the same and pass such orders as he considers proper either by confirming or modifying the repartition. It would be very important to notice here that he will have to pass an order while confirming or modifying repartition whether objections were filed or not. Therefore, the proposed repartition made under S. 21 (1) is finally to merge in an order to be passed by Consolidation Officer under sub-sec. (2) which becomes final subject to further appeals under sub-sec. (3) and sub-sec. (4) by Settlement Officer or Assistant Director as the case may be who again have to pass orders confirming or modifying the repartition. This again would be subject to a petition under S. 42 to the State Government. Therefore, if any change is to be got made in the final repartition made under S. 21 (2) it can be in any of the ways, i. e. by filing further appeals under sub-secs. (3) & (4) or directly filing objection under S. 42, as held by this Court in *Rattan v. State of Punjab*, (1965) 67 Pun LR 276. Therefore, I am of the confirmed view that an order of repartition finalized under S. 21 (2) would be clearly an order within the meaning of R. 18 and if against such an order instead of filing appeal under sub-sec. (3) and a further appeal under sub-sec. (4) if directly a petition is filed under S. 42, it can be done only within 6 months of the date of the order passed under S. 21 (2) and any petition filed beyond that period would clearly be barred by time.

5. The matter of repartition of holdings of right-holders in the estate is of prime importance so far as Consolidation Act is concerned. That is why S. 21 (1) provides that repartition should be proposed after obtaining the advice of the right-holders of the estate. After repartition is proposed, it is published in the estate in the prescribed manner vide which 15 days' time is allowed to the right-holders to file objections to the proposed repartition. In case objections are not received, the Consolidation Officer shall pass an order confirming the repartition. And even in this eventuality it would be an order of the Consolidation Officer within the meaning of R. 18. If objections are filed then the same would be heard and after considering the matter either repartition would be confirmed as it is or would be

modified as may be deemed just by the Consolidation Officer. If an order passed under S. 21 (2) is not to be considered an order but simply the repartition, then it would be open to any right-holder even after 10/20 years to file a petition under S. 42 to get the repartition changed and if such a cycle is to be allowed then after any number of years any right-holder would be entitled to file a petition under S. 42 and if the State Government under S. 42 would be entitled to entertain the same without limit of time then the repartition made under S. 21 (2) would never become final because an order under S. 42 would be final between the parties and petition under S. 42 would be maintainable at the instance of the other persons without respect to any time limit. Such a course was never intended under S. 42.

6. It is then urged by counsel for respondent No. 3 that on a reading of Haqiqat Singh's case (AIR 1981 Punj 204) (supra) it is clear that if appeals are filed under Ss. 21 (3) and 21 (4) against repartition, such orders would be challenged under S. 42 within a period of six months provided in R. 18. But if matter of repartition rests under S. 21 (2) only and no appeals are filed under sub-secs. (3) and (4) then in that case petition under S. 42 can be filed without any limit of time. For that matter, he has invited my attention to the following portion of the judgment of the Division Bench (at p. 208):—

"Further R. 17 of the Rules which deals with the form of the application to be filed under S. 42 of the Act makes it abundantly clear that the bar of limitation has been created only in the context where a party impugns a specific order passed by any of the authorities under S. 21, sub-sections (3) and (4) of the Act. It is for this reason alone that in computing the period of six months, the time spent in obtaining the certified copies of the order passed under S. 21 is to be excluded. This is what has been provided for by the proviso to R. 18 itself."

The first proviso to R. 18 does show that if appeals are filed under sub-sec. (3) or sub-sec. (4) of S. 21 then in petition under S. 42 the time spent in obtaining the certified copies of the orders and grounds of appeal shall be excluded. Similarly if against an order confirming or modifying repartition under S. 21 (2) a petition is directly filed under S. 42, to

my mind, even then under the second proviso to R. 18, the applicant would be entitled to exclude the time spent by him in obtaining certified copy of order of Consolidation Officer passed under S. 21 (2) confirming or modifying the repartition. So first proviso to R. 18 does not in any way suggest to the contrary and so the decision of the Division Bench to my mind is not correct. Since the petitioner is succeeding in this case on the other point. I do not consider it proper to refer the case to a larger Bench and would content by saying what I have said above. Of course on facts the decision of the Division Bench is correct because in that case no order was sought to be set aside. There the appellant who was entitled to a path had not been provided one either in the Scheme or in repartition. So path could be provided under S. 42.

7. Even if it is assumed that R. 18 would not bar a petition before the State Government under S. 42 of the Act against an order passed under S. 21 (2) beyond a period of six months, yet I would be of considered view that if a petition to have repartition re-opened or changed is made after seven years, I would certainly hold that the State Government would have no power to exercise its jurisdiction under S. 42 unless grave facts or circumstances are brought before it. As noticed on the other point in the earlier part of the judgment, the stand of Consolidation Department before this Court in the earlier writ petition was that there was no water-course running through the fields of the petitioner nor it was intended to be dug through till the same was acquired. It would be clearly an abuse of its power now to upset the repartition by recording an erroneous finding that the water-course was already in existence and the water was running and that in repartition the same should have been protected. Therefore, on these facts as have been found before me, I am of the clear opinion that petition under S. 42 after the lapse of seven years would not be competent and the impugned order would clearly be without jurisdiction.

8. For the reasons recorded above, this petition is allowed with costs and the impugned order annexure 'B' is quashed. counsel fee being Rs. 100/-.

Petition allowed.

AIR 1982 PUNJAB AND HARYANA 152**FULL BENCH****S. S. SANDHAWALIA, C. J.,****S. S. KANG AND****G. C. MITAL, JJ.**

Union of India, Appellant v. Girdhari and another, Respondents.

Cross Objection No. 36-C-II of 1981 in F. A. O. No. 466 of 1980. D/- 8-1-1982.

Court-fees Act (7 of 1870), Sec. 8, Sch. I, Art. 1 and Sch. II Art. 11 — Punjab Requisitioning and Acquisition of Immovable Property Act (11 of 1953), Sec. 11 — Appeal or cross-objection against compensation award — Court-fee payable on memorandum of appeal or cross-objection has to be ad valorem and not fixed one. AIR 1957 Punj 32, (1979) 81 Pun LR 340 (1) and F. A. O. No. 269 of 1979 D/- 3-9-1979 (Punj) Overruled; AIR 1971 SC 1887 Foll. (Civil P. C. (1908) O. 41 R. 22). (Prs. 14, 15, 16) Cases Referred: Chronological Paras

(1980) F. A. O. No. 185 of 1980, D/- 15-12-1980, Maha Singh v. State of Haryana through Senior-Sub-Judge, Gurgaon (Punj) 2

(1979) 81 Pun LR 340 (1): 1979 Pun LJ 603 15

(1979) C. M. No. 2091 C II 81 in F. A. O. No. 269 of 1979, D/- 3-9-1979 (Punj) Kanwaljit Singh v. State of Punjab 2, 15

AIR 1971 SC 1887 3, 5, 7, 11, 12

(1968) 70 Bom LR 407: 1968 Mah LJ 587 6, 10, 12

AIR 1957 Punj 32: ILR (1957) Punj 142 1, 4, 5, 6, 7, 10, 11, 12, 13, 14, 15

AIR 1945 Bom 348 4, 6, 10, 11

AIR 1939 All 127: 1938 All LJ 1124 4

AIR 1932 Cal 346 4, 6, 9, 11

AIR 1926 Lah 343 13

H. S. Brar, for Appellant; M. S. Bedi, for Respondents.

S. S. SANDHAWALIA C. J. (for himself and on behalf of S. S. Kang and G. C. Mital JJ.):— Whether the court-fee payable on a Memorandum of Appeal under S. 11 of the Punjab Requisitioning and Acquisition of Immovable Property Act, 1953, has to be ad valorem in accordance with S. 8 read with Sch. I, Art. 1 of the Court-fees Act, 1870, or is a fixed one under Sch. II, Art. 11 of the said Act is the pristinely legal question which falls for determination before Full Bench. More pointedly at issue, is the

correctness of the Division Bench judgment, (in this context) in Kanwar Jagat Bahadur Singh v. State of Punjab, AIR 1957 Punj 32.

2. In view of the purely legal nature of the question, it is indeed unnecessary and wasteful to advert to the facts. It suffices to say that there is a patent discordance of judicial opinion with regard to the court-fee payable on a Memorandum of Appeal under Sec. 11 of the Punjab Requisitioning and Acquisition of Immovable Property Act, 1953 (hereinafter called 'the Act'), in two Single Bench judgments of this Court in C. M. No. 2091-C-II-81 in F. A. O. No. 269 of 1979 (Kanwaljit Singh v. State of Punjab), decided on Sept. 3, 1979; and, F. A. O. No. 185 of 1980 (Maha Singh v. State of Haryana through Senior Sub-Judge, Gurgaon as Arbitrator), decided on Dec. 15, 1980. The issue has, therefore, been pointedly raised with regard to the court-fee payable on Cross-Objections No. 36 of 1981 in F. A. O. No. 466 of 1980. (Union of India v. Girdhari Lal), and the matter has been placed before this Full Bench for an authoritative decision.

3. It appears to me that for once the strict discipline of the doctrine of precedents cuts the Gordian knot of controversy cleanly in this context. The issue is now clinched by a binding precedent of the final Court. This obviates any consideration on first principles and even on the language of the statute because I am inclined to take the view that the ratio of Sahadu Gangaram Bhagade v. Special Duty Controller, Ahmedabad, AIR 1971 SC 1887, now squarely governs the issue and it, therefore, suffices to indicate how the same is clearly and inexecrably applicable in the present case as well.

4. It is apt to advert at the very outset to the Division Bench judgment in Kanwar Jagat Bahadur Singh's case (AIR 1957 Punj 32) (supra), which, as yet holds the field within this jurisdiction. Therein, the identical question before us had come up for consideration. In taking the view the Division Bench was primarily influenced by the under-mentioned four premises:—

(i) that Sec. 8 of the Court-fees Act was not the charging section, and in fact the charging provisions were Schedules I and II thereof, with the result that Sch. II, Art. 11 would govern the issue;

(ii) that the Award of the Arbitrator under the Act not being a decree or an order having the force of a decree, the matter would come within the language of Schedule II, Art. 11 of the Court-fees Act;

(iii) the primary reliance was placed on the single Bench judgment in *Hiraji Virji Jangbari v. Government of Bombay*, AIR 1945 Bom 348 and the view therein was unreservedly followed, and;

(iv) the Division Bench dissented from the contrary view of Rankin, C. J., in *Ananda Lal Chakrabutty re*: AIR 1932 Cal 346 and in *Debi Din v. Secretary of State*, AIR 1939 All 127.

5. That all the aforesaid premises have now been completely over-turned by *Shahadu Gangaram Bhagade's case* (AIR 1971 SC 1887) (supra) thus shattering cornerstone of the ratio in *Kanwar Jagat Bahadur Singh's case* (AIR 1957 Punj 32) (supra) appears to me as manifest. In order to appreciate this, one has to keep in mind that the relevant provisions of Sec. 7 (1) of the Bombay Court-fees Act 1959 which had fallen for interpretation in the Bombay High Court and later before their Lordships of the Supreme Court as well, and those of Sec. 8 of the Court-fees Act, 1870, are in *pari materia* and it is, therefore, apt to juxtapose them against each other:—

(See table below)

6. Having noticed the identity of the two aforesaid provisions, it deserves highlighting that the identical issue now before us came up for consideration before a Division Bench in *Chatushshakhiya Brahmavrinnda Gayaran Trust v. Union of India*, (1968) 70 Bom LR 407 in the context of Sec. 7 of the Bombay Court-fees Act. A perusal of the judgment discloses that the crucial question before the Bench was the correctness of the earlier view of the Bombay High Court in *Hiraji Virji* (contd. on Col. 2)

Jangbari's case (AIR 1945 Bom 348) (supra). In an exhaustive judgment which now bears the seal of approval by the final Court, the Division Bench preferred the ratio expounded by Rankin, C. J., in *Ananda Lal Chakrabutty In Re*: case (AIR 1932 Cal 346) (supra), after extensively quoting therefrom. They also specifically referred to the view of this Court in *Kanwar Jagat Bahadur Singh's case* (AIR 1957 Punj 32), and in an analysis which is remarkable in its detail, they in terms dissented therefrom. Consequently, the earlier Bombay view in *Hiraji Virji Jangbari's case* (supra) was overruled and it was in terms held that the court-fee payable on the memorandum of appeal preferred against a compensation Award would be *ad valorem*, in accordance with Sec. 7 (1) of the Bombay Court-fees Act read with Sch. I Art. 3 thereof.

7. Now what seems to conclude the matter is the fact that an identical question came to be agitated before the final Court in *Sahadu Gangaram Bhagade's case* (AIR 1971 SC 1887) (supra), again in the context of the Bombay Court-fees Act. Apparently, the arguments which had earlier found favour in *Kanwar Jagat Bahadur Singh's case* (supra) were raised before their Lordships as well, but met summary rejection at their hands. As regards the stand that S. 8 of the Court-fees Act being not the charging section and, therefore, Schedule II, Art. 11 would apply, their Lordships conclusively repelled the same with the following observations:— (at p. 1890)

"This provision is similar to Sec. 8 of the Court-fees Act, 1870. It clearly applies to an appeal filed under Sec. 11 of the Act. It is true that the provision is not a charging section. It only provides for the computation of the court-fee payable. But that provision makes it

S. 8 of the Court-fees
Act, 1870.

S. 7 (1) of the Bombay Court-
fees Act.

"The amount of fee payable under this Act on a memorandum of appeal against an order relating to compensation under any Act for the time being in force for the acquisition of land for public purposes, shall be computed according to the difference between the amount awarded and the amount claimed by the appellant."

"The amount of fee payable under this Act on a memorandum of appeal against an order relating to compensation under any Act for the time being in force for the acquisition of land for public purposes shall be computed according to the difference between the amount awarded and the amount claimed by the appellant."

clear that it relates to the computation of a court-fee payable on ad valorem basis. It can have no connection with any Article providing for the payment of fixed Court-fee. Therefore the computation provided under that provision can only be of a Court-fee payable under one or the other articles in Schedule I....."

8. Similarly dealing with the contention that the Award of the Arbitrator under the Act not being a decree or an order having the force of a decree and, therefore, the matter would be out of the ambit of Sec. 7 (1) of the Bombay Court-fees Act and come within the Schedule II thereof their Lordships of the Supreme Court categorically rejected the same in the following terms:—

"We see no force in the contention that before Sec. 7 (1) of the Bombay Court-fees Act, 1959, can be attracted to an appeal, the order under appeal must have the force of a decree. That section does not say so. It would not, therefore, be proper on our part to add the words "having the force of a decree" after the word 'order' in Sec. 7 (1). In fact that section is so plain as not to require any interpretation. In that view, it is not necessary for us to consider any of the Articles in Sch. II of the Bombay Court-fees Act, 1959. All that we have to see is under which Article of Schedule I, the Court-fee is payable."

9. Then advertent to the earlier view of Rankin, C. J., in Ananda Lal Chakrabutty case (AIR 1932 Cal 346) (supra), their Lordships, in terms quoted therefrom, and expressly approved enunciation therein.

10. Lastly, their Lordships approved the overruling of the earlier view in Hiraji Virji Jangbari's case (AIR 1945 Bom 348) (supra), with the following concluding observations:—

"For the reasons mentioned above, we think that the decision of the High Court in Chatusshakhiya Brahmavrinada Gayaran Trust v. Union of India, (1968) 70 Bom. L. R. 407, is correct. In this view, it is not necessary for us to consider the correctness of the decision of the Punjab High Court in Kanwar Jagat Bahadur Singh v. Punjab State, I. L. R. (1957) Punj 142: (AIR 1957 Punj 32).

11. It would be manifest from the above that all the four premises on

which the ratio of Kanwar Jagat Bahadur Singh's case (AIR 1957 Punj 32) (supra) rested have now been authoritatively demolished. The contentions accepted therein have been expressly rejected by their Lordships of the Supreme Court and the judgment in Hiraji Virji Jangbari's case (AIR 1945 Bom 348) (supra), which was its sheet-anchor, now stands overruled. Ananda Lal Chakrabutty case (AIR 1932 Cal 346) (supra) which had been expressly dissented from, has now been reaffirmed in no uncertain terms by the final Court. It would thus appear that Kanwar Jagat Bahadur Singh's case (supra), can no longer hold the field in view of the categoric and authoritative enunciation of the law in Sahadu Gangaram Bhagade's case (AIR 1971 SC 1887) (supra).

12. I would equally wish to dispose of a rather halfhearted argument that Kanwar Jagat Bahadur Singh's case (supra), has not been expressly overruled by their Lordships of the Supreme Court in view of the quotation therefrom (in paragraph 10 above in Sahadu Gangaram Bhagade's case). It deserves highlighting that the Bombay High Court in Chatusshakhiya Brahmavrinada Gayaran Trust's case (1968-70 Bom LR 407) (supra), had expressly dissented in detail from Kanwar Jagat Bahadur Singh's case (supra) and in specifically approving the former, their Lordships would necessarily disapprove of the ratio in the latter case. A larger (closer?) reading of the Supreme Court judgment leaves no manner of doubt that Kanwar Jagat Bahadur Singh's case (supra), is no longer good law. The only construction possible on the concluding observations made by their Lordships is that having settled and declared the law to the contrary, they did not deem it necessary to individually consider and overrule other judgments including that in Kanwar Jagat Bahadur Singh's case (supra).

13. Now apart from the binding precedent of the final Court, in the context of the Bombay Court-fees Act, it appears that the weight of precedent under the Court-fees Act of 1870, is equally on the other side. It was the admitted case before us that the High Court of Bombay and Andhra Pradesh have, in terms expressed their dissent from the view in Kanwar Jagat Bahadur Singh's case (AIR 1957 Punj 32) (supra). The Calcutta, Allahabad and even our predeces-

sor High Court of Lahore in *Puran Chand v. Emperor*, AIR 1926 Lah 343. have consistently taken a contrary view. Learned counsel for the respondent, even though pressed, was unable to cite any judgment which still holds the field in consonance with *Kanwar Jagat Bahadur Singh's case* (supra).

14. To conclude, it must now be held that *Kanwar Jagat Bahadur Singh's case* (supra), is no longer good law and the same is hereby overruled.

15. As a necessary consequence of the above, it would follow that all later single Bench judgments of this Court, taking the view in line with *Kanwar Jagat Bahadur Singh's case* (supra), are erroneously decided. We would, therefore, overrule *Union of India v. Virsa Singh*, (1979) 81 Punj LR 340 (1) and, F. A. O. No. 269 of 1979 (*Kanwaljit Singh v. State of Punjab*, decided on Sept. 3, 1979).

16. In the light of the aforesaid discussion, the answer to the question posed at the outset is rendered to the effect that the court-fee payable on a memorandum of appeal, under S. 11 of the Act has to be ad valorem in accordance with S. 8 read with Sch. 1 Art. 1 of the Court-fees Act, 1873.

17. In view of the consistent stream of precedent in this Court, which we have now reversed, the cross-objector must obviously be afforded some time to make up the deficiency in the court-fee. We accordingly allow a period of two months to do the needful.

Reference answered.

AIR 1982 PUNJAB AND HARYANA 155

M. R. SHARMA AND
M. M. PUNCHHI, JJ.

Bhim Sain, Petitioner v. Laxmi Narain, Respondent.

Civil Revn. No. 1737 of 1981, D/- 16-10-1981.*

Haryana Urban (Control of Rent & Eviction) Act (11 of 1973), Ss. 13 (2) (i) First Proviso, 7 — Civil P. C. (1908), O. 8, R. 6D (inserted by Civil P. C. Amendment Act (1976)) — Eviction proceeding on ground of arrears of rent — Dispute as to exact quantum of rent —

*From order of B. N. Singal, HCS, Rent Controller-cum-Sub. J 1st Class, Narwana, D/- 3-6-1981.

Can be raised as counter claim in the same eviction petition by the tenant. 1970 Ren. C. J. 671 (Delhi) Dissented from.

In availing the provisions of the proviso to S. 13 (2) (i) the tenant does not lose the right of claiming an issue on the quantum of rent and a decision thereon from the Rent Controller in the proceedings for eviction. Such right or claim in respect of the cause of action having accrued to him on and during the pendency of the eviction application, his defence laid in the written statement will have the effect of a cross claim. In the altered general principles of law as embodied in Civil P. C. by amendment of 1976 even if the landlord does not want to continue with the petition for eviction or gets it stayed or dismissed, the counter claim can nevertheless be proceeded with as visualised under O. 8, R. 6D. 1970 Ren. C. J. 671 (Delhi) Dissented from; AIR 1979 Punj & Har 96 Approved. (Para 11)

Rules 6-A to 6-G provide for the filing of a counter claim by the defendant in a suit, based upon any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit, but before the defendant has delivered his defence or the time set out for the purpose. Such counter claim in R. 6A (2) has the same effect as if it is a cross suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter claim. R. 6A (4) provides that the counter claim shall be treated as a plaint and governed by the rule applicable to the plaints. (Para 10)

Cases Referred: Chronological Paras
AIR 1979 Punj & Har 96: (1979) 81 Pun LR 502 1, 3, 8, 10, 11
(1977) 1 Ren CR 208: (1977) 1 Rent LR 150 7, 10
(1973) Civil Revn. No. 1185 of 1972 D/- 27-3-1973 (Punj), *Ram Sarup v. Sham Sunder* 5
1970 Ren CJ 671: 1970 Ren CR 76 (Delhi) 6, 11
(1967) 69 Pun LR 248 5, 11
(1967) Civil Revn. No. 210 of 1965 D/- 24-3-1967 (Punj), *Gayan Parbha v. Anar Devi* 4
Rajesh Chaudhry, for Petitioner; *Puran Chand*, for Respondent.

M. M. PUNCHHI, J.:— Since doubt was entertained by S. P. Goyal, J. with regard to the correctness of the rule propounded in *Nasib Singh v. Om Par-*

kash. (1979) 81 Punj LR 502 : (AIR 1979 Punj & Har 96) this petition for revision was admitted by him to a Division Bench. Hence the listing of the petition before us.

2. Facts giving rise thereto are plain and simple. The landlord-respondent had sought eviction of the tenant-petitioner's before the Rent Controller, Narwana on a variety of grounds. One such ground was that the tenant had not paid or tendered the rent due to him and was thus in arrears from 1-3-1978 till date. The rate of rent claimed was Rs. 110/-. The tenant while denying the allegations in the eviction petition claimed in his written statement that the rate of rent was Rs. 75/- per mensem. All the same to avoid eviction, the tenant availed of the first proviso to S. 13 (2) (i) of the Haryana Urban (Control of Rent and Eviction) Act, 1973 (briefly referred to as the Act) by making payment of the arrears of rent at the rate of Rs. 110/- per mensem as asked for. Having warded off summary eviction, the tenant applied to the Rent Controller that an issue be struck which should determine the rate of rent — whether it was Rs. 75/- per mensem or Rs. 110/- per mensem. The Rent Controller issued notice on that application to the landlord. He, while resisting it countered, that after the tender of the arrears of the rent, the ground of eviction on the basis of non-payment of arrears of rent had been rendered infructuous and thus the tenant should seek his remedy by filing an independent suit under S. 7 of the Act. According to the landlord, there was no necessity of framing the issue sought. Agreeing with the contention of the landlord, the Rent Controller vide his order dated 3-6-1981, now under challenge, dismissed the application.

3. The learned counsel for the petitioner in support of his contention cited before S. P. Goyal, J. Nasib Singh's case (AIR 1979 Punj & Har 96) (supra) as has been done before us. That decision was rendered by my learned brother M. R. Sharma, J. (who is now with me as a partner in the Bench). In addition thereto, he relied on some other single Bench cases which wholly or partially supported his contention. We propose to deal with each of them presently. On the other hand, learned counsel for the landlord-respondent did not cite before us a single judgment to the contrary.

4. In *Gayan Parbha v. Anar Devi*, Civil Revision No. 210 of 1965 decided on 24-3-1967, Chief Justice Mehar Singh took the view that it was the duty of the tenant to make payment or make tender of the amount as stated, and if he fails to do so, he cannot have the advantage of the proviso to cl. (i) of sub-sec. (2) of S. 13 of the East Punjab Urban Rent Restriction Act, 1949. In that case, tender had been made by the tenant at the rate owned by her and not as stated by the landlord. That case was decided against the tenant as there was short payment even at the rate calculated by the tenant and in regard to the interest and costs of the application.

5. In *Dial Chand v. Mahant Kapoor Chand*, (1967) 65 Punj LR 248, Mehar Singh C. J. observed as follows:—

"It is conceivable that a landlord may make an unreasonable claim with regard to the rate of rent in arrears, may be with the dishonest intention of placing the tenant in such a position that he may not be able to take advantage of the proviso, but even in such a case the tenant ought to know the truth, that is to say, the actual rent that he has been paying all along and the rent that has been agreed to by him with his landlord, and if he holds to the actual rent and succeeds in proving that figure, the exaggerated claim by the landlord would come to nothing. In such a case if the tenant complies with the proviso according to the rate which he says is the true rate and proves that to be so, he has the benefit of the proviso and escapes ejection. This is an aspect of the provision with regard to ejection for arrears of rent which does give the landlord a certain advantage to harass the tenant by making an unfounded claim of arrears at a higher rate of rent than the actual rent and for this there is not even a provision in the Act for any penal action against the landlord. In spite of this, the proviso being for the benefit of the tenant, if he wishes to take advantage of it he has to comply with it strictly, and in a case like the present he can take one of the three courses. He can under protest make payment or tender of the arrears at the rate claimed by the landlord in the ejection application, and if the rate is found subsequently to be less, he can hope for adjustment of the excess payment. He can come forward with a

straight statement of what is the true rate of rent and on that proceed to comply with the proviso, in which case he has the benefit of the proviso, if the finding is that the rate stated by him is the rate of rent for the tenancy. Lastly, he can enter into a dispute with the landlord, as in this case, and insist upon his lower rate of rent and then take the consequence if he is not able to prove that that is the actual rent."

The ratio of the decision in Dial Chand's case ((1967) 69 Punj LR 248) (supra) was followed by D. K. Mahajan J. in Ram Sarup v. Saam Sunder, Civil Revision No. 1185 of 1972 decided on 27-3-1973. Thus an issue on question of rent was held claimable.

6. In Behari Lal v. Ajudhia Dass, 1970 Rent C. J. 671, V. D. Misra J. of the Delhi High Court while interpreting S. 13 of the East Punjab Urban Rent Restriction Act, 1949 took the view that the terminology used therein did not show that any duty was cast on the Rent Controller to assess the arrears of rent due independently of the stand taken by the landlord. It was held therein that in a case where the demand of the landlord had been met availing of the proviso to S. 13 (2) (i) of the said Act, the Rent Controller had no authority to enter into an inquiry to find out as to what the rate of rent was, before dismissing the application of the landlord on this aspect. The duty of the Rent Controller was confined to see whether on the date of hearing the tenant has paid or tendered the arrears of rent asked for by the landlord along with interest and costs. The moment that was done, it was the duty of the Rent Controller to dismiss the application for eviction. It was also held therein that the mere fact that the tenant had paid the rent while reserving his right to recover the excess paid by him, the payment on his behalf could not be termed conditional.

7. In Avtar Singh v. Machhi Ram (1977) 1 Rent C. R. 208, R. S. Narula, C. J. took the view that if the tenant disputed in his written statement that the rent was lesser than claimed by the landlord but yet tendered rent at the rate claimed by the landlord unconditionally, the subsequent suit of the tenant to recover the excess amount was barred by principles of *res judicata*. This principle was held applicable to the facts of that case since no express

reservation had been made, nor could one be implied, in the earlier eviction petition and thus the subsequent suit was held barred by principles of constructive *res judicata*.

8. Lastly is Nasib Singh's case (AIR 1979 Punj & Har 96) (supra) where the view taken by my learned brother M. R. Sharma, J. was that the proviso to Section 13 (2) (i) of the East Punjab Urban Rent Restriction Act, 1949 nowhere mentioned that a tenant while making the tender of the rent should do so under protest and all that is required is that the tenant should pay the arrears of rent, interest and costs etc. On the first hearing of the application, such tender was held not to debar the tenant from claiming trial of the issue relating to the quantum of the rent. The principle of "Payment under protest" was held not to be so sacrosanct but was held a matter inferable from the facts and circumstances of each case. In any case if the lower rate had been pleaded in the written statement, there was held to be a presumption that the tender made of the rent at the higher rate was under protest or only provisional so that if the decision of the issue regarding quantum of rent ultimately went against the tenant, he could not be deprived of the benefit of the aforesaid proviso. It was also held that the precautionary measure adopted by him did not debar the tenant from insisting upon the determination by the Rent Controller of the rate of rent fixed by the parties by mutual consent.

9. It is undisputed that the excess rent paid by the tenant is recoverable by him under S. 7 of the Act and that an action by way of suit is also not barred. The remedies can be availed of within a period of six months of such excess payments as provided in S. 7. The twin question is whether the tenant should file a separate suit to claim refund of the excess payments or can he claim an issue in the eviction petition itself since an event occurring therein gave him the cause of action.

10. It is well settled that the general principles of the Civil P. C. 1908 apply to proceedings before the Rent Controller, though strictly the Code as such is not applicable. It would be useful now to take note of some new provisions inserted by Civil P. C. Amendment Act, 1976 operative with effect from 1-2-1977.

These are embodied in O. VIII, Rr. 6A to 6G. These rules provide for the filing of a counter claim by the defendant in a suit, based upon any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit, but before the defendant has delivered his defence or the time set out for the purpose. Such counter claim in R. 6A (2) has the same effect as if it is a cross suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter claim. R. 6A (4) provides that the counter claim shall be treated as a plaint and governed by the rule applicable to the plaints. Principles embodied in Rr. 6A to 6G of O. VIII as a whole leave no manner of doubt that a counter-claim set up by the defendant (in this case the tenant) that the rent settled between the parties was at the rate of Rs. 75/- per mensem and not Rs. 110/- per mensem is in the nature of a claim or a right, the cause of action of which accrued to the tenant after the filing of the eviction petition and for the plea taken on that behalf in the written statement. The scope of such defence plea, having the effect of a cross-claim is to enable the Court to pronounce the final judgment in one and the same proceeding. These principles which have now come about as a part of the Civil P. C. carry out the broader principles of the public policy that there should be avoidance of multiplicity of proceedings and the parties should litigate once for all lest suffer bars of res judicata as spelled out in the afore-quoted single Bench decisions. Protest payment at the rate claimed by the landlord or insisted upon by the tenant is necessary to claim benefit of the proviso to avoid eviction. Unless such protest is lodged or inferred, the subsequent suit for recovery of the excess payment would be barred by principles of constructive res judicata as held by Narula C. J. in Avtar Singh's case (1977-1 Ren CR 208) (supra). Protest is to be presumed if a plea is taken in the written statement by the tenant that a lesser sum is due, yet the benefit of the proviso is availed of by him making or tendering the amount claimed by the landlord. And the issue of question of rent is capable of being settled in the same eviction petition as held in Nasib Singh's case (AIR 1976 Punj & Har 96) (supra).

11. On reconsideration of the entire case law on the subject as also from the light, which is forthcoming from the amendment made to the Civil P. C. it becomes crystal clear that in availing the provisions of the proviso to S. 13 (2) (i) of both the Acts aforementioned, the tenant does not lose the right of claiming an issue on the quantum of rent and a decision thereon from the Rent Controller in the proceedings for eviction. Such right or claim in respect of the cause of action having accrued to him on and during the pendency of the eviction application, his defence laid in the written statement will have the effect of a cross-claim. In the altered general principles of law, even if the landlord does not want to continue with the petition for eviction or gets it stayed or dismissed, the counter-claim can nevertheless be proceeded with as visualized under O. VIII R. 60. Thus the view taken by the Delhi High Court in Behari Lal's case (1970 Ren CJ 671) (supra) which view seems to have been shared by S. P. Goyal, J. in the admitting order, that the question of rent has not any bearing in the petition for ejectment thereafter, cannot, with due respect to the learned Judges, be taken to be stating the principle now applicable. Specific defence when set up by the tenant in the written statement would itself be an inbuilt protest for the simultaneous availing of the benefit of the proviso by making excess payment as held in Nasib Singh's case (AIR 1979 Punj & Har 96) (supra) by my learned brother M. R. Sharma, J. and logically for hopeful adjustment of the excess payment as conceived of by Mehar Singh C. J. in Dial Chand's case (1967-69 Punj LR 248) (supra). We are persuaded to come to this view, while applying general principles of the Civil P. C. to further the intendment of the law framers. One of the foremost considerations for the enactment of Rent Control Laws is restrictions on the quantum of rents. Permitting the landlord to take away the excess rent from the tenant frightened to make payment in order to avail of the benefit of the proviso and the Rent Controller wringing his hands that he could do nothing about it would, to our mind, be a fraud on the statute. S. 7 of the Act conceives of a situation where refund would be necessary for excess payments of rent made by a tenant. We see no reason why a claim under

S. 7 of the Act cannot be determined by the Rent Controller as a cross-claim under the Act simultaneously with the eviction petition. Such a course to our mind furthers the purposes of the Act rather than frustrate them.

12. For the view thus taken, we hold that the order of the Rent Controller in refusing to frame the issue on the quantum of rent was illegal and improper and deserves to be set aside. While allowing the petition and setting aside the impugned order, we direct that the Rent Controller shall, in the light of the observations made by us, frame the requisite issue, determine the quantum of rent and settle it one way or the other and such relief to the parties as is consonant with the ends of justice. This petition is accordingly allowed but with no order as to costs.

M. R. SHARMA, J. — I agree.
Petition allowed.

AIR 1982 PUNJAB & HARYANA 159
GOKAL CHAND MITAL, J.

Gram Panchayat, Kundli and another
Petitioners v. The State of Haryana,
and another, Respondents.

Civil Writ No. 1223 of 1981, D/- 6-5-1981.

Punjab Gram Panchayat Act (4 of 1953), S. 26—Prohibition—Closing of sale of intoxicating liquor at licensed shop within local area of Gram Panchayat — Resolution for, by Gram Panchayat — Resolution sent to concerned authorities, by Counsel of Gram Panchayat — Effect of — (Prohibition) — (Constitution of India, Art. 47).

Where the Gram Panchayat had passed a resolution for closing the sale of intoxicating liquor at licensed shop within its local area on 3-4-1980, a copy of which was sent to the Excise and Taxation Commissioner and various concerned authorities by the Counsel of Gram Panchayat and the resolution was not considered by the Excise and Taxation Commissioner merely because it was unattested i.e. not bearing the seal of Gram Panchayat and it was not sent by Sarpanch or Gram Sachiv; the action of the Commissioner would be illegal and contrary to the provisions of S. 26. The sale of intoxicating liquor at licensed shop was directed to be stopped as there

was due compliance of S. 26 by the Gram Panchayat. Case law discussed.

(Paras 5, 7)

Cases Referred: Chronological Paras

1981 Punj LJ 307	2
1975 Punj LJ 21:77 Punj LR 219	9
AIR 1974 Punj 89:1973 Punj LJ 619:	
76 Punj LR 105	9
1974 Punj LJ 360	2, 5
J. S. Malik, for Petitioners; B. L. Bishnoi for Respondents.	

ORDER:— Gram Panchayat, Kundli, Tahsil and district Sonapat, and its Sarpanch have come to this Court under Art. 226 of the Constitution of India seeking a writ of mandamus for stopping the sale of intoxicating liquor at any licensed shop within the local area of the Gram Panchayat.

2. In March, 1980, two liquor vends within the Panchayat area of village Kundli were auctioned by the State of Haryana which started functioning on 1st April, 1980. The Gram Panchayat of Kundli passed a unanimous resolution dated 3rd April, 1980 (annexure P-1) to the effect that the Government has caused harm to the rights of the Panchayat as also the residents of the village by opening the liquor vends. It was mentioned in the resolution that near the village there was factory area and the workers after taking liquor create nuisance and quarrel on the road side and create lawlessness which affects the students besides the residents of the village. By the resolution, the opening of the vends was opposed and it was decided to request the Government to close the same immediately. In nutshell, the resolution was that the Panchayat did not want any liquor vend within the Panchayat area. Copies of this resolution were sent by the Gram Panchayat, through their Advocate Shri J. S. Malik, by registered A. D. Post, along with a forwarding letter dated 30th April, 1980, to the following four authorities:—

1. The Excise and Taxation Commissioner, Haryana, Chandigarh.
2. The Minister, Excises and Taxation, Haryana, Chandigarh.
3. The Secretary, Excise and Taxation Department, Haryana, Chandigarh, and
4. The Director, Gram Panchayats, Haryana, Chandigarh.

A copy of the forwarding letter is annexure P. 2 which was received by all the four aforesaid authorities on 5th May, 1980, as is clear from the original A. D. receipts filed as annexures P-3

to P- 6. The resolution annexure P-1 was passed in pursuance of S. 26 of the Punjab Gram Panchayat Act, 1953, as amended by the State of Haryana, which was in force at the time of the passing of the resolution, S. 26 *ibid*, which was in force on 3rd April, 1980, read as under:—

"26. (1) A Gram Panchayat may, by vote of at least two-thirds majority of Panches, direct that intoxicating liquor may not be sold at any licensed shop within the local area of the Gram Panchayat.

(2) When a resolution has been passed under sub-section (1) above, it shall take effect from the 1st day of April of the year next after such resolution.

(3) Notwithstanding anything contained in the Punjab Excise Act, 1914, or any other Act for the time being in force and the rules made thereunder with regard to the powers and functions of the Collector under the said Act, such a resolution will be binding upon the Excise and Taxation Commissioner: Provided that if the Excise and Taxation Commissioner is of the opinion for reasons to be recorded in writing that within such local area illicit distillation or smuggling of alcohol has been carried on or connived at, within two years preceding the date of the passing of such resolution, in such local area, such resolution shall not be binding upon him, unless the Government orders that it shall be so binding."

The aforesaid provision was interpreted by D. S. Tewatia, J., in *Gram Panchayat, Oon v. Excise and Taxation Commissioner, Haryana*, 1974 Pun LJ 360. There, two resolutions were passed by the Gram Panchayat, one on 6th March, 1974, and the other on 20th March, 1974, to enforce prohibition in the Panchayat area and it was held that those two resolutions would take effect from 1st April, 1974 and, therefore, the State Government could not auction any vend in the Panchayat area for the year 1st of April 1974 to 31st of March, 1975. According to the aforesaid decision, the resolution passed in the present case dated 3rd April, 1980, would have taken effect from 1st April, 1981, and, therefore, the State Government could not auction any liquor vends for the year 1st April, 1981 to 31st March, 1982. It is worthwhile to notice that the decision of Tewatia, J., was doubted and the

matter was considered by a Division Bench in S. A. No. 1096 of 1980 — *Hawa Singh v. State of Haryana*, decided on 24th March, 1981,* and it was held that if resolution for prohibition is passed up to 31st December of a year, that resolution would take effect from 1st April of the following year and on this reasoning the decision of Tewatia, J., was overruled. The fact remains that on the facts of this case, under any of the two views, according to the aforesaid provisions of S. 26, the resolution passed by the Gram Panchayat on 3rd April, 1980, would have become applicable w. e. f. 1st April, 1981, and the prohibition policy in the Panchayat area had to commence from that date and no earlier date.

3. The Haryana Legislature made amendment in sub-sections (1) and (2) of S. 26 of the principal Act by the Haryana Act 8 of 1980, which was published in the Government Gazette on 11th April, 1980. The amended sub-sections (1) and (2) are as under:—

"26(1). A Gram Panchayat may, at any time, during the period commencing on the 1st day of April and ending with the 30th day of September of any year, by resolution passed by majority of panches holding office for the time being, direct that intoxicating liquor may not be sold at any licensed shop within the local area of the Gram Panchayat.

(2) When a resolution has been passed under sub-section (1) and is received in the office of the Excise and Taxation Commissioner, Haryana, on or before the 31st day of October, it shall take effect from the 1st day of April of the year next after such resolution."

According to the aforesaid provision, if a resolution was passed by a Gram Panchayat by majority during the period commencing on 1st day of April and ending with 30th day of September of any year directing that intoxicating liquor may not be sold on any licensed shop within the local area of the Gram Panchayat and if such a resolution is received in the office of the Excise and Taxation Commissioner, Haryana on, or before the 31st day of October, it shall take effect from the first day of April of the year next after such resolution. Therefore, applying the aforesaid amended provision to the present case, it is

*Reported in 1981 Pun LJ 307.

evident that the resolution passed on 3rd April, 1980, was not only conveyed to the Excise and Taxation Commissioner Haryana, on 5th May, 1980, but to three more authorities also. Therefore, there was due compliance of sub-sections (1) and (2) of S. 26 as amended by the Haryana Act No. 8 of 1980. Accordingly, the resolution had to take effect from 1st April, 1981, and, therefore, the Excise and Taxation Commissioner, Haryana, or the State Government through the Excise and Taxation Department could not auction any liquor vend within the local area of Gram Panchayat, Kundli. In spite of the situation being the same under S. 26 before or after the Haryana Act No. 8 of 1980, on the facts of the present case two liquor vends were auctioned in the local area of Gram Panchayat, Kundli, in the end of March, 1981. When the Gram Panchayat came to know of it, the present writ petition was filed on 28th March, 1981, challenging the same and to have the sale of intoxicating liquor stopped within the local area of the Panchayat.

4. Reply has been filed by the Excise and Taxation Commissioner, Haryana. Therein it is admitted that Shri J. S. Malik, Advocate, did send the letter dated 30th April, 1980, annexing thereto an unauthenticated copy of the resolution of Gram Panchayat, Kundli, alleged to have been passed on 3rd April, 1980, for the closure of the liquor vends. However, it was pleaded that no copy of the resolution was received from Gram Panchayat, Kundli, or from the Gram Sachiv concerned and reliance has been placed on S. 16 of the Act wherein the duties of Gram Sachiv have been defined as follows :—

"16. Duties of Gram Sachiv. — It shall be the duty of the Gram Sachiv to—

(a) maintain accounts, record and other property of the Gram Sabha and the Gram Panchayat under the general supervision of the Sarpanch and to assist the Gram Panchayat in the discharge of its duties and functions under this Act or under any other law for the time being in force.

(b) carry out the resolutions of the Gram Panchayat;

(c) omitted by Haryana Act, 16 of 1973;

(d) perform such other duties and functions as may be prescribed."

According to the stand of the Excise and Taxation Commissioner, if the Gram Sachiv or the Sarpanch had sent a copy of the resolution of the Panchayat duly certified with the common seal of the Gram Panchayat on or before 31st October, 1980, as required by amended sub-section (2) of S. 26 of the Act, then the matter would have been different, otherwise the answering respondent was justified in auctioning the liquor vends in the village for the year 1981-82. It has further been highlighted in the written statement that the copy of the resolution attached with the letter of Shri J. S. Malik, Advocate, neither bore the common seal of Gram Panchayat, Kundli nor was it certified to be a true copy of the original either by the Gram Sachiv or the Sarpanch and, therefore, such a copy of the resolution did not call for any action and accordingly it was consigned to record. It was then pleaded that according to Rule 7 (ii) of the Gram Panchayat Rules, 1965, the record of the proceedings of a Gram Panchayat are to be signed by the Sarpanch and all other Panches attending the meeting of the Panchayat and a copy of the resolution annexed with the petition as P-1 does not indicate if the alleged resolution was actually signed in accordance with the aforesaid provision. If it was so signed, then annexure P-1 is not a true copy of the original and if it was not so signed then the resolution has not been passed in accordance with law.

5. As the law stood, when the resolution was passed on 3rd April, 1980, a decision had to be taken by the Gram Panchayat by two-thirds majority of the Panches to direct that intoxicating liquor may not be sold at any licensed shop within the local area of the Gram Panchayat. Such a resolution was duly passed and the result of it would have been according to the law as applicable at that time, that the Excise and Taxation Commissioner could not auction any liquor vend w. e. f. 1st April, 1981, as no sale of intoxicating liquor could take place in the local area of Gram Panchayat, Kundli, from that date. It appears that to obviate the difficulty caused by the decision of D. S. Tewatia, J., in Gram Panchayat Oon's case (supra), sub-sections (1) and (2) of S. 26 were amended because, according to that deci-

sion, even if the resolution was passed by the Panchayat on 31st March, for enforcing prohibition, the same would have become effective from the following day, namely, 1st of April. It cannot be lost sight of that the policies and the budget of the State are made before 1st April and accordingly provision is made in the budget as to how the revenue is to be collected.

Keeping that in view, the liquor vendis, which also contribute towards the revenue of the State, are generally auctioned towards the end of March which start functioning from 1st April. Therefore, in such a situation if the resolution passed by the Gram Panchayat on 31st of March were to become effective from 1st of April, without knowledge of the State Government in the Excise and Taxation Department, that was likely to cause material difference in the revenue of the State so as to upset their programmes. Although that view was overruled by the Division Bench in *Hawa Singh's case* (supra) and according to the Division Bench if the resolution had been passed on 31st of December, then there was clear three months' time for the Government to prepare its budget keeping in view the resolution passed by the Panchayat. But, by the amendments made by the Haryana Act No. 8 of 1980, the Government has enlarged the minimum period to five months because even if a resolution is passed up to 30th of Sept. unless the same is received by the Excise and Taxation Commissioner by 31st Oct. it shall not become effective from 1st day of April of the ensuing year. Therefore, the minimum period for the Government to consider the matter in the light of the resolution passed by the Gram Panchayat would be from 1st of November till the end of March of the ensuing year. In spite of the aforesaid amendment, what I find is that the Excise and Taxation Commissioner has thrown to the winds the provision made in sub-secs. (1) and (2) of S. 26 made by the Legislature by not giving effect to the resolution passed on 3rd of April, 1980, a copy of which was admittedly received by him on 5th of May, 1980. The sole purpose of S. 26 is to carry out the Directive Principle of Prohibition enshrined in Art. 47 of the Constitution of India. As the law stood before the Haryana Act, No. 8 of 1980, only the passing of the resolution before the end of the year was

necessary and that would have taken effect from the following 1st of April and there was no provision that the resolution must be conveyed to the Excise and Taxation Commissioner before the end of the year. To obviate that eventuality also, a specific provision was made in sub-section (2) in the amended Act, besides giving clear five months' notice to the Excise and Taxation Commissioner of the prohibition policy adopted by the Panchayat. The provision contained in sub-s. (2) is being misconstrued by the Excise and Taxation Commissioner because the whole purpose was to give information of a resolution of the Panchayat so that the same could be given effect to with effect from 1st of April of the ensuing year. It is admitted by the Excise and Taxation Commissioner that the letter of Shri J. S. Malik, Advocate, was duly received by him along with an unattested copy of the resolution. A reading of annexure P-2 shows that it was clearly specified therein that vide resolution dated 3rd of April, 1980, passed under S. 26 of the Act, the two liquor vendis be closed and intoxicating liquor may not be sold within the local area of the Gram Panchayat and it was specifically stated that a copy of the resolution was attached. A reading of the resolution (copy annexure P-1) clearly goes to show that a unanimous decision was taken by the Panchayat directing that intoxicating liquor may not be sold at any licensed shop within the local area of the Gram Panchayat. The counsel for the Panchayat produced the original resolution book containing the resolution in dispute which was signed by the Sarpanch and six members of the Panchayat and the seventh member of the Panchayat was absent. The same was seen by the counsel for the Excise and Taxation Commissioner and he could not point out any infirmity therein.

6. This brings me to the consideration of the hyper-technical objection raised on behalf of the Excise and Taxation Commissioner to the effect that the copy of the resolution which was sent with letter annexure P-2 could be ignored by him and was filed as the same was not sent to him by the Sarpanch or the Gram Sachiv and that it was without the seal of the Gram Panchayat and the signatures of the Sarpanch. I do not find any merit whatsoever in this objection. As already observed above, the

sole purpose of passing a resolution by a Panchayat is to take a decision to enforce prohibition within its local area and to give information of the same to the Excise and Taxation Commissioner so that he may proceed accordingly. S. 80 of the Code of Civil Procedure provides for giving of a notice before a suit is to be filed against the State or an officer of the State. The notice can be issued by the party himself but it has been seen that generally it is issued through a counsel. To ensure that the notice is received by the Excise and Taxation Commissioner, in the present case, it was sent through Shri J. S. Malik, Advocate, and it was stated in the notice that the Panchayat has unanimously resolved to enforce the prohibition policy and requested for the closure of the liquor vends. Along with the notice, an uncertified copy of the resolution was sent. To my mind, it would have been due compliance of the provisions of S. 26 of the Act if the Excise and Taxation Commissioner had enquired into the matter whether such a resolution has been passed by the Panchayat instead of filing the same without taking any action thereon. Let us try to analyse the stand taken by the Excise and Taxation Commissioner and take it to a logical end. If a copy of the resolution is duly received by the Excise and Taxation Commissioner before 31st October, which copy is duly signed by the Sarpanch and bears the seal of the Panchayat concerned and is sent under the signatures of the Sarpanch or the Gram Sachiv, containing a decision that intoxicating liquor may not be sold within the local area of the Gram Panchayat concerned, would the Excise and Taxation Commissioner blindly accept that copy of the resolution without finding whether it was really passed by the Gram Panchayat, for it may be a fabricated document? To my mind, even in such a case it would be in the fitness of things that he should make an enquiry and find out whether the Panchayat has really passed the resolution because if it is found that no such resolution was passed then necessarily that would be a forged document. Therefore, in either eventuality, it will be the duty of the Excise and Taxation Officer to find out whether the Panchayat has really decided to enforce prohibition in its local area and if he comes to the conclusion that such a resolution

was passed then it must be given effect to subject to the provisions of sub-secs. (3) and (4) of Section 26 of the Act.

7. To my mind, the matter may not rest here. Even if a copy of the resolution passed by the Panchayat had been sent by the Sarpanch or the Gram Sachiv, which was duly signed by the Sarpanch and had the seal of the Panchayat, and was duly received by the Excise and Taxation Commissioner before 31st Oct. yet another hyper-technical objection could well be raised on a strict reading of S. 26 (3) of the Act because it does not talk of sending of a copy of the resolution but says that when a resolution has been passed and is received in the office of the Excise and Taxation Commissioner There fore, it could well be argued that it should be the resolution which should reach the Excise and Taxation Officer before 31st Oct. and not a copy of the same. I am endeavouring to discuss this point in this case so that in some other case the aforesaid objection may not be raised because to my mind the entire underlying object of S. 26 is that if a Panchayat takes a decision to prohibit sale of intoxicating liquor within its local area and information of the same is sent to the Excise and Taxation Commissioner before 31st Oct. then it would become the duty of the Excise and Taxation Commissioner to enquire into the matter. According to the provision made in the amended S. 26 (1), every year a given Panchayat will have to pass a resolution between 1st day of April and 30th day of September and to convey information of the same on or before 31st day of October so that from the ensuing 1st of April no liquor vend is opened in the local area of that Panchayat. Accordingly, the objection raised by the Excise and Taxation Commissioner is overruled and it is held that due information of the resolution dated 3rd April, 1980, to stop the sale of intoxicating liquor was duly conveyed to the Excise and Taxation Commissioner on 5th May, 1980, in pursuance of which he could not auction the liquor vends to function within the local area of Gram Panchayat, Kundli, w. e. f. 1st April, 1981, and the action of the Excise and Taxation Commissioner to the contrary is clearly against the provisions of S. 26 of the Act and is struck down.

8. It is well known but deserves to be highlighted that Advocates' profession

is an honourable profession and as such every Advocate deserves to be given due respect. The letter of Shri J. S. Malik, Advocate, sent along with the unattested copy of the Panchayat's resolution dated 3rd April, 1980, which was duly received by the Excise and Taxation Commissioner on 5th May, 1980, should have engaged his attention to find out if really the Panchayat had passed the resolution to enforce prohibition in its local area. It cannot be disputed that the Gram Panchayats are local Governments for their respective Panchayat areas, just like municipalities for their respective limits. These are wings of the State Government and come under the Panchayat or Local Government Departments. It pains to notice that the letter and the resolution were filed unceremoniously and the law made by the Legislature in pursuance of the Directive Principle of enforcing prohibition, contained in the Constitution of India, was thrown to the winds.

9. In Gram Panchayat, Mehtabgarh v. State of Punjab, 1973 Punj LJ 619 : (AIR 1974 Punj 89) and Gram Panchayat, Gholian Khurd v. The Excise and Taxation Commr., Punjab, 1975 Punj LJ 21, while quashing the action of the Excise and Taxation Commissioner in auctioning the liquor vends, thirty days' time was given by Sharma, J. and Tewatia, J., respectively in the aforesaid cases, to the State for closure of the vends. A reading of the facts of the aforesaid cases shows that the Panchayat concerned had passed a resolution in the month of March for enforcing prohibition with effect from 1st April of that very year. But, in the present case, I find that the resolution was passed on 3rd April, 1980, the information of which was received by the Excise and Taxation Commissioner on 5th May, 1980, which had to take effect from 1st April, 1981. Therefore, on the facts of the present case, I do not find any sufficient ground to grant even a single day's time for enforcing prohibition. Accordingly, this writ petition is allowed with costs and a writ of mandamus is issued to the respondents to stop the sale of intoxicating liquor in the liquor vends auctioned within the local area of Gram Panchayat, Kundli, Tahsil and District Sonapat, forthwith. Counsel's fee Rs. 200/-.

petition allowed.

AIR 1982 PUNJAB AND HARYANA 164 SPECIAL BENCH

S. S. SANDHAWALIA, C. J.,
B. S. DHILLON AND B. S. YADAV, JJ.

Mrs. Martha A. J. Brown, Petitioner v. Amrit Jasper Brown and another, Respondents.

Matrimonial Ref. No. 1 of 1980, D/- 24-9-1981.*

Divorce Act (4 of 1869), Ss. 10, 17 —
Petition by wife — Husband, guilty of marriage with another woman — Said guilt not condoned by wife — Decree for dissolution of marriage in favour of wife, must be confirmed. (Paras 7, 8)

B. S. Tyagi, for Petitioner.

S. S. SANDHAWALIA, C. J. :— This is a reference under S. 17 of the Divorce Act, 1869, for confirmation of the decree nisi granted by the learned District Judge, Chandigarh.

2. The petitioner, Mrs. Martha A. J. Brown had presented the petition under S. 10 of the Divorce Act, 1869, on the allegations that she was married to respondent No. 1, Amrit Jasper Brown on May 25, 1977 in the Christ Church, Chandigarh. After living together with the petitioner till May 22, 1978, respondent No. 1 deserted her and left for Ghazibad and later shifted to Kanpur where he secured employment as a teacher in the Hudson Girls School, spurning all requests and messages to return to the matrimonial home made by the petitioner, respondent No. 1, on May 26, 1979 married one Darris Stella Clemant (who was also employed as a teacher in the School aforesaid according to Christian rites in the Church at Kanpur. Thereafter, both the respondents have been living as husband and wife at Kanpur.

3. Notice of the petition was served on both the respondents, but they refused to accept the summons and consequently the proceedings were ordered against them ex parte.

4. In support of her case, the petitioner stepped into the witness box as P. W. 1, and deposed both with regard to her marriage with respondent No. 1 and his subsequent desertion and second marriage with respondent No. 2. Documentary proof was placed on the record in

*From decree of Dist. J., Chandigarh, D/- 23-9-1980.

the shape of Exhibit P/1, the photostat copy of the certificate of marriage of the petitioner with respondent No. 1 at Chandigarh. Exhibit P/2 is the photostat copy of the certificate of the marriage between the two respondents which took place in Kanpur whilst Exhibit P/3 is the photostat copy of an invitation card to a dinner which had been hosted to celebrate the marriage of the two respondents.

5. Accepting the un rebutted evidence of the petitioner, the learned District Judge passed a decree of the dissolution of marriage in favour of the petitioner and against respondent No. 1.

6. In the present proceedings also the two respondents have been served but have not chosen to put in any appearance. Hence ex parte proceedings are ordered against them. It is the admitted position that the statutory period of six months has since elapsed.

7. After hearing the learned counsel for the petitioner and adverting to the material part of the record, we find not the least ground to take a view different from the one arrived at by the learned District Judge. The evidence of the petitioner wife stands uncontradicted and has necessarily to be accepted. The inference, therefore, is irresistible that the respondent-husband had been guilty of marriage with another woman namely, respondent No. 2 and the petitioner is categorical that she has not condoned the said guilt.

8. In the result, we allow the reference and confirm the decree of the dissolution of marriage passed in favour of the petitioner. The parties, are, however, left to bear their own costs.

B. S. DHILLON, J. :- I agree.

B. S. YADAV, J. :- I agree.

Reference allowed.

AIR 1982 PUNJAB AND HARYANA 165 FULL BENCH

**S. S. SANDHAWALIA, C. J., P. C. JAIN
AND I. S. TIWANA, JJ.**

**Hari Parshad Gupta, Petitioner v.
Jitender Kumar Kaushik, Respondent.**

**Civil Revn, No. 2298 of 1980, D/-
30-11-1981.***

***Decided by Full Bench on Order of
Reference made by S. S. Sandhawalia-
C. J. and I. S. Tiwana, J. D/- 24-9-1981.**

BE/CZ/A399/82/LGC

Haryana Urban (Control of Rent and Eviction) Act (11 of 1973), S. 12 — East Punjab Urban Rent Restriction Act (3 of 1949), S. 3 — Notification under S. 3 exempting buildings and rented lands belonging to Municipal Committees from the application of that Act — Lease of land by Municipal Committee — Lessee-landlord constructed room on it and rented it out — Roof of room started leaking — Application u/s. 12 by tenant that he may be allowed to carry out necessary repairs at the cost of landlord — Jurisdiction of Rent Controller, held was not barred. (1970) 72 Punj LR 431, Overruled. (T. P. Act (1882), S. 105).

A notification under S. 3 of E. P. Urban Rent Restriction Act 1949 exempting buildings and rented lands belonging to Municipal Committees from the application of the Act was issued by the State Govt. on 3-6-1959. Though the notification was issued under the Act of 1949 it continued to survive under the present Act 11 of 1973. (Para 1)

A certain land was leased out by the Municipal Committee the petitioner-landlord constructed room on it and rented it out to the respondent-tenant. As the roof of the room started leaking out the tenant filed an application under S. 12 of the Act of 1973 praying therein that he may be allowed to carry out the necessary repairs at the cost of the landlord.

Held that the Rent Controller had the jurisdiction to go into the matter. (1970) 72 Punj LR 431 Overruled; Case law discussed. (Para 7)

Where a plot of land had been demised, the said plot can continue to belong to the lessor and the building or the superstructure raised by the lessee on that plot can belong to the latter. In law there can be two distinct ownerships, that is, the lessor can be the owner of the building raised thereon, and the matter essentially is dependent on the terms of the contract between the parties. The factum of consent or no consent by the Municipal Committee or the local authority to the construction raised by the lessee on the demised municipal land is not decisive of the matter. It is the form and the substance of the terms of lease entered into between the Municipal Committee and the lessee that have to be considered and construed to find out whether the building on the

leased land belonged to the Municipal Committee or not. (Para 6)

In the instant case the petitioner has raised the construction on the land which he had taken on lease from the Municipal Committee and it was this construction which had been leased out to the respondent tenant by the petitioner. It cannot possibly be said that the building too belongs to the Municipal Committee, as between the petitioner and the respondent what has been leased out is the building, that is the two rooms including the one constructed by the petitioner on the municipal land. Thus apparently the Rent Controller had the jurisdiction to go into the matter. (Para 7)

The Legislature did intend to confer immunity from the operation of the Act on the premises leased out by the Municipal Committee but that does not mean that the petitioner or the lessee by changing those premises into a different type of premises, that is, converting the rented land into building by raising construction on the plot of land demised in his favour, does not lease out a different premises to his tenant or lessee or the respondent in this case. (Para 8)

Cases Referred: Chronological Paras

AIR 1980 Punj & Har 188 : (1979) 2	
Rent LR 457	3, 8
(1970) 72 Punj LR 431 : 1970 Cur LJ 19	4, 6
AIR 1958 SC 789 : 1959 SCR 799	6
AIR 1953 SC 16	6
AIR 1951 Bom 205	6
AIR 1929 PC 163 : (1929) 56 Ind App 259	6
AIR 1927 PC 135 : 26 All LJ 1	6
(1869) 6 Bom HCAC 80	6
(1866) 6 Suth WR 228	6

A. N. Mittal with Vinay Mittal, for Petitioner; H. L. Sarin with R. L. Sarin, for Respondent.

I. S. TIWANA, J. :- What is the true import and scope of the State Government Notification dated June 3, 1959, issued under S. 3 of the East Punjab Urban Rent Restriction Act, 1949, is the precise question which calls for determination by this Full Bench. This notification reads as follows:—

"In exercise of the powers conferred by S. 3 of the East Punjab Urban Rent Restriction Act, the Governor of Punjab is pleased to direct that the provisions of the aforesaid Act shall not apply to the buildings and rented lands

belonging to Municipal Committee, N.A.Cs., District Boards or Panchayats."

Though this notification was issued in exercise of the powers conferred by the East Punjab Urban Rent Restriction Act, yet it is the conceded position that it continued to survive and be effective under the present Act, that is, the Haryana Urban (Control of Rent and Eviction) Act, 1973 (hereinafter referred to as the Act), which came into force with effect from April 27, 1973, in view of the provisions of S. 22 of the Punjab General Clauses Act.

2. The few skeletal facts which deserves to be noticed to unravel the controversy raised in this petition under Section 15 (6) of the Act are as follows:

The demised premises consist of two rooms, one constructed by the petitioner-landlord on his own land and the other constructed by him on the land taken on lease from the Municipal Committee, Gurgaon. Both these rooms were rented out to the respondent-tenant at one and the same time and thus one tenancy came into being. As the roof of the room on the municipal land started leaking and required immediate repairs and the repeated efforts of the respondent failed to persuade the petitioner to carry out those repairs, he filed the present application under S. 12 of the Act praying therein that he may be allowed to carry out the necessary repairs at the cost of the landlord. The petitioner while admitting the relationship of landlord and tenant between the parties pleaded the 'bar of jurisdiction' with the Rent Controller on the basis of the above notification. His precise plea was that since the land underneath the room rented out to the respondent belonged to the Municipal Committee, the Rent Controller had no jurisdiction in the matter. As a result of the trial that followed, the Rent Controller upheld this plea and dismissed the application of the respondent-tenant. On an appeal by the latter, the appellate authority (Additional District Judge, Gurgaon) held that though the land underneath the superstructure had been taken on lease by the petitioner from the Municipal Committee and thus belonged to it, yet the superstructure thereon having been raised by the landlord (lessee from the Municipal Committee) and the relationship of landlord and tenant having been admitted between the parties, the Rent Controller had all the jurisdiction to entertain and

decide the present application filed under S. 12 of the Act. As a result of this conclusion, the appellate authority remanded the case back to the Rent Controller for decision afresh on merits. It is this order of the appellate authority dated Sept. 5, 1980, which is now impugned by the landlord-petitioner in this petition.

3. When the case was argued before me in Single Bench, I was inclined to allow this petition in view of the Division Bench judgment of this Court in *Raghu Nath Jalota v. Romesh Duggal*, (1979) 2 Rent LR 457: (AIR 1980 Punj & Har 188) wherein it has been held that an appellate authority under S. 15, sub-sec. (3) of the Act has no jurisdiction to remand the whole case to the Rent Controller; but since the learned counsel for the petitioner maintained that the finding of the appellate authority to the effect that the Rent Controller had the jurisdiction to entertain and decide the present application, was untenable, I allowed the matter to be argued in detail.

4. In support of his contention that if a construction is raised on a piece of land taken on lease from the Municipal Committee, then the superstructure also belongs to the Committee, the learned counsel for the petitioner placed primary reliance on a Single Bench judgment of this Court in *Kirpal Singh v. Parabhjot Singh*, (1970) 72 Punj LR 431, which undoubtedly supports this contention of his. Since the learned counsel for the respondent earnestly challenged the correctness of this judgment, I thought it proper to refer the matter to a larger Bench.

5. During the course of argument before the Division Bench, the question of law as to whether there can be two distinct ownerships—one of the land and the other of the superstructure—assumed importance and was urged with some amount of vehemence on either side, it was thought proper by the Bench to place this matter before a Full Bench in view of the ramifications—not under the rent law alone—the decision of this point of law was going to have. That is how the matter is before us now.

6. To me it appears abundantly clear that 'building' and 'rented land', as referred to in the abovesaid notification, are two different concepts or identities and have respectively been defined in cls. (a) and (f) of S. 2 of the Act. In fact this factual and legal position has

neither been disputed by the learned counsel for the parties nor can possibly it be. So it is in the light of this that the legal position has to be construed with regard to the rights of the lessor and the lessee in cases in which lease of a plot of land is obtained and the lessee after putting up superstructure thereon leases it out further. This aspect of the matter came up for consideration of their Lordships of the Privy Council as early as in the year 1927 in *Narayan Das v. Jatindra Nath*, AIR 1927 PC 135, and their Lordships while pointing out distinction in the relevant law prevailing in England and this country, approved the following observations of Sir Barnes Peacock in the case of *Thakoor Chunder Proamanick v. Ramdhone Bhuttacharjee*, (1866) 6 Suth WR 228:—

"We have not been able to find in the laws or customs of this country any traces of the existence of an absolute rule of law that whatever is affixed or built on the soil becomes a part of it, and is subjected to the same rights of property as the soil itself."

In a still later case, that is, *Vallabhdas Naranji v. Development Officer, Bandra*, (1929) 56 Ind App 259: (AIR 1929 PC 163) the Privy Council once again referred to Sir Barnes Peacock's observations as stated above. In this judgment the following observations of Couch C. J. in *Narayan v. Bholagir*, (1869) 6 Bom HCAC 80, were quoted with approval:—

"We cannot, however, apply to cases arising in India the doctrine of the English law as to buildings, viz., that they should belong to the owner of the land. The only doctrine which we can apply is the doctrine established in India that the party so building on another's land should be allowed to remove the materials."

This legal position as enunciated above by the Privy Council was later followed by Tendolkar, J. (as his Lordship then was) in *Laxmipat Singhania v. Larsen and Toubro Ltd.*, AIR 1951 Bom 205 and was approved by the Supreme Court in *Dr. K. A. Dhairyawan v. J. R. Thakur*, 1959 SCR 799: (AIR 1958 SC 789). In the latter case the Supreme Court, while considering a similar notification under the provisions of Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, held as under:—

"Upon a proper construction of the lease there was a demise only of the

land and not of the building and consequently the provisions of the Act did not apply to the contract for delivery of possession of the building. The ownership in the building was with the lessees and in which the lessors had no right while the lease subsisted. There was no absolute rule of law in India that whatever was affixed or built on the soil became part of it, and was subject to the same rights of property."

Yet in another case, that is, *Messrs Bhatia Co-operative Housing Society Limited v. D. C. Patel*, AIR 1953 SC 16, the Supreme Court recognised and upheld the abovenoted proposition of law that where a plot of land had been demised, the said plot can continue to be long to the lessor and the building or the superstructure raised by the lessee on that plot can belong to the latter. However, in the given facts and circumstances of that case it was held by the Supreme Court that the building too belonged to the lessor. Thus it is abundantly clear from the above authoritative pronouncements that in law there can be two distinct ownerships, that is, the lessor can be the owner of the plot and the lessee can be the owner of the building raised thereon, and the matter essentially is dependent on the terms of the contract between the parties. The factum of consent or no consent by the Municipal Committee or the local authority to the construction raised by the lessee on the demised municipal land is not decisive of the matter. It is the form and the substance of the terms of lease entered into between the Municipal Committee and the lessee that have to be considered and construed to find out whether the building on the leased land belonged to the Municipal Committee or not. Examining the ratio of *Kirpal Singh's case* (1970-72 Pun LR 431) (supra) firmly relied upon by the learned counsel for the petitioner in the light of the above settled proposition of law, I find that the learned Judge deciding that case had misconstrued the legal position. The following observations made by the learned single Judge in that case indicate the approach adopted:—

"The superstructures have been constructed on the land by Parabhjot Singh without the consent of the Municipal Committee and they have not yet accorded their consent to the construction of the superstructures either impliedly or expressly. Therefore, the position is

that the land on which the superstructures stand, being Municipal land, it is exempt from the provisions of the East Punjab Urban Rent Restriction Act in view of the notification It appears that both the Rent Controller and the Appellate Authority were obsessed with the idea that the superstructure is something apart from the land but this contention would only mean that the superstructures hang in the air and do not rest on Municipal land."

At one stage the learned counsel for the petitioner sought to urge that neither the learned Judge has recorded a positive finding that the superstructure raised by Parabhjot Singh lessee from the Municipal Committee without the consent of the latter belonged to the Municipal Committee nor does he maintain anything of the sort. If this stand of the learned counsel is accepted, then on what basis the learned counsel maintains or has been held by the learned Judge that the superstructure in that case too was not outside the scope of the abovenoted notification, has not been explained by him in any manner. From a reading of the abovenoted judgment of the learned single Judge I am clear that the learned Judge has held that since the land underneath the superstructure raised by Parabhjot Singh lessee belonged to the Municipal Committee, the superstructure too belonged to the Municipal Committee. It is only on this basis that the learned Judge concluded:—

"It appears to me, therefore, that the decision of the Rent Controller as well as the Appellate Authority cannot be sustained so far as the Rent Restriction Act is concerned because the provisions of this Act have been expressly kept in abeyance so far as the municipal land is concerned."

Thus we are of the opinion that the above noted judgment in *Kirpal Singh's case* ((1970) 72 Pun LR 431) (supra) does not lay down the correct law and has to be overruled, which we do.

7. In the case in hand the terms and conditions of the lease entered into between the petitioner and the Municipal Committee, Gurgaon, are not before us. In the absence of the same and on the basis of the admitted facts that the petitioner has raised the construction on the land which he had taken on lease from the Committee and it was this

construction which had been leased out to the respondent tenant by the petitioner, it cannot possibly be held that the building in this case too belongs to the Municipal Committee, Gurgaon. As between the petitioner and the respondent what has been leased out is the building, that is the two rooms including the one constructed by the petitioner on the municipal land. Thus apparently the Rent Controller had the jurisdiction to go into the matter.

8. In order to find flaw with the abovenoted conclusion of ours, the learned counsel for the petitioner pointed out that the Act and the notification referred to above, intend to confer immunity from the operation of the Act to the premises leased out by the Municipal Committee and not to the relationship of landlord and tenant. He maintains that in the light of the abovenoted conclusion of ours in a case brought by the Municipal Committee against the petitioner, it would have to be held that the Act does not apply to the demised property in view of the abovenoted notification whereas in the present case between the parties it has been held that the Act does apply though in both the cases the same property, that is, the plot of land taken on lease by the petitioner, is the subject-matter of litigation. To my mind, the learned counsel completely misconstrued the legal position. It is beyond dispute that the Legislature did intend to confer immunity from the operation of the Act on the premises leased out by the Municipal Committee but that does not mean that the petitioner or the lessee by changing those premises into a different types of premises, that is, converting the rented land into building by raising construction on the plot of land demised in his favour, does not lease out a different premises to his tenant or lessee or the respondent in this case. It may be that in case an action is brought by the Municipal Committee against the petitioner, the petitioner may not be in a position to successfully plead that by raising a construction on the plot of land demised in his favour, he has changed the nature of the premises rented out to him as he cannot unilaterally change the nature of his tenancy, but this does not mean that what he has leased out to the respondent, is a plot of land and not a building. As already pointed out, the building and rented land being two

separate and distinct entities, what was rented out to the petitioner was the land and what the petitioner had rented out to the respondent was the building. The answer to the whole issue is dependent on the question, what was actually let out by the landlord to a tenant in a particular case. Thus having held that the authorities under the Act have the jurisdiction to determine and decide the application of the respondent tenant, filed under S. 12 of the Act, the impugned order of the appellate authority is set aside in view of the decision of this Court in Raghu Nath Jalota's case (AIR 1980 Punj & Har 188) (supra) and the case is sent back to it for decision afresh in accordance with law.

S. S. SANDHAWALIA, C. J.:— I agree.

PREM CHAND JAIN, J.:— I also agree.

Order accordingly.

AIR 1982 PUNJAB AND HARYANA 169 FULL BENCH

PREM CHAND JAIN, D. S. TEWATIA,
KULWANT SINGH TIWANA,
HARBANS LAL AND
G. C. MITAL, JJ.

Teja Singh Petitioner v. Union Territory of Chandigarh and others, Respondents.

Civil Writ Petn. No. 1522 of 1973, D/- 20-10-1980 (FB decision) and D/- 16-3-1981 (DB decision consisting of K. S. Tiwana and Surinder Singh JJ.)*

(A) Constitution of India, Arts. 226, 225 — Procedure — Applicability of provisions of Civil P. C. — Not barred, unless contrary is provided under the High Court Rules framed under Art. 225 — Applying provisions of Civil P. C. does not amount to curtailment of rights under Art. 226. (Writ Jurisdiction (Punjab & Haryana) Rules (1976), R. 32).

In the matters which have not been specifically dealt with by the Writ Jurisdiction (Punjab and Haryana) Rules (1976), the provisions of the Civil P. C., so far as they can be made applicable, would apply to the proceedings under Art. 226 of the Constitution. The ex-

*The judgment of Division Bench follows the judgment of Full Bench.

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planation added to Sec. 141 of the Civil P. C. by the 1976 C. P. C. (Amendment) Act, does not in any way nullify the effect of Rule 32 of the Writ Rules.

(Para 27)

The intention of the High Court while framing Rule 32 was clear to the effect that all the provisions of the Civil P. C. would apply to the writ proceedings in so far as they could be made applicable and were not inconsistent with the writ Rules. While framing the rules, High Court could have re-written certain provisions of the Civil P. C. in the shape of rules which were necessary for regulating the form and other details of procedure of writ petitions. But instead of unnecessarily wasting time, it was thought proper to apply all the relevant provisions of the Civil P. C. by enacting a rule of the kind of Rule 32.

That being so, it cannot be said that the provision of Rule 32 of the Writ Rules can be ignored on the ground that in case the provisions of Civil P. C. are made applicable, then it would result in curtailment of the constitutional right of a person to approach High Court under Art. 226 of the Constitution. The rules which have been framed are only a guideline for the proper exercise of the power by High Court in writ proceedings and do not take away the right to file a petition.

(Para 18)

(B) Constitution of India, Art. 226 — Procedure — Res judicata — Applicability in writ proceedings — Scope. (Civil P. C. (1908), Sec. 11; Writ Jurisdiction (Punjab & Haryana) Rules (1976), R. 32).

When a writ petition is dismissed after contest by passing a speaking order, then such decision would operate as res judicata in any other proceeding such as suit, a petition under Art. 32 etc. If a petition is dismissed only on the ground of laches or the availability of an alternate remedy or on a ground analogous thereto, then any other remedy by way of suit or any other proceeding will not be barred on principle of res judicata. Even in cases where a petition is dismissed on the ground of laches or on the ground of alternate remedy or on a ground analogous thereto, a second petition on the same cause of action under Art. 226 would be barred. But where the first petition is dismissed on the ground that alternate remedy under the Act has not been availed of then after availing of the statutory remedy under the Act, a second petition may be maintainable

on the principle that the same has been filed on a cause of action which has arisen after the decision of the appropriate authority under the Act. A second petition on similar facts and in respect of the same cause of action by the same party would not be maintainable even if his earlier petition has been disposed of by one word 'dismissed.' Case law discussed. (Paras 15, 17, 27)

(C) Constitution of India, Art. 226 — Procedure — Joinder of more than one petitioner and causes of action — Permissible. (Civil P. C. (1908), O. 1 Rr. 1 and 8; O. 2 R. 3; Writ Jurisdiction (P & H) Rules (1976), R. 32).

(Paras 22, 27)

(D) Constitution of India, Art. 226 — Procedure — Abatement on death of party — Provisions of O. 22, Civil P. C. apply — Provisions of Limitation Act do not, however, apply. (Civil P. C. (1908), O. 22 Rr. 2, 3; Writ Jurisdiction (Punjab & Haryana) Rules (1976), R. 32; Limitation Act (1963), Art. 137).

(Paras 23, 24, 27)

(E) Constitution of India, Art. 226 — Procedure — Petition withdrawn — Leave to file fresh petition not obtained — Second petition on same set of facts not maintainable. (Civil P. C. (1908), O. 23 R. 1; Writ Jurisdiction (Punjab and Haryana) Rules (1976), R. 32).

(Paras 25, 27)

Cases Referred: Chronological Paras

AIR 1980 Kant 72	19
AIR 1979 SC 1328	12, 14
AIR 1978 SC 1283: 1978 Lab IC 1111	15
AIR 1978 Punj & Har 258: 80 Pun LR 494	15
AIR 1977 Punj & Har 87: 79 Pun LR 100 (FB)	4, 6, 21, 23, 24
AIR 1968 SC 985: (1968) 3 SCR 91: 1968 Lab IC 1223	12
AIR 1967 Punj 28 (FB)	15
AIR 1966 SC 1445: 1966 Cur LJ 152	15
(1965) 67 Pun LR 862: 1965 Cur LJ 852	15
AIR 1961 SC 1457: (1962) 1 SCR 574	12, 16
(1892) 2 QB 21: 61 LJ MC 151, Queen v. Mayor and Justice of Bodmin	15

Teja Singh in Person (in D. B. decision) and Anand Swaroop Sr. Advocate with G. S. Chawla and M. L. Bansal (in F. B. decision), for Petitioner; Gurbachan Singh (for Nos. 1 to 3), G. S. Grewal, Addl. Advocate General (Punj), (for No. 2) and R. S. Mongia, (for No. 5), for Respondents.

PREM CHAND JAIN, J.:— Whether provisions of the Civil P. C. would apply to the writ proceedings, is the prime and important question which falls for our determination in these cases.

2. I do not propose to refer to the facts of the cases which have been set down for hearing before us as for answering the aforesaid question it is not necessary to do so and that each case will have to be gone into on its own facts by the Bench before which the cases will go back, in the light of the answer returned by us to the aforesaid question. But the circumstances which necessitated the reference may be stated.

3. C. W. P. No. 1522 of 1973 came up for hearing before a Division Bench on November 23, 1978, when an argument was advanced on behalf of the contesting respondents that the provisions of the Civil P. C. applied to writ proceedings as has been provided under Rule 32 of the Writ Jurisdiction (Punjab and Haryana) Rules, 1976 (hereinafter referred to as the Writ Rules); and that in view of the provisions of O. 23, R. 1 of the Civil P. C. C.W.P. No. 1522 of 1973 was not maintainable as in respect of the same cause of action the earlier petition, C. W. No. 1064 of 1973 was got dismissed as withdrawn without obtaining permission to file a fresh petition. In L. P. A. No. 269 of 1979, which came up for hearing before another Division Bench, the objection that was raised on behalf of the respondents was that the writ petition had abated as the sole petitioner had died and his legal representatives were not brought on the record within the prescribed period of limitation. In other words, the question agitated before the Bench was that provisions of O. 22 applied to writ proceedings.

4. On the other hand, the stand taken by the learned counsel for the petitioner/appellant was that provisions of the Civil P. C. did not apply to writ proceedings. In support of this contention reliance was placed solely on an earlier Full Bench case decided by three learned Judges in *Ram Kala v. Assistant Director, Consolidation of Holdings, Punjab* (1977) 79 Pun LR 100: (AIR 1977 Punj & Har 87). The question that arose in *Ram Kala's* case was whether Art. 137 of the Limitation Act does or does not apply to an application for

adding or substituting parties to a petition under Art. 226 of the Constitution. Before the Bench two arguments were raised. The first argument advanced was that in a petition under Art. 226 of the Constitution of India, civil rights of the parties are involved and the procedure laid down in the Code of Civil Procedure, so far as it can be made applicable to proceedings which partake of the nature of civil proceedings and by virtue of S. 141 of the Code and other provisions of the Code, including O. 22, does apply to such proceedings. While repelling the aforesaid argument, it was observed thus (at p. 89 of AIR):

"The proceedings under Art. 226 of the Constitution relating to civil matter are no doubt civil proceedings but on that ground alone it cannot be held that the Civil P. C. governs such proceedings. This Court may while exercising jurisdiction under Art. 226 of the Constitution draw upon the principles enunciated in the Civil P. C., for, the principle contained therein are by and large based on the principles of natural justice. Nevertheless, it can devise its own procedure for rendering speedy and efficacious justice in the circumstances of the case. S. 141 of the Civil P. C. lays down that the procedure provided in that Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of Civil jurisdiction but this provision cannot be pressed into service for putting procedural fetters in the way of this Court for exercising jurisdiction under Art. 226 of the Constitution for the adoption of that course would practically strangle this jurisdiction."

Thereafter, reference was made to some judicial decisions and ultimately it was held as under (at p. 90 of AIR):

"In view of the binding precedent of the Supreme Court and the preponderance of opinion in this Court, we hold that O. 22, Civil P. C., does not apply to the writ proceedings."

5. The second contention raised before the Bench related to the applicability of the provisions of Art. 137 of the Limitation Act and on that aspect it was observed as follows (at p. 91 of AIR):

"As already noticed, this Court while exercising jurisdiction under Art. 226 of the Constitution does not try a suit as commonly understood. It is settled

law that when a Court is invested with a particular jurisdiction under an Act of the Parliament, it also gets invested with the authority to take all ancillary steps which are necessary to exercise that jurisdiction. A petition presented to this Court exercising jurisdiction under Art. 226 of the Constitution cannot necessarily be regarded as an application under the Civil P. C. It is an entirely different matter that while entertaining and deciding such an application, this Court may draw upon the principles of the Civil P. C. which are based on equity, justice and good conscience but in doing so this Court seldom takes recourse to the penal provisions of the said Code. All that has to be seen is whether the grant of such an application would promote the ends of justice or not.

We are, therefore, of the view that Art. 137 of the Schedule to the Limitation Act cannot be held to govern an application filed in the High Court exercising jurisdiction under Art. 226 of the Constitution of India."

6. The correctness of the aforesaid view was challenged by the learned counsel for the respondents on the ground that R. 32 of the Writ Rules was not brought to the notice of the learned Judges and that in the wake of that rule, the view taken in Ram Kala's case (AIR 1977 Punj & Har 87) (FB) deserved to be re-considered. It is in this situation that a larger Bench has been constituted for deciding the question which has been formulated in the earlier part of the judgment.

7. In exercise of the powers conferred under Art. 225 of the Constitution, this Court has made rules regulating the form and other details of procedure of writ petitions filed under Art. 226 of the Constitution. R. 32 of the Writ Rules, with which we are concerned, reads as under:—

"32. In all matters for which no provision is made by these rules, the provisions of the Civil P. C. 1908 shall apply mutatis mutandis in so far as they are not inconsistent with these rules."

8. The contention of Mr. Anand Swarup, Senior Advocate, which was also adopted by Mr. Sangha, learned counsel, was that the right to file a petition under Art. 226 is a constitutional right which could not be taken away by framing rules as such rules have been

enacted for the purpose of laying down procedure as to how a petition under Art. 226 is to be dealt with. In other words, what was sought to be argued by the learned counsel was that the rules which have been framed only provide the procedure for dealing with a petition under Art. 226 of the Constitution and that these rules in no way affect the right of a litigant to approach this Court under Art. 226 of the Constitution any number of times and at any time. It was also submitted by the learned counsel that under Sec. 141 of the Civil P. C. an explanation has been inserted by Civil P. C. (Amendment) Act, 1973, which clearly goes to show that the expression "proceedings" does not include any proceedings under Art. 226 of the Constitution. Sec. 141 of the Civil P. C. reads as under:—

"141. The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.

Explanation.— In this section, the expression 'proceedings' includes proceedings under O. IX, but does not include any proceeding under Art. 226 of the Constitution."

9. So far as the explanation, which has been added to Sec. 141 by the Amendment Act is concerned, it may be observed that it has only set at rest the controversy which had arisen earlier regarding the interpretation of the words "proceedings in any Court of Civil jurisdiction" with regard to their applicability to a petition under Art. 226 of the Constitution. Before the addition of the explanation, one view was that a writ proceeding is one of "Court of civil jurisdiction" and this section applied to such proceedings. The other set of cases had taken the view that a writ proceeding is a proceeding of a special nature and not one in a "Court of civil jurisdiction" and therefore this section did not apply. There was a third view also that a writ proceeding was not in the nature of a civil suit and that consequently the provisions of this section could not be invoked so as to apply the provisions of the Code to such proceeding. As earlier observed, by the addition of the explanation the question stands settled that the expression "proceedings" in the section does not include a proceeding under Art. 226 of the Constitution.

10. Mr. Anand Swarup, learned counsel, has tried to take advantage of the explanation, but to me, it is quite evident that the newly added explanation has no relevance at all to the decision of the point involved in these cases. The explanation only provides that the word "proceedings" would not include any proceeding under Art. 226 of the Constitution. There would have been some force in the contention of Mr. Anand Swarup if this Court in exercise of its power under Art. 226 had not framed any rules. But in the presence of the Writ Rules which have been validly framed by this Court, the explanation loses its force. It was not contended by Mr. Anand Swarup, and rightly so, that in view of the provisions of the explanation, the Writ Rules would be deemed to be non-existent and would stand superseded. As has been earlier observed, the explanation had to be added by the Parliament in order to remove the controversy which had arisen with regard to the interpretation of the provision of Sec. 141 as it stood before the Amendment Act, 1976. Thus, the provisions of the explanation to Section 141 are of no help to the petitioner appellant before us, nor does it advance their case, nor does it help us one way or the other in solving the problem with which we are faced in these cases.

11. This brings me to the contention of Mr. Anand Swarup that a litigant is entitled to approach this Court at any time and for any number of times for the same relief as a constitutional right has been given to him under Art. 226 of the Constitution. What was highlighted by the learned counsel was that the rules framed by this Court could not abridge or curtail this right in any manner. In other words, what was contended by Mr. Anand Swarup was that till the time a petition filed by a litigant was disposed of on merits by passing a speaking order, the right of the litigant was not taken away, nor could he be precluded from filing petitions under Art. 226 if his earlier petitions were disposed of without dealing with the controversy on merits.

12. Mr. Anand Swarup, learned counsel, cited certain cases before us in support of his viewpoint and the main case relied upon was in *Hoshnak Singh v. Union of India*, AIR 1979 SC 1328. The

facts of that case are that Hoshnak Singh appellant was allotted on quasi-permanent basis land measuring 32½ standard acres in village Daulatpur. The Union of India acquired land measuring 1243 Kanals 5 Marlas, which included 15 acres of land of the appellant, for constructing a railway line. Thereafter, more acquisition was made by the Union of India in which the land of the appellant was also included. In the case of first two acquisitions, cash compensation was paid to the appellant. In the case of third acquisition which took place in July, 1953, cash compensation was not paid. The appellant approached the authorities for payment of compensation. In the meantime, after the introduction of the Displaced Persons (Compensation and Rehabilitation) Act, 1954, allotment of land to the appellant which was till then on quasi-permanent basis was converted into permanent basis. As the appellant was clamouring for compensation for the land taken from him, the Chief Settlement Commissioner, Punjab made an order on 17th Mar. 1961, whereby a reference made from the Evacuee Property Department was accepted and the permanent settlement rights conferred on the appellant in respect of 1 standard acre and 15½ units of land were cancelled. The appellant questioned the correctness of that order by filing a petition under Art. 226 of the Constitution which was dismissed in limine on 22nd Mar. 1961. After the dismissal of the petition, the appellant approached the Financial Commissioner requesting him to pay cash compensation for the land taken over by the Union of India. It appears that nothing tangible came out, with the result that the appellant preferred a petition under Sec. 33 of the Act challenging the order dated 17th Mar. 1961 of the then Settlement Commissioner cancelling the permanent settlement rights conferred upon the appellant. That application was rejected by the Joint Secretary to the Government of India. Thereafter, the appellant filed a writ petition in which rule nisi was issued and return was filed by the Under Secretary to the Government of Punjab. At the time of hearing an objection was raised that in view of the dismissal of the earlier petition bearing on the same subject, the present petition was barred by the principles of *res judicata*. The learned single Judge upheld the objection and the peti-

tion was dismissed. The appellant filed an appeal under Cl. X of the Letters Patent, but did not succeed. Still dissatisfied, the appellant approached the Supreme Court by special leave against the order of the learned single Judge and also of the letters patent bench dismissing the appeal in limine. At the time of hearing of the appeal, a similar objection about the maintainability of the writ petition was raised before their Lordships of the Supreme Court on behalf of the respondents, but the same did not prevail and while repelling the objection it was observed thus (at pp. 1331, 32, 33 of AIR):

"The earlier petition was dismissed by a non-speaking one word, order 'dismissed.' The High Court may as well dismiss the petition in limine on the ground of delay or laches or on the ground of alternative remedy. The second petition after pursuing the alternative remedy would not be barred by the principles analogous to res judicata. More often a petition under Art. 226 is dismissed on the ground that before invoking the extraordinary jurisdiction of the High Court, if the petitioner has an alternative remedy under a statute under which the right is claimed by the petitioner, the Court expects the petitioner to exhaust the remedy and in such a situation the petition is dismissed in limine.

If after preferring an appeal or revision under the statute under which the right is claimed by the petitioner a petition under Art. 226 is filed irrespective of the fact that the revision or appeal was dismissed and the original order which was challenged in the first petition had merged into the appellate or revisional order, nonetheless the second petition in the circumstances would not be barred by the principles analogous to res judicata because the cause of action is entirely different and the merger of the order cannot stand in the way of the petitioner invoking the jurisdiction of the High Court under Art. 226.

In the leading case of *Daryao v. State of U. P.* (1962) 1 SCR 574: (AIR 1961 SC 1457):

"this Court in terms said that if the petition filed in the High Court under Art. 226 is dismissed not on the merits but because of the laches of the party applying for the writ or because it is held that the party had an alternative

remedy available to it then the dismissal of the writ petition would not constitute a bar to the subsequent petition under Art. 32 except in cases where the facts found by the High Court may themselves be relevant even under Art. 32. If a writ petition is dismissed in limine and an order is pronounced in that behalf whether or not the dismissal would constitute a bar would depend upon the nature of the order. If the order is on the merits it would be a bar if the order says that the dismissal was for the reason that the petitioner was guilty of laches or that he had an alternative remedy it would not be a bar except in cases indicated in the judgment. Then comes an observation which may better be quoted:—

"If the petition is dismissed in limine without passing a speaking order then such dismissal cannot be treated as creating a bar of res judicata. It is true, that, prima facie, dismissal in limine even without passing a speaking order in that behalf may strongly suggest that the Court took the view that there was no substance in the petition at all, but in the absence of a speaking order it would not be easy to decide what factors weighed in the mind of the Court and that makes it difficult and unsafe to hold that such a summary dismissal is a dismissal on merits and as such constitutes a bar of res judicata against a similar petition filed under Article 32.'

xx xx xx xx xx

It must follow as a necessary corollary that a subsequent petition under Art. 226 would not be barred by the principles analogous to res judicata. Re-affirming the view taken on this point in *Daryao's* case (AIR 1961 SC 1457) in *P. D. Sharma v. State Bank of India*, (1968) 3 SCR 91: (AIR 1968 SC 985) the preliminary objection about the bar of res judicata was negatived. It is therefore incontrovertible that where a petition under Art. 226 is dismissed in limine without a speaking order such a dismissal would not constitute a bar of res judicata to a subsequent petition on the same cause of action, more so, when on the facts in this case it appears that the petition was dismissed presumably because the petitioner had an alternative remedy by way of a revision petition under Sec. 33 of the 1954 Act which remedy he avail-

ed of and after a failure to get the relief he moved the High Court again for the relief."

13. Mr. Anand Swarup laid great emphasis on the observations of the learned Judge in the abovementioned judgment in para 10, which have been underlined by me, for showing that dismissal of the first petition was not treated to be a bar to the filing of the second petition. What was intended to be shown from the aforementioned observations, by the learned counsel, was that if dismissal of an earlier petition could not operate as a bar to the filing of a second petition, then how could dismissal of a petition as withdrawn be a bar to the filing of a fresh petition.

14. Though I have made reference in detail to the judgment in Hoshnak Singh's case (AIR 1979 SC 1328) yet I may observe that the said decision is not at all helpful for deciding the point in issue nor is it an authority to determine whether provisions of the Civil P. C. would apply or not to the writ proceedings when it has been so specifically provided under the rules validly framed by this Court under Art. 225 of the Constitution. The reading of the judgment in Hoshnak Singh's case shows that the point that needed decision was whether the dismissal of earlier petition on same and similar facts would operate as a bar to the filing of a second petition on principles analogous to res judicata. On the facts of that case it was held that the dismissal of the earlier petition would not operate as res judicata because the dismissal of the earlier petition was treated not to be on merits, but was taken to be on the ground that an alternate remedy was available. It would be pertinent to observe that in Hoshnak Singh's case it was not held by their Lordships that principles analogous to res judicata could not be invoked in writ proceedings.

15. Moreover, the contention of Mr. Anand Swarup that a litigant can approach this Court under Article 226 any number of times in respect of the same cause of action if his earlier petition has been disposed of by one word 'dismissed' and that the dismissal of the petition would not operate as a bar to the filing of a second petition is again not legally sustainable. It is not necessary to deal with the subject in detail as we have an authoritative pronouncement of the

Supreme Court in *Workmen of Cochin Port Trust v. Board of Trustees of the Cochin Port Trust*, AIR 1978 SC 1283, wherein it has been observed thus (at paras 8, 9):

"It is well-known that the doctrine of res judicata is codified in Section 11 of the Code of Civil Procedure but it is not exhaustive. S. 11 generally comes into play in relation to civil suits. But apart from the codified law the doctrine of res judicata or the principle of res judicata has been applied since long in various other kinds of proceedings and situations by Courts in England, India and other countries. The rule of constructive res judicata is engrafted in Explanation IV of Section 11 of the Civil P. C. and in many other situations also principles not only of direct res judicata but of constructive res judicata are also applied. If by any judgment or order any matter in issue has been directly and explicitly decided the decision operates as res judicata and bars the trial of an identical issue in a subsequent proceeding between the same parties. The principle of res judicata also comes into play when by the judgment and order a decision of a particular issue is implicit in it, that is, it must be deemed to have been necessarily decided by implication; then also the principle of res judicata on that issue is directly applicable. When any matter which might and ought to have been made a ground of defence or attack in a former proceeding but was not so made, then such a matter in the eye of law, to avoid multiplicity of litigation and to bring about finality in it is deemed to have been constructively in issue and, therefore, is taken as decided.

In the instant case the award of the Tribunal, no doubt, was challenged in the special leave petition filed in this Court on almost all grounds which were in the High Court. There is no question, therefore, of applying the principles of constructive res judicata in this case. What is, however, to be seen is whether from the order dismissing the special leave petition in limine it can be inferred that all the matters agitated in the said petition were either explicitly or implicitly decided against the respondent. Indisputably nothing was expressly decided. The effect of a non-speaking order of dismissal without anything more indicating the grounds or reasons of its dismissal must, by necessary implication, be taken to have decided that it was

not a fit case where special leave should be granted. It may be due to several reasons. It may be one or more. It may also be that the merits of the award were taken into consideration and this Court felt that it did not require any interference. But since the order is not a speaking order, one finds it difficult to accept the argument put forward on behalf of the appellants that it must be deemed to have necessarily decided implicitly all the questions in relation to the merits of the award. A writ proceeding is a different proceeding. Whatever can be held to have been decided expressly, implicitly or even constructively while dismissing the special leave petition cannot be re-opened. But the technical rule of res judicata although a wholesome rule based upon public policy, cannot be stretched too far to bar the trial of identical issues in a separate proceeding merely on an uncertain assumption that the issues must have been decided. It is not safe to extend the principle of res judicata to such an extent so as to found it on mere guesswork. To illustrate our viewpoint we may take an example. Suppose a writ petition is filed in a High Court for grant of a writ of certiorari to challenge some order or decision on several grounds. If the writ petition is dismissed after contest by a speaking order obviously it will operate as res judicata in any other proceeding, such as, of suit, Art. 32 or Art. 136 directed from the same order or decision. If the writ petition is dismissed by a speaking order either at the threshold or after contest, say, only on the ground of laches or the availability of an alternate remedy, then another remedy open in law either by way of suit or any other proceeding obviously will not be barred on the principle of res judicata. Of course, a second writ petition on the same cause of action either filed in the same High Court or in another will not be maintainable because the dismissal of one petition will operate as a bar in the entertainment of another writ petition. Similarly, even, if one writ petition is dismissed in limine by a non-speaking one word order 'dismissed' another writ petition would not be maintainable because even the one word order, as we have indicated above, must necessarily be taken to have decided impliedly that the case is not a fit one for exercise of the writ jurisdiction of

the High Court. Another writ petition from the same order or decision will not lie. But the position is substantially different when a writ petition is dismissed either at the threshold or after contest without expressing any opinion on the merits of the matter, then no merit can be deemed to have been necessarily and impliedly decided and any other remedy of suit or other proceeding will not be barred on the principle of res judicata."

Reference may also be made to a Full Bench authority of this Court in *Bansi v. Addl. Director, Consolidation of Holdings*, AIR 1967 Punj 28, wherein it has been observed thus (at pp. 30, 31):

"There are orders and orders. A question will always arise what has the High Court decided and what is the effect of the order. If, for example, the High Court declines to interfere because all the remedies open under the law are not exhausted, the order of the High Court may not possess that finality which the Article contemplates. But the order would be final if the jurisdiction of a tribunal is questioned and the High Court either upholds it or does not. In either case, the controversy in the High Court is finally decided. To judge whether the order is final in that sense it is not always necessary to correlate the decision in every case with the facts in controversy especially where the question is one of the jurisdiction of the Court or tribunal. The answer to the question whether the order is final or not will not depend on whether the controversy is finally over but whether the controversy raised before the High Court is finally over or not. If it is, the order will be appealable provided the other conditions are satisfied, otherwise not.

In the case before the Supreme Court *Ramesh's case*, 1966 Cur LJ 152 : (AIR 1966 SC 1445) (supra) the question raised was whether the Commissioner, Nagpur Division, had jurisdiction to set aside the discharge of the debt ordered by the Claims Officer. This decision was challenged by a proceeding under Article 226. The High Court summarily dismissed the petition, that is, it upheld the jurisdiction and the Supreme Court held that in the circumstances it makes no difference whether the High Court makes a speaking order or not, for by this order this High Court has finally

decided the question of jurisdiction. Since the order which was passed was final for the purpose of appeal to the Supreme Court, it was decided that the High Court was in error in refusing the certificate under Art. 133 (1) (a) and (b) of the Constitution.

This judgment is very helpful for deciding the point under consideration before us. In the earlier writ petition (Civil Writ No. 2946 of 1965) as well as the writ petition (Civil Writ No. 3005 of 1965) giving rise to this Letters Patent Appeal, what was challenged was the jurisdiction of respondents Nos. 1 and 2 to make the impugned orders. The previous writ petition was dismissed in limine on the 3rd Dec. 1965, and the dismissal in limine of the previous writ petition amounted to affirming the jurisdiction. That order on the principle laid down in Ramesh's case 1966 Cur. LJ 152: (AIR 1966 SC 1445) (supra) was final so far as this Court was concerned and it could be challenged either by way of a review petition or by taking steps to file an appeal to the Supreme Court apart, of course, from recourse to the petition to the Supreme Court under Article 32 of the Constitution. To entertain the second petition on the same grounds would amount to by passing these recognised legal procedures.

Such a course would also be wrong not only on principle but also on grounds of propriety and public policy, which, subject to the well recognised exception, require finality of judicial proceedings so far as the same Court is concerned. These rules of practice and propriety were enunciated as far back as 1892 in *Queen v. Mayor and Justices of Bodmin*, (1892) 2 QB 21 and have been endorsed by the Bench of this Court in (1965) 67 Punj LR 862 at p. 866."

The second case to which reference may be made is in *Union of India v. Diwan Chand*, (1978) 80 Punj LR 494: (AIR 1978 Punj & Har 258) wherein also the question of res judicata had been raised on the plea that the writ petitioner having challenged the legality of the order of cancellation of allotment and having failed in his attempt to have it set aside because of the order of dismissal of his earlier writ petition, cannot be allowed to re-agitate the same matter over and again on principle analogous to those was passed in limine. The con-

tention of the learned counsel in that petition was that the earlier dismissal was not res judicata as the previous order of dismissal was not shown to have been made on merits. The contention was repelled and the learned Judges observed thus (at p. 260 of AIR):

"Learned counsel for both the parties are agreed that the order dismissing the previous writ petition consisted of a single word 'Dismissed'. According to Mr. Chawla, that order cannot be said to have been made on merits because it is not a speaking order. The argument is fallacious. Had the order been passed because of laches on the part of the writ petitioner or for the reasons that an alternative remedy was available to him or on a ground analogous thereto, the order would certainly have said so. Its silence on these points is conclusive to show that the dismissal was ordered on merits. In the absence of any specific reasons making out that the dismissal was ordered on account of a technical defect or some such reason, such a defect or reason cannot be read into it."

16. Mr. Anand Swarup, learned counsel, drew our attention to the judgment of the Supreme Court in *Daryao v. State of U. P.*, AIR 1961 SC 1457, which is the basic authority dealing with the question of res judicata. That decision is not at all helpful to the learned counsel. In *Daryao's* case, the question of bar of res judicata was being considered in respect of the petitions made to the High Court under Art. 226 of the Constitution vis-a-vis the petitions based on similar facts made to the Supreme Court under Art. 32 of the Constitution and that the point which has been debated by Mr. Anand Swarup that if a petition under Art. 226 of the Constitution is disposed of in limine by one word 'Dismissed', then the same would not be a bar to the filing of second petition by the same petitioner in the High Court and based on similar facts, was never the question before their Lordships.

17. Thus it is quite evident that the principles of res judicata are attracted only when a writ petition is dismissed after contest by passing a speaking order as in that event the decision would operate as res judicata in any other proceeding such as suit or a petition under Art. 32 etc. But where a petition is dis-

missed only on the ground of laches or the availability of an alternate remedy or on a ground analogous thereto, then any other remedy by way of suit or any other proceeding will not be barred on principles of *res judicata*. Further where a petition is dismissed on the ground of laches or on the ground of alternate remedy or on a ground analogous thereto, a second petition on the same cause of action under Art. 226 would be barred. But again, it may be observed that where a petition is dismissed on the ground that alternate remedy under the Act has not been availed of, then after availing of the statutory remedy, a second petition would be maintainable on the principle that the same has been filed on a cause of action which has arisen after the decision of the appropriate authority under the Act. Further, a second petition on similar facts and in respect of the same cause of action by the same party would not be maintainable even if his earlier petition has been disposed of by one word 'dismissed'.

18. Coming to the point in issue, I find that R. 32, which has been reproduced in the earlier part of the judgment, clearly specifies that the provisions of the Civil P. C. would be applicable *mutatis mutandis* insofar as they are not inconsistent with the rules. In view of the specific rule there can be no gainsaying that the intention of this Court while framing Rule 32 was clear to the effect that all the provisions of the Civil P. C. would apply to the writ proceedings in so far as they could be made applicable and were not inconsistent with the writ rules. For regulating the form and other details of procedure, rules had to be framed. In exercise of the power vested in this Court under Art. 225, writ rules have been framed. While framing the rules, this Court could have re-written certain provisions of the Civil P. C. in the shape of rules which were necessary for regulating the form and other details of procedure of writ petitions. But instead of unnecessarily wasting time, it was thought proper to apply all the relevant provisions of the Civil P. C. by enacting a rule of the kind of R. 32. It would be pertinent to observe here that it was not contended by Mr. Anand Swarup that in case a rule in the same terms as O. 23, R. 1 or O. 22 of the Code had been incorporated in the Writ Rules,

then such a rule could be ignored on the ground that it curtailed the constitutional right of a party to approach this Court under Art. 226 of the Constitution. In other words, it was not controverted by the learned counsel that for the purpose of dealing with a petition under Art. 226, rules could be framed which could have had the same effect as the provisions of the Civil P. C. have. That being so, I fail to understand as to how the provision of R. 32 of the Writ Rules can be ignored on the ground that in case the provisions of Civil P. C. are made applicable, then it would result in curtailment of the constitutional right of a person to approach this Court under Article 226 of the Constitution. Moreover, the argument of the learned counsel that by applying the provisions of the Civil P. C. the constitutional right of a litigant to approach this Court shall stand curtailed is wholly untenable. By framing rules no constitutional right has been taken away. The High Court is empowered to make rules. The Writ Rules regulate the form and prescribe procedure as to how a petition under Art. 226 of the Constitution shall be dealt with. If by the applicability of the rules a petition is found to be not maintainable then it cannot justifiably be urged that some constitutional right is being taken away. A distinction has to be drawn between the right available to a litigant to file a petition under Art. 226 of the Constitution and the power of this Court to deal with such a petition. The rules which have been framed are only a guideline for the proper exercise of the power by this Court in writ proceedings and do not take away the right to file a petition.

19. To me, it appears that the question, though simple but of some importance, has been unnecessarily complicated. The court has power to make rules and in exercise of that power rules have been framed. R. 32 specifically says that the provisions of the Civil P. C. so far as they are not inconsistent, would regulate the form and other details of procedure for writ proceedings. In the wake of this specific rule, there cannot be any justification to hold that the provisions of the Civil P. C. would not apply. If the contention of Mr. Anand Swarup is accepted, then R. 32 would be rendered nugatory. The view which I am taking finds full support from the solitary judgment of the Karna-

taka High Court in *M. R. Channarayana v. Tahsildar and Returning Officer, Malur*, AIR 1980 Kart 72. In that High Court, writ rules have been framed and R. 39 of theirs is identical with R. 32 of this Court. One of the questions that arose in the aforesaid case before the learned Judge was whether the provisions of Order 27 of the Civil P. C. would apply to writ proceedings or not and the learned Judge on that aspect of the matter observed thus (at p. 74):

"The Writ Proceedings Rules of 1977 made by this Court, regulating the form and other details of procedure of writ petitions filed under Art. 226 of the Constitution, do not regulate the service of notices on the parties. By R. 39 of the Rules, the provisions of the Civil P. C. in matters not specifically dealt by the Rules and to the extent they are necessary, are made applicable to proceedings under Art. 226 of the Constitution. In matters of procedure, it is permissible to rely on the provisions made in the Code with such modifications as are necessary in the context. I am therefore of the opinion that Order 27 of the Civil P. C. is applicable to writ proceedings before this Court. In O. 27 of the Civil P. C. we have to read the words 'writ petition' wherever the word 'suit' occurs."

20. As a result of the aforesaid discussion, I find no escape from the conclusion that in the matters which have not been specifically dealt with by the Writ Rules, the provisions of the Civil P. C. to the extent they are necessary would be applicable to proceedings under Art. 226 of the Constitution.

21. After having arrived at the aforesaid conclusion, it would not have been necessary for me to deal with some of the specific provisions of the Code, which would become applicable to the writ proceedings; but in view of the judgment of this Court in *Ram Kala's case* (AIR 1977 Puni & Har 87) (FB) which has to be specifically dealt with and also with a view to elucidate the point further I have decided to advert to certain provisions of the Code the applicability of which would be attracted to the Writ Proceedings.

22. Order 1, R. 1 and O. 2, R. 3 talk of joinder of more than one plaintiff and causes of action. Cases have arisen in this Court, where petitions have

been filed jointly by more than one petitioner and joining several distinct causes of action. In such cases the non-maintainability of the petition on the ground of misjoinder of parties and causes of action, has to be decided keeping in view the aforesaid provisions. In cases where there are numerous petitioners or respondents having the same interest, resort can be made to the provisions of O. 1, R. 8.

23. Reference may now be made to O. 22. Our attention was drawn, besides *Ram Kala's case*, to some other judicial decisions for the proposition that O. 22, Rr. 3 and 4 would not apply to writ proceedings. But all those decisions have not taken into consideration the provisions of Rule 32 and have been rendered on the interpretation of un-amended S. 141 of the Civil P. C. When a party dies, then a writ petition cannot be heard and the legal representatives of the deceased have to be brought on the record so as to enable the Court to hear the petition on merits as in the absence of the legal representatives of a party to the petition, it would not be permissible to hear the petition, on merits. In case a party dies and the legal representatives are not brought on the record, then the Court is bound to dismiss that petition for want of necessary parties. The question that now arises for consideration is as to what should be the period of limitation for bringing on record the legal representatives of the deceased because the question of abatement would arise only when the legal representatives of the deceased are not brought on the record within the period of limitation. In other words, what has to be seen is whether the provisions of the Limitation Act would also be attracted while dealing with the applications filed under Order 22 for bringing on record the legal representatives of the deceased? In my view, the answer has to be in the negative. R. 32 only makes applicable the provisions of the Civil P. C. There is no rule which may provide for the applicability of the provisions of the Limitation Act. So far as writ proceedings are concerned, there can be no gainsaying that the provisions of the Limitation Act do not apply nor have they been made applicable. A petition under Art. 226 of the Constitution is not a suit and it is also not a petition or an application to which the Limitation Act applies. If

such is the position of law with regard to the applicability of the provisions of the Limitation Act to writ petitions, then a fortiori the same principle would apply to miscellaneous applications filed in the writ petitions. It, therefore, follows that the provisions of the Limitation Act would not apply to an application filed under O. 22 for bringing on record the legal representatives of the deceased.

24. The question that would now arise is as to what considerations or factors have to be kept in mind while dealing with an application filed under O. 22? The answer to this question is very simple, i.e. that whatever considerations are taken note of while dealing with a petition under Art. 226, would be adverted to for deciding an application under O. 22. For filing writ petitions no period has been indicated which may be regarded as an ultimate limit of action. There is no lower limit nor is there any upper limit and generally each case is judged on its own facts and in case it is found that a party has been guilty of avoidable delay, then on that ground the Court refuses to exercise its extraordinary jurisdiction. The same factors would be taken into consideration while dealing with an application under O. 22. Whenever a petitioner/applicant is able to satisfy that an application has been filed within a reasonable time and any unnecessary delay has been avoided, then he would be entitled to a favourable order. In case it is found that the petitioner/applicant is guilty of laches, then the application would deserve to be rejected. As earlier observed, each case will have to be seen and judged on its facts. In this view of the matter, I am constrained to hold that the view taken in Ram Kala's case (AIR 1977 Punj & Har 87) (FB) that O. 22 of the Civil P. C. does not apply to the writ proceedings is not correct.

25. This brings me to the provisions of O. 23, R. 1 of the Code. As has come in the contention of Shri Anand Swarup, the applicability of this provision was sought to be avoided solely on the plea that a petition which has been dismissed as withdrawn could not be a bar to the filing of the second petition as in a petition which is got dismissed as withdrawn, the merits of the controversy are not gone into; but this approach of the learned counsel is without any merit. It is correct that in the petition which

is dismissed as withdrawn, the merits of the controversy are not gone into but that fact by itself would not entitle a litigant to claim entertainment of his second petition in the wake of the provisions of O. 23, R. 1 which become applicable to writ proceedings by virtue of R. 32. It may be noticed that the applicability of the provisions of O. 23, R. 1 shall have a very salutary effect as it would minimise to a great extent the chances of the abuse of the process of this Court. To elucidate the point further, I take an example. A litigant files a petition in this Court which comes up for motion hearing. During the arguments an impression is gathered that the Bench is not agreeing and the petition is likely to be dismissed and on the basis of that impression, the petition is got dismissed as withdrawn. Thereafter, on same facts and in respect of the same cause of action a second writ petition is filed. Now in such case, if the contention, of Mr. Anand Swarup is accepted, then the second writ petition must be entertained and disposed of on merits one way or the other by passing a speaking order. Such a course, if adopted, would, in my opinion, not only result in the abuse of the process of the Court, but would also give handle to a dishonest and unscrupulous litigant to harass his opponent.

26. By the applicability of the provisions of O. 23, R. 1, no constitutional right of a litigant is being taken away. A litigant has a right to withdraw his petition; but in case he wishes to file a fresh petition on the same cause of action, then permission of the Court has to be taken, and for that purpose, proper legal foundation has to be laid.

27. As a result of my aforesaid discussion, I come to the following conclusion :—

(1) That in the matters which have not been specifically dealt with by the Writ Rules, the provisions of the Civil P. C., so far as they can be made applicable, would apply to the proceedings under Art. 226 of the Constitution.

(2) That the explanation added to S. 141 of the Civil P. C., by the Amendment Act, does not in any way nullify the effect of R. 32 of the Writ Rules.

(3) That when a writ petition is dismissed after contest by passing a speaking order, then such decision would operate as res judicata in any other proceed-

ing such as suit, a petition under Art. 32 etc.

(4) That if a petition is dismissed only on the ground of laches or the availability of an alternate remedy or on a ground analogous thereto, then any other remedy by way of suit or any other proceeding will not be barred on principle of *res judicata*.

(5) That even in cases where a petition is dismissed on the ground of laches or on the ground of alternate remedy or on a ground analogous thereto, a second petition on the same cause of action under Art. 226 would be barred.

(6) That there is an exception to proposition (5) that where the first petition is dismissed on the ground that alternate remedy under the Act has not been availed of, then after availing of the statutory remedy under the Act, a second petition may be maintainable on the principle that the same has been filed on a cause of action which has arisen after the decision of the appropriate authority under the Act.

(7) That a second petition on similar facts and in respect of the same cause of action by the same party would not be maintainable even if his earlier petition has been disposed of by one word 'Dismissed'.

(8) That the provisions of O. 22 Civil P. C. would apply to the proceedings under Article 226 of the Constitution.

(9) That provisions of O. 23, R. 1 of the Civil P. C. would apply to the writ proceedings and that a petition which has simply been got dismissed as withdrawn would be a bar to the filing of a second petition on the same facts and in respect of the same cause of action.

(10) That the provisions of the Limitation Act are not applicable to the writ proceedings or the miscellaneous applications filed in the writ proceedings.

28. The case would now be placed for final disposal before the Bench.

D. S. TEWATIA, J.:— 29. I agree.

KULWANT SINGH TIWANA, J.:— 30. I agree.

HARBANS LAL, J.:— 31. I agree.

G. C. MITAL, J.:— 32. I agree.

K. S. TIWANA, J.: (for himself and Surinder Singh J.):— 23. This petition under Arts. 226 and 227 of the Constitution of India has been filed by Teja Singh petitioner stating that he was employed as a Radiographer in the State of Punjab in 1959. He was posted in that capa-

city in the General Hospital, Sector 16 at Chandigarh. At the time of the reorganization of the State, he was allocated to the service of the Health Department of the Union Territory of Chandigarh Vide letter No. 7364-GH-73/1230 D/- 2nd Feb. 1973 which is Annexure p. 7, he was reverted to the State of Punjab from which service he was on deputation to the Union Territory of Chandigarh. The petitioner has challenged this order on the ground that he was a permanent employee of the Union Territory of Chandigarh and after his allocation to this territory he could not be sent to the State of Punjab.

34. The respondents in their written statements have contested the position taken by the petitioner and have averred that he was only on deputation to the Union Territory of Chandigarh and was reverted on administrative grounds. It was also put forward that the petitioner had no legal right to make the petition.

35. It may be noticed that the petitioner filed Civil Writ Petition No. 1064 of 1973 Teja Singh v. U. T. Chandigarh, in which he had challenged the same order, that is, 7364-GH-II-73 issued in the month of Feb. copy of which was annexure P-14 to that petition and which is Annexure P. 7 in the present writ petition. C. W. P. No. 1064 of 1973 was dismissed on 2nd April, 1973 as withdrawn. An objection was raised on behalf of the respondents that since the earlier writ petition was dismissed as withdrawn without any permission having been sought by the petitioner or given to him by the Court to file a new petition on the same cause of action, the present writ petition could not lie. As there was a conflict in the decisions of this Court, the matter was referred to a Full Bench. A Bench of five Judges, vide judgment pronounced in this petition, that is C. W. P. 1522/1973, held:—

"This brings me to the provisions of O. 23 Rule 1 of the Code. As has come in the contention of Shri Anand Swarup, the applicability of this provision was sought to be avoided solely on the plea that a petition which has been dismissed as withdrawn could not be a bar to the filing of the second petition as in a petition which is got dismissed as withdrawn, the merits of the controversy are not gone into; but this approach of the learned counsel is without any merit. It is correct that in the petition which is dis-

missed as withdrawn, the merits of the controversy are not gone into but that fact by itself would not entitle a litigant to claim entertainment of his second petition in the wake of the provisions of O. 23 R. 1 which become applicable to writ proceedings by virtue of rule 32. It may be noticed that the applicability of the provisions of O. 23 R. 1 shall have a very salutary effect as it would minimise to a great extent the chances of abuse of the process of this Court. To elucidate the point further, I take an example. A litigant files a petition in this Court which comes up for motion hearing. During the arguments an impression is gathered that the Bench is not agreeing and the petition is likely, "to be dismissed and on the basis of that impression, the petition is got dismissed as withdrawn. Thereafter on same facts and in respect of the same cause of action a second writ petition is filed. Now in such case, if the contention of Mr. Anand Swarup is accepted, then the second writ petition must be entertained and disposed of on merits one way or the other by passing a speaking order. Such a course, if adopted, would, in my opinion, not only result in the abuse of the process of the Court, but would also give handle to a dishonest and unscrupulous litigant to harass his opponent. By the applicability of the provisions of Order 23 rule 1, no constitutional right of a litigant is being taken away. A litigant has a right to withdraw his petition; but in case he wishes to file a fresh petition on the same cause of action, then permission of the Court has to be taken, and for that purpose, proper legal foundation has to be laid."

While deriving the conclusion on the last page in sub-para (9), the Full Bench observed:—

"That provisions of O. 23 R. 1 of the Civil P. C. would apply to the writ proceedings and that a petition which has simply been got dismissed as withdrawn would be a bar to the filing of a second petition on the same facts and in respect of the cause of action."

36. Teja Singh petitioner, who appeared in person, urged that the relief claimed in both the petitions was not the same. We have gone through the contents of CWP 1064 of 1973 and find that the same order was under challenge, which is in the present petition. The prayer made was also exactly the same. C. W. P. 1064 of 1973 was got dismissed simply

as withdrawn. No prayer was made for seeking the permission of the Court to file a fresh petition on the same cause of action nor was any accorded by the Court since no such prayer was made. In view of the Full Bench decision referred to above, the present petition does not lie.

37. The case of the petitioner in the present petition is that he was permanently allocated to the Union Territory of Chandigarh. In C. W. P. No. 1064 of 1973 in para 5, the position taken by him was "By another order, passed on the same day, viz. Aug. 31, 1968, the petitioner was finally allocated to the State of Punjab." In para 6 of that petition, reiterating that position, he stated that "even though the petitioner had been finally allocated to the State of Punjab, yet on account of the orders at Annexure P. 2, passed by the Central Government, he was to continue working in the Union Territory of Chandigarh." Even according to his own assertion in the previous petition, he was not allocated to the Union Territory of Chandigarh. On that basis he has no cause to challenging his reversion to the State of Punjab.

38. For the foregoing reasons the present petition is barred on the principle of res judicata as the earlier petition was got dismissed by him as withdrawn. No order as to costs.

Petition dismissed.

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M. M. PUNCHHI, J.

Vidya Dhar, Petitioner v. Onkar Nath, Respondent.

Civil Revn. No. 1429 of 1979, D/- 6-1-1982.*

(A) Civil P. C. (5 of 1908), S. 115; O. 14, R. 1 — Framing of issue — Words not conforming with language of statute — Finding thereon in accordance with provisions of statute — Decision cannot be set aside in revision on ground of defect in issue. (Har. Urban (Control of Rent and Eviction) Act (11 of 1973), S. 13 (2) (v).)

In a suit for eviction under S. 13 (2) (v), of the Act which makes a tenant liable to eviction if he leaves the tenanted house unoccupied for a continuous period of more

* From order of Appellate Authority, Sirsa, D/- 28-1-1977.

BZ/BZ/A529/82/AGM/MVJ

than 4 months, the issue framed was, "whether the house in dispute is lying uninhabited for the last many years? If so, its effect", and the period for which the house was actually left unoccupied as proved in evidence adequately covered the four months specified in the statute;

Held that, though the issue was not happily worded and its answer strictly did not conform to the language of the statute, it is the essence of things which has to be gone into and not mere verbiage, especially in revision. Therefore in the instant case, as the evidence makes it noticeable that the house was left unoccupied for a long period which adequately covers the four months specified in the statute, the mere omission of the words "four months" in the issue will not render the finding and decision thereon defective in the eye of law. (Para 4)

(B) Haryana Urban (Control of Rent and Eviction) Act (11 of 1973), S. 13 (2) (v) — Tenancy for fixed term — Tenanted premises left unoccupied continuously for more than four months during fixed term of tenancy — Eviction under S. 13 (2) (v) sought after expiry of fixed term — Eviction can be granted.

Eviction under S. 13 (2) (v) cannot be restricted by the provisions of S. 13 (3) Proviso 1. A tenant is liable to eviction under S. 13 (2) (v) if he leaves the tenanted house unoccupied for a continuous period of four months even during a fixed term of tenancy. It is not correct to say that if such a ground for eviction arises during the fixed term of tenancy it could not be made use of by the landlord after the expiry of the fixed term. The ground for eviction under S. 13 (2) (v) being based on the conduct or fault of the tenant, it cannot be wiped out by subsequent conduct of the tenant of removing the fault or in improving his conduct. The liability to eviction once incurred has to remain sustaining and can adequately be cashed upon by the landlord anytime. 1973 Rent CJ (SN) 26 (Punj), Rel. on. (Para 8)

Cases Referred: Chronological Paras
1973 Rent CJ (SN) 26 8

S. C. Kapoor, for Petitioner; M. L. Sarin, for Respondent.

ORDER:— This is a revision petition preferred by the tenant who was ordered to be ejected by the Rent Controller, Sirsa and whose appeal was dismissed by the Appellate Authority, Sirsa.

2. Facts giving rise thereto, so far as the present petition is concerned, are that the respondent-landlord claimed ejection of the tenant, amongst others, on the ground of the

tenant keeping the premises in dispute unoccupied for a long period. Eviction of a tenant is permissible under S. 13 (2) (v) of the Haryana Urban (Control of Rent and Eviction) Act, 1973 (hereafter referred to as the Act) when the tenant has ceased to occupy the building for a continuous period of four months without reasonable cause. The ground pleaded by the landlord was denied by the tenant and this gave rise to issue No. 3 which was couched in this language:—

"Whether the house in dispute is lying uninhabited for the last many years? If so, its effect?"

3. Both the officers below have returned the finding in favour of the landlord and this has resulted in ordering the ejection of the petitioner and hence this revision petition.

4. The sole contention of the learned counsel for the petitioner is that the issue as struck by the Rent Controller is not directly in accordance with the language of the statute for there the minimum period of four months is mentioned for which the building should be left unoccupied by the tenant and that too without reasonable cause. According to the learned counsel, if the issue itself is defective, the finding too must be taken to be defective despite the evidence as appraised by the officers below. It is no doubt true that the issue is not happily worded and its answer strictly does not conform to the language of the statute but it is to the essence of the things that we have to go into and not to mere verbiage, more so in revision. From the perusal of the orders of the Rent Controller as also the Appellate Authority, it appears that the kind of evidence adduced by the landlord with regard to the building in dispute lying uninhabited for a very long period becomes patently noticeable and that period can adequately cover the period of four months. The tenant did not plead any justifiable cause since he stuck to his ground that he had not vacated it ever.

5. Coming to the evidence led by both the parties and its scope, it would seem that the Appellate Authority has confirmed the findings of fact recorded by the Rent Controller. He took into account the voters list to come to the conclusion, as also the inference, that the petitioner was occupying another house belonging to one Pushkar Dutt. Though some comment could be offered and was even attempted with regard to the value attached to the voters list, as the entries therein can neither be called presumptive nor conclusive, yet the finding was based on an admission of the petitioner. That admission was contained in the address supplied by the peti-

tioner to the Rent Controller describing himself to be a resident of the house of Pushkar Dutt as also the premises in dispute. No fault can be found on such deduction and inference drawn by the Rent Controller as also by the Appellate Authority. Effort was also made to minimise the period during which the electricity connection of the house in dispute remained disconnected and it was sought to be put within that period of tenancy during which the term was fixed. It was stated that the tenancy being fixed was terminable only on Dec. 4, 1973 and the electricity connection was renewed on Nov. 22, 1973. On this aspect as well, there seems no difficulty in upholding the inferences drawn by the Appellate Authority that the disconnection of electricity was due to the fact that the premises had remained unoccupied for a sufficiently long period. And lastly there is oral evidence led by both the parties. The evidence led by the landlord has been preferred by the officers below to conclude that the premises had remained unoccupied for a very long period which inferentially means that for more than four months it had been left unoccupied. This approach cannot be called either illegal or improper calling for any interference by this Court.

6. The next question urged by the learned counsel for the petitioner was that the said ground of eviction was not available to the landlord if it came into being during the period when the tenancy was for a fixed term. Reliance has been placed on the first proviso to S. 13 (3) of the Act which is to the following effect:—

“Provided that where the tenancy is for a specified period agreed upon between the landlord and the tenant, the landlord shall not, except under sub-clause (v) of Cl. (a), be entitled to apply under this sub-section before the expiry of such period.”

7. This objection seems to be totally misconceived, as this proviso governs sub-sec. (3) of S. 13 of the Act and would have no applicability to the present controversy, since eviction sought herein is on the ground specified in S. 13 (2) (v) of the Act.

8. It was then contended that the ground if it arose during the time of fixed period of tenancy, could not be made use of by the landlord after the expiry of the fixed term as during that period, the tenant was completely on a holiday and he could leave the premises unoccupied without attracting any liability to eviction. This argument seems also to me to be totally misconceived because by merely fixing a term of tenancy, one cannot alter the provisions of the Act. The ground for evic-

tion, if based on the conduct or fault of the tenant, cannot be wiped out by subsequent conduct of the tenant of removing the fault or in improving his conduct. The liability to eviction once incurred has to remain sustaining and can adequately be cashed upon by the landlord. This view is fortified by a single Bench decision of this Court in *Sat Pal v. Faqir Chand*, 1973 Rent CJ (SN) 26, which apparently was a case of the present kind.

9. No other point arises in this petition.

10. For the foregoing reasons, this petition fails and is hereby dismissed without any order as to costs.

11. At the request of the learned counsel for the petitioner, one month's time is granted to the tenant to vacate the premises.

Petition dismissed.

AIR 1982 PUNJAB AND HARYANA 184 RAJENDRA NATH MITTAL, J.

Nand Ram and others, Applicants v. State of Punjab, Respondent.

Civil Misc. No. 836-C-I of 1981, D/- 2-11-1981.

Civil P. C. (5 of 1908), S. 152 — Land Acquisition Act (1894), S. 28 — Omission in judgment to award interest on compensation is accidental slip within S. 152 — It can be rectified any time.

Interest under S. 28 is an integral part of compensation which is to be awarded by the Court. Omission in the judgment to award interest on compensation constitutes an accidental slip within the meaning of S. 152, Civil P. C. and can be rectified at any time.

**AIR 1976 Orissa 203, Rel. on. (Para 2)
Cases Referred: Chronological Paras
AIR 1976 Orissa 203 2**

Ashok Aggarwal, for Applicants; U. D. Gaur, Advocate General Haryana, for Respondent.

ORDER:— Briefly, the facts of the case are that some land of the petitioners situated in village Chhattera, District Sonapat, was acquired by the State Government under the Land Acquisition Act. The award was given by the Collector on Sept. 13, 1961. They were not satisfied with the award of the Collector and they got the matter referred to the Civil Court under S. 18 of the Act. It dismissed the application on 28th Jan., 1963, and maintained the award of the Collector. They came up in appeal to this Court. The Court increased the compensation with respect to Ghahi land but did not grant the

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interest on the enhanced amount. They have filed the application under Ss. 151, 152 and 153 of the Code of Civil Procedure, praying that they should be granted interest on that amount.

2. The only question that arises for determination is as to whether the petitioners can claim the interest on the enhanced amount after a lapse of about eight years. Section 28 of the L. A. Act provides that if the sum which, in the opinion of the Court, the Collector ought to have awarded as compensation is in excess of the sum which the Collector did award as compensation, the award of the Court may direct that the Collector shall pay interest on such excess at the rate of six per centum per annum from the date on which he took possession of the land to the date of payment of such excess into Court. From a perusal of the section, it is evident that the interest is an integral part of the compensation which is to be given by the Court. It has been enacted to compensate the owner if the payment is delayed by the State. Section 152 of the Code entitles the Court to rectify clerical or arithmetical mistakes in judgments or errors therein from any accidental slip or omission at any time. The above mistake is an accidental slip and, according to the section, can be rectified at any time. In the aforesaid view, I get support from the following observations of the Division Bench in *Jayakrishna Mangaraj Mohapatra v. State of Orissa*, (AIR 1976 Orissa 203 at para 204):—

“Statutory interest provided under S. 28 of the Land Acquisition Act is an integral part of the decree to be passed by the Court and the Court, while determining compensation under the Act, has to award the same. An omission to award statutory interest is an error which can be cured by the Court in exercise of its power under S. 152, Civil P. C.; for an application under S. 152, Civil P. C. there is no period of limitation prescribed under the law and unless a third party has acquired an interest in the decree without knowing that there is an accidental slip or omission in it such accidental slip or omission can be rectified under S. 152.”
I am in respectful agreement with the above-said observations.

3. It may be mentioned that prior to 1st July, 1967, the interest provided under S. 28 of the L. A. Act was 4 per cent per annum and thereafter it was enhanced to 6 per cent per annum. The petitioners are, therefore, entitled to interest at the rate of 4 per cent per annum from the date of taking over of the possession of the land by the State up to

30th June, 1967, and at the rate of 6 per cent per annum thereafter till the compensation was paid.

4. Consequently, I accept, the application, modify the judgment and grant interest accordingly. No order as to costs.

Application accepted.

AIR 1982 PUNJAB AND HARYANA 185

J. V. GUPTA, J.

Sis Ram, Appellant v. Sukh Lal and others, Respondents.

Second Appeal No. 1884 of 1970, D/- 22-10-1981.*

Transfer of Property Act (4 of 1882), Section 92 — Principle based on justice, equity and good conscience was applied to Punjab — Redeeming co-mortgagor was not a mere charge holder in respect of other co-mortgagors — Non-payment of their share to the redeeming co-mortgagor within time prescribed under Art. 148, Limitation Act, 1908 would bar them from redeeming. (Limitation Act (1963), Art. 61).

Though S. 92, T. P. Act was as such not applicable to the State of Punjab the principle underlying the section being one based on justice, equity and good conscience was applicable and therefore where one of the several mortgagors paid up and discharged the entire mortgage debt he should be held to be subrogated to all the rights of the mortgagee and not merely as holding a charge on the property for the share of the debt due by the non-redeeming co-mortgagors and which he was entitled to claim from them. Therefore, the redeeming co-mortgagor would be the mortgagee qua the other co-sharers and if the latter fail to pay up their share of the debt within time prescribed for redeeming a mortgage under Art. 148, Limitation Act, 1908 (Art. 61 of 1963 Act) their right would become extinct. AIR 1953 SC 1, Foll. (Paras 5 and 6)

Cases	Referred:	Chronological	Paras
AIR 1979 SC 1937			3
AIR 1977 Ker 148 (FB)			3
AIR 1964 Mad 269 (FB)			3
AIR 1959 Punj 170			3, 5
AIR 1957 Mys 1 (FB)			3
AIR 1955 NUC (Punj) 5719			3, 5
AIR 1953 SC 1			3, 5
AIR 1952 SC 47			3

* Against judgment and decree of S. R. Bakshi, Addl. Dist. J., Karnal, D/- 24-7-1970.

KY/AZ/F528/81/TVN/SSG-H

AIR 1942 Lah 135
 AIR 1941 Pat 147
 AIR 1938 Lah 184
 AIR 1936 Lah 290
 AIR 1928 All 241 : 26 All LJ 298

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ous grounds and on the pleadings of the parties, the following two preliminary issues were framed by the trial Court:

Sh. R. S. Mittal and Sh. N. K. Khosla, for Appellant; Sh. J. K. Sharma, for Respondents.

JUDGMENT:— The plaintiff-appellant has filed this appeal against the judgment and decree of the Additional District Judge, Karnal, dated July 24, 1970, whereby the decree of the trial Court dismissing his suit was maintained.

2. The appellant filed a suit against Sukh Lal and others defendants-respondents, for a declaration to the effect that he had become the owner of one-half share of the suit land and that the sale of a portion of the said land by Shrimati Patori in favour of Sukh Lal, respondent, on June 6, 1968, was not binding on him. It was alleged in the plaint that Data Ram was the original owner of the land and he mortgaged orally the suit land in favour of Jawahra for a sum of Rs. 440/- for which the mutation was sanctioned on Nov. 30, 1903. It was alleged that Data Ram died before 1947, and the appellant, Sukh Lal, respondent, and several others being his heirs, became the mortgagors qua the suit land. It was also alleged that Jawahra mortgagee also died before 1947 and Hardeva and others became the mortgagees being the heirs of Jawahra. The appellant and Sukh Lal, respondent, filed an application in the Court of the Revenue Assistant, Karnal, against the mortgagees for redemption of the mortgage and also deposited Rs. 440/-. By order of the Revenue Assistant dated May 8, 1947, the redemption was ordered in favour of the appellant and Sukh Lal, respondent. It was further alleged that the share of the mortgagors other than the appellant and Sukh Lal, respondent, came to be mortgaged with them and the possession of the land was also given to them. The mutation was sanctioned in their favour of June 9, 1947. According to the appellant, the mortgage was more than 60 years' old at the time of sale by Shrimati Patori on June 6, 1968. So, he and Sukh Lal, respondent, had become the owners of the land, in suit, in equal shares and Shrimati Patori mortgagor had no right to sell the land inasmuch as she had lost all rights in the land by efflux of time. The sale made by Shrimati Patori mortgagor, to Sukh Lal, respondent, was not binding on him to the extent of one-half share. The suit was contested by the defendants-respondents on vari-

1. Whether the persons recorded as mortgagors owners of the suit land are not necessary parties in this case?

2. It being the very case of the plaintiff that the share of mortgagors other than the plaintiff and defendant No. 1 came to be mortgaged with the plaintiff and defendant No. 1 in consequence of the redemption order obtained by them on May 8, 1947, whether the plaintiff can claim extinction of the right of redemption of this mortgage on the ground that the original mortgage by Data Ram was created in the year 1903?

3. Relief.

No finding was given on issue No. 1, issue No. 2 was found against the appellant and consequently, his suit was dismissed by the trial Court. In appeal, the finding of the trial Court on issue No. 2 was maintained. Feeling aggrieved against the same, the appellant has come up in second appeal to this Court.

3. According to the findings of the lower appellate Court, the position of the other co-mortgagors was that of co-sharers with the mortgagors who redeemed the mortgage and, therefore, no question of extinction of the right of ownership, by lapse of time, arose in the present case. It was also held that the provisions of S. 92 of the T. P. Act, (hereinafter called the Act) were not attracted to the present case in view of the authority of this Court reported in Janardhan Bhagwan Dass v. Sham Lal Nand Lal, AIR 1959 Punj 170, wherein, according to the learned Additional District Judge, it was held that the mortgagor, who has redeemed the whole mortgage, cannot be taken to have been subrogated to all the rights of the original mortgagees. The learned counsel for the appellant contended that both these findings, arrived at by the lower appellate Court, are erroneous, in law, as well as on facts. According to the learned counsel, it has nowhere been held in Janardhan Bhagwan Dass's case (AIR 1959 Punj 170) (supra), that a co-mortgagor who has redeemed the whole mortgage could not be taken to have been subrogated to all the rights of the original mortgagee. Even though the provisions of the Act, as such are not applicable, argued the learned counsel, yet the principles of S. 92 of the Act have always been made applicable on the principles of justice, equity and good conscience and, therefore, in equity, the appellant and Sukh Lal, respondent, had been subrogees qua the other non-

redeeming co-mortgagors and the limitation for redemption qua the non-redeeming co-mortgagors was 60 years from the date of the original mortgage which, in the present case, was in the year 1903. In support of his contention, the learned counsel relied upon *Ram Chander v. Prabhu Dayal*, AIR 1955 NUC (Punj) 5719. The decision in the said case was given in Regular Second Appeal No. 789 of 1951 decided on Feb. 9, 1955. The learned counsel also relied upon a Full Bench judgment of the Madras High Court in *Valliamma v. Sivathanu*, AIR 1964 Mad 269, which was later on also affirmed by the Supreme Court in *Valliamma Champaka Pillai v. Sivathanu Pillai*, AIR 1979 SC 1937. On the other hand, the learned counsel for the respondents, submitted that the position of a redeeming co-mortgagor is that of a charge holder. He does not become the mortgagee qua the non-redeeming co-mortgagors. According to the learned counsel, the redeeming co-mortgagor is only entitled to enforce the charge on the mortgaged property and he has no other right qua the non-redeeming co-mortgagors who are co-sharers in the property redeemed earlier. In support of his contention, the learned counsel placed reliance on *Mahommed Ali v. Ghulam Nabi*, AIR 1936 Lah 290; *Ganeshi Lal v. Joti Pershad*, AIR 1953 SC 1; *Kedar Lal v. Hari Lal*, AIR 1952 SC 47; *Lakshmi Pilla v. Easwara Pillai*, AIR 1977 Ker 148 (FB); *Aziz Ahmad Khan v. Chote Lal*, AIR 1928 All 241 and *Kenchappa v. Rokhade Nagappa*, AIR 1957 Mys 1 (FB).

4. I have heard the learned counsel for the parties at a great length and have also gone through the case law cited at the bar.

5. The only question involved in *Janardhan Bhagwan Dass's case* (AIR 1959 Punj 170) (supra), was whether the non-redeeming co-mortgagors were entitled to redeem their share only and that they were not bound to bring a suit for the redemption of the entire mortgaged property. While dealing with this contention, it has been held therein that it will be in accordance with the principles of justice, equity and good conscience to allow the plaintiffs (non-redeeming co-mortgagors, in that case) to redeem their share of the property on payment of the proportionate amount of the mortgage money. In the said case, reference has also been made to the decision of the Supreme Court in *Ganeshi Lal's case* (AIR 1953 SC 1) (supra) and observations were made by the Supreme Court in that case, reproduced in para 5, are as follows:

"If we remember that the doctrine of subrogation which means substitution of one

person in place of another and giving him the rights of the latter is essentially an equitable doctrine in the origin and application, and if we examine the reason behind it, the answer to the question which we have to decide in this appeal is not difficult. Equity insists on the ultimate payment of a debt by one who in justice and good conscience is bound to pay it, and it is well recognised that where there are several joint debtors, the person making the payment is a principal debtor as regards the part of the liability he is to discharge and a surety in respect of the shares of the rest of the debtor. Such being the legal position as among the co-mortgagors, if one of them redeems a mortgage over the property which belongs jointly to himself and the rest, equity confers on him a right to reimburse himself for the amount spent in excess by him in the matter of redemption; he can call upon the co-mortgagors to contribute towards the excess which he has paid over his own share."

Thus, it can be held that though the provisions of S. 92 of the Act as such are not applicable to the State of Punjab, but the said principles being based on justice, equity and good conscience, have always been made applicable. In this view of the matter, it is clear that the lower appellate Court has erred in placing reliance on *Janardhan Bhagwan Dass's case* (AIR 1959 Punj 170) (supra), in coming to the conclusion that the redeeming co-mortgagors cannot be taken to have been subrogated to all the rights of the original mortgagee. In fact, *Ganeshi Lal's case* (AIR 1953 SC 1) (supra), decided by the Supreme Court, was from Punjab and the principles contained in S. 92 of the Act were made applicable as it was held therein that the doctrine of subrogation which means substitution of one person in place of another and giving him the rights of the latter is essentially an equitable doctrine in its origin and application, and if we examine the reason behind it, the answer to the question which we have to decide in this appeal is not difficult. Equity insists on the ultimate payment of a debt by one who in justice and good conscience is bound to pay it, and it is well recognised that where there are several joint debtors, the person making the payment is a principal debtor as regards part of the liability he is to discharge and a surety in respect of the shares of the rest of the debtors. The contention raised on behalf of the respondents, that the position of a redeeming co-mortgagor is that of a charge holder, in one sense does not go contrary to these principles. Of course, the redeeming co-mortgagor has a charge on the property till the non-

redeeming co-mortgagor makes the payment of his share in the mortgaged property, but it does not advance the case of the respondents more than this. The non-redeeming co-mortgagor cannot be said to be a co-sharer till the amount of his share is paid by him to the redeeming co-mortgagor, the limitation for which was then provided under Art. 148 of the Limitation Act, 1908. This matter has been fully discussed in Ram Chander's case (AIR 1955 NUC (Punjab) 5719) (supra) by a learned single Judge of this Court. Reference therein has also been made to Abdul Ghafur Khan v. Firm Mangat Rai Ganga Sahai, AIR 1938 Lah 184 and Khuda Bakhsh v. Ata Mohammad, AIR 1942 Lah 135. It has been clearly held in Ram Chander's case (supra), that the position of a co-mortgagor who redeems the entire mortgage is that of a mortgagee and not that of a mere charge holder in respect of the other co-sharers. The same view has also been taken by the Patna High Court in Mukh Narain Singh v. Ramlochan Tiwari, AIR 1941 Pat 147. It has been further observed in Ram Chander's case (supra) that a co-mortgagor who has redeemed a mortgage is subrogated to the position of the mortgagee and a suit against him by the other mortgagors for redemption is governed by Art. 148 and time runs against the plaintiffs from the date of the original mortgage. I am in full agreement with these observations in the above-said case.

6. For the reasons recorded above, this appeal succeeds and is allowed. The judgment and decree of the lower appellate Court are set aside and the finding of the Courts below on issue No. 2 is reversed. Since the matter had been decided on the preliminary issues only and the appellant's suit was dismissed, this case is demanded to the trial Court for fresh decision on merits in accordance with law. The parties, through their counsel, have been directed to appear in the trial Court on Nov. 27, 1981. The record of the case be sent back immediately. No costs. Appeal allowed.

AIR 1982 PUNJAB AND HARYANA 188

G. C. MITAL, J.

Siri Kishan and others, Appellants v. Mem Chand. died by L. R., Respondent.

Second Appeal No. 822 of 1970, D/- 9-10-1981.*

* From decree of Addl. Dist. J., Rohtak, D/- 2-6-1970.

KY/AZ/F530/81/AKJ/SSG/HN

East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (50 of 1948), Ss. 9 and 30 — Sale of land in 1961 during consolidation — Mutation not sanctioned in favour of vendee — Revocation of consolidation in 1964 and fresh notification for consolidation in 1966 — Sale, held, not void — Parties to the sale were bound by the transaction.

Respondent was owner of certain agricultural land. In 1960, consolidation proceedings started and the land held by him was put in hotch-pot and he was allotted certain land. After the allotment was made, he sold the land on 9-10-1961. Since consolidation was going on, mutations with regard to the aforesaid sales were not sanctioned in favour of vendees. In 1964, notification of consolidation was revoked and thereafter a fresh notification was issued in 1966 for consolidation. Respondent was allotted the land in that consolidation, and possession was given to him. Vendees filed suits for possession.

Held, vendees were entitled to succeed. In view of revocation in 1964, consolidation would be deemed to have been started in the year 1966 and since sale was made in 1961, Sec. 30 of the Act was not applicable. What S. 30 said was that the rights of all land-owners or occupancy tenants would have to be found out as existing on the date of the publication of notification for consolidation under S. 14 and all transactions with regard to the land covered by the notification made during the operation of consolidation would be ignored by the consolidation authorities and fresh re-partition would be made as if no transaction occurred during the consolidation operations. But as regards the rights of the parties to the transactions inter se they would bind them and the transferee could enforce in a Court of law the transaction against the transferor and follow the land which was allotted to the transferor during consolidation since there was no indication in the section that the transaction itself would be totally void even between the parties to the same. Section 9 was not applicable. Even if it was assumed that S. 9 was applicable since Section 30 of the Act was not in absolute terms to render all transactions void and only envisaged that the same would not be given effect to so as to affect the rights therein of any other land-owner or tenant having right of occupancy, the sale transactions in dispute would not be held to be void and the same could be ignored for purposes of carrying out the scheme of consolidation and by

treating the vendor as the owner of the property. Hence, the impugned sales could not be held to be contrary to any provision of the Act and, therefore, could not be held to be void under S. 9 of the Act. 1967 Cur LJ 146 (Punj) and AIR 1972 Punj 274, Rel. on. (Paras 4, 5, 6, 11)

Cases Referred: Chronological Paras
 AIR 1972 Punj 274: 74 Pun LR 734 8, 9
 1967 Cur LJ 146 (Punj) 8

H. L. Sarin and M. L. Sarin, for Appellants; Chandra Singh, for Respondent.

JUDGMENT:— Whether a sale or any other alienation made during the currency of the consolidation, without obtaining permission of the Consolidation Officer, would be void between the parties to the transaction, in view of S. 30 of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948, is the sole question of law of somewhat significant importance which arises in these two appeals, R. S. A. Nos. 822 and 823 of 1970.

2. Mam Chand was owner of certain agricultural land in village Badasa, tahsil Jhajjar, district Rohtak. In 1960, consolidation proceedings started in the village and the land held by Mam Chand was put in hotch-pot and during consolidation he was allotted 71 Kanals 10 Marlas comprised in Khasra Numbers detailed in para 1 of the plaints. After the allotment was made to him of the said 71 Kanals 10 Marlas, on 9th Oct., 1961, Mam Chand sold by two separate registered sale deeds for Rs. 10,000/- each, half of the land to Siri Kishan and others, plaintiffs in this appeal, and the balance half to Siri Raj and others, plaintiffs in R. S. A. No. 823 of 1970. Since the consolidation was going on, mutations with regard to the aforesaid sales were not sanctioned in favour of the vendees. In the year 1964, the notification of consolidation was revoked and thereafter a fresh notification was issued in the year 1966 for consolidation. In pursuance of that, consolidation started in the year 1966. Since the name of Mam Chand continued in the revenue records to be the owner of 71 Kanals 10 Marlas, he was allotted 107 Kanals 13 Marlas, the detailed Killa numbers of which are stated in the body of the plaints, and possession was given to him. On 2nd Aug., 1967, the two sets of vendees of Mam Chand filed the present two suits for recovering possession in each for half of 107 Kanals 13 Marlas of land allotted during the consolidation to Mam Chand in lieu of 71 Kanals 10 Marlas of land which had been sold to them in

equal shares. While Mam Chand defendant admitted that in lieu of 71 Kanals 10 Marlas, he was allotted 107 Kanals 13 Marlas during consolidation, he denied having made any sale to the plaintiffs and pleaded that he had executed lease deeds and the plaintiffs were his tenants and, as such, Civil Court had no jurisdiction to try the suits. The trial Court found, after evidence was led on the issues framed in the case, that the plaintiffs had proved the due execution of the sale deeds in their favour, the story of lease set up by the defendant was wholly untrue and as such the Civil Court had the jurisdiction. However, it found that both the sales were void in view of S. 30 of the E. P. H. (C. and P. of F.) Act, 1948 (hereinafter called the Act) and, therefore, dismissed the suits. The plaintiffs filed appeals which met with the same fate. The plaintiffs have come to this Court in these second appeals.

3. These appeals have to be decided on the finding of facts, namely, that Mem Chand sold his entire land, 71 Kanals 10 Marlas, which was allotted to him during the first consolidation which started prior to the sales and which was revoked in the year 1964, i.e., after the sales were made and thereafter fresh consolidation started in the year 1966 during which 107 Kanals 13 Marlas of land was allotted in lieu of the aforesaid land. On these facts, I am of the opinion that, viewing the case from any angle, the plaintiffs-appellants are entitled to the decrees for possession as prayed for against Mem Chand, defendant-respondent.

4. Mem Chand was allotted 71 Kanals 10 Marlas of land in the first consolidation and after that allotment he made the sales to the plaintiffs in the year 1961 and the consolidation was revoked in the year 1964. Fresh consolidation started in the year 1966 by issue of a fresh notification under S. 14 of the Act. Therefore, by revocation of the earlier consolidation it has to be deemed as if no consolidation took place earlier and the impugned sales were made at a time when no notification under S. 14 of the Act was in operation, and as if the consolidation in the village started for the first time in the year 1966. In view of these facts, the consolidation will be deemed to have been started in the year 1966 and since the sale was made in the year 1961, the provisions contained in S. 30 of the Act would not be applicable to the facts of the present case. Therefore, the Courts below were in error in applying S. 30 of the Act to the facts of the present case. Once that is so, the plain-

tiffs were entitled to follow the land which was allotted in lieu of 71 Kanals 10 Marlas purchased by them, in the consolidation proceedings of 1966 and seek possession thereof from the person who came in its possession, namely, Mam Chand, the original vendor and, therefore, on this ground alone, the suits deserve to be decreed.

5. Even if it is assumed that the sales were made at a time when the first consolidation proceedings were on and the revocation of consolidation after the making of sales would not be affected by the operation of S. 30 of the Act on the date of sale, i.e., 9th Oct., 1961, still I am of the view that S. 30 of the Act has been misinterpreted and, thus, wrongly applied to the facts of the present case. It will be useful to notice two provisions in this regard, namely, Ss. 9 and 30 of the Act which are reproduced below :—

“9. The transfer or partition of any land contrary to the provisions of this Act, shall be void.”

“30. After a notification under sub-sec. (1) of Section 14 has issued and during the pendency of the consolidation proceedings no landowner or tenant having a right of occupancy upon whom the scheme will be binding shall have power without the sanction of the Consolidation Officer to transfer or otherwise deal with any portion of his original holding or other tenancy so as to affect the rights of any other landowner or tenant having a right of occupancy therein under the scheme of consolidation.”

Admittedly, no sanction of the Consolidation Officer to make the impugned transfers was obtained in the present cases. Therefore, it has to be seen whether the impugned sales would be hit by S. 30 of the Act to such an extent that the contract between the two parties would be totally void or would bind them inter se without affecting the consolidation proceedings or the scheme of consolidation with the result that the particular Khasra numbers consisting of 71 Kanals 10 Marlas belonging to Mam Chand, which was put in a hotch-pot during consolidation of 1966, would be treated for the purposes of consolidation as belonging to him alone and not to the two sets of vendees and the fresh allotment would be made during consolidation in the name of Mam Chand and whatever is allotted in lieu of the Khasra numbers comprised in 71 Kanals 10 Marlas would be treated in law as having been sold by Mam Chand to the two sets of vendees in equal shares. To find out the answer,

the scheme of the Act will have to be noticed.

The title of the Act clearly gives an indication that the Act has two purposes. One is to consolidate the holdings of land-owners and tenants and the other is to prevent fragmentation of holdings of the land-owners and tenants. As regards prevention of fragmentation, the matter is covered by Chap. II consisting of Ss. 3 to 13 and this chapter would come into force for a ‘notified area’ as may be specified by the State Government under S. 3 of the Act and then under Section 5 of the Act, the State Government has to determine the ‘standard area’ which would be considered as the minimum area necessary for profitable cultivation in the said ‘notified area’. It is not the case of the parties that the State Government ever specified the estate where the land in dispute is situated as a ‘notified area’ or any ‘standard area’ was determined in that notified area. Hence Chap. II would not be applicable and S. 9 which comes in that chapter would also not be applicable to the facts of the present case.

6. Chapter III talks of ‘consolidation of holdings’. This chapter consists of Ss. 14 to 36. Section 14 provides for the issue of a notification by the State when it considers proper that for better cultivation of land in any estate or a group of estates or any part thereof, consolidation of holdings is necessary and a scheme in this regard deserves to be made. After the notification is published then the Consolidation Officer so empowered prepares a draft scheme against which objections are heard and then there are provisions for appeal, second appeal and petition to the State Government. The scheme provides for the method of calculation of different qualities of land originally held by the land-owners or tenants the method of allotment during consolidation in lieu thereof, provision of minimum and maximum number of plots in lieu of the original number of plots to each land-owner or tenant, the method of fixation of major portion of each land-owner or tenant and various other matters in order to consolidate the holdings of land-owners or tenants for better cultivation taking into consideration the position which prevails at the time of publication of the notification for consolidation.

It will be best to have the example of Mam Chand land-owner to further understand the scheme of this chapter. If Mam Chand had not made the two sales in dispute then he would have continued to be the owner of particular Khasra numbers com-

prised in 71 Kanals 10 Marlas throughout the currency of the consolidation proceedings and under the scheme of consolidation prepared on that basis he would have been allotted land in lieu thereof. Similar would be the position of all other land-owners or tenants owning or possessing land in the revenue estate for which the notification for consolidation was issued. However, if he makes a sale, the same would be ignored and land would be allotted in the same manner as if he had not made the sale.

If Section 30 had not been enacted then the result would have been that the sales, gifts, mortgages or creation of leases, etc., namely any sort of alienation by a land-owner or a tenant made during the currency of the consolidation proceedings would have had to be recognised for purposes of consolidation scheme and while doing so it would have become impossible to finalise a consolidation scheme because the moment a scheme was finalised, on the next day there would be a fresh such transaction and again a fresh scheme would have to be prepared and in this manner, it would have been an unending process and the very purpose of framing a scheme to consolidate the holdings would have never fructified. In order to avoid this, a deadline was fixed by enacting Section 30 of the Act that whosoever was owner or was entitled to occupy the land on the date of notification published under Section 14 of the Act was to be considered as the owner or occupier of the land for purposes of consolidation scheme and for implementation of the same. All such transactions made during the currency of the consolidation had to be ignored by the consolidation authorities and notwithstanding such transactions, the original holding of a land-owner or a tenant could be allotted by the consolidation authorities under the scheme of consolidation to any other land-owner or tenant and the transferee of the original holding could not come forward and raise objection during consolidation that the same had been purchased by him and, therefore, should be kept cut of consolidation or that he has become a new land-owner or a tenant, as the case may be, by virtue of the transaction and, therefore, he is entitled to have the scheme modified so as to include his name in the scheme and then to have allotment of land under the scheme on that basis and also to file objections, appeals and petitions before the State Government.

By making a provision like S. 30, the transferee of the original holding or tenancy

who acquired rights during the currency of consolidation were kept out of the consolidation proceedings. However, S. 30 nowhere goes to show that the transfer or other transaction, of the original holding or tenancy was to be treated as completely void even between the parties to the transaction, otherwise it would have been so specifically provided in S. 30. Even by necessary intendment or implication, I find that the Legislature while enacting S. 30 never wanted to make a provision that such transactions would be wholly void and unenforceable in a Court of law even between the parties to the transaction. On the other hand, it is clear from the express provisions of the section that after a notification is issued under S. 14, no land-owner or tenant having a right of occupancy upon whom the scheme of consolidation would be binding would be entitled to deal with his original holdings so as to affect the rights of any other land-owners or tenants having right of occupancy therein under the scheme of consolidation. Meaning thereby that even if original holding is sold by a land-owner or an occupancy tenant, the same would not affect the enforcement or the scheme of consolidation and the consolidation authorities would be entitled to deal with the original holding under the scheme of consolidation and if the original holding is allotted to some other land-owner or tenant having a right of occupancy then the rights of such a person therein would not be affected by such transaction by the original owner of his original holding.

Similarly in consolidation, the rights of the original land-owner who has parted with the same during the currency of the consolidation would be considered on the date of publication of the notification and he would be allotted fresh land in accordance with the scheme of consolidation for his original holding. The transferee from such a land-owner would not be entitled to claim his original holding but his right to follow the land which is allotted in consolidation to such a land-owner has not been taken away by any provision of this section. Hence I conclude that the only reasonable interpretation to be placed on S. 30 would be that the rights of all land-owners or occupancy tenants will have to be found out as existing on the date of the publication of notification for consolidation under S. 14 and all transactions with regard to the land covered by the notification made during the operation of consolidation would be ignored by the consolidation authorities and fresh re-

partition will be made as if no transaction occurred during the consolidation operations. But as regards the rights of the parties to the transactions inter se they will bind them and the transferee can enforce in a court of law the transaction against the transferor and follow the land which is allotted to the transferor during consolidation since there is no indication in the section that the transaction itself would be totally void even between the parties to the same.

7. If, however, the transferor obtains sanction of the Consolidation Officer and the transfer is made after the sanction is granted then the transfer will be recognised by the Consolidation Officer and the rights of the transferee would also be decided under the Act on the basis of the scheme. In that event, the transferee would be entitled to allotment of land in re-partition in his own right in accordance with the scheme of consolidation.

8. The aforesaid interpretation of S. 30 finds some support from two decisions of this Court in *Amar Singh v. Director of Consolidation of Holdings, Punjab*, 1967 Cur LJ 146 and *Ranbir Singh v. Mangal Singh*, 74 Pun LR 734: (AIR 1972 Punj 274). The facts of *Amar Singh's* case (*supra*) were that the writ petitioner in that case owned land in village Mahlan in a compact block known as Chamariwala fields. While the consolidation proceedings were in process, with the permission of the Consolidation Officer, he purchased the whole of the land belonging to Gajjan Singh in that village. In re-partition on the basis of the scheme, the petitioner wanted his original holding to be clubbed with the land purchased during consolidation from Gajjan Singh and on that basis his major portion should be calculated and allotment made. His request was declined by the State Government on the sole ground that since he had purchased area from Gajjan Singh, therefore, the same could not be counted while calculating his major portion. Against the aforesaid order of the State Government, a writ petition was filed in this Court and D. K. Mahajan, J., while interpreting S. 30 of the Act came to the conclusion that since purchase had been made by the writ petitioner with the permission of the Consolidation Officer, therefore, the same had to be given effect to under the scheme of consolidation, and the petitioner's writ petition was allowed and the order of the State Government was quashed restoring that of the Consolidation Officer, who had made allotment to the writ petitioner considering his major portion to be 100 per cent

at the disputed place which percentage was arrived at after taking into consideration the sale made by Gajjan Singh in his favour.

9. *Ranbir Singh's* case (*supra*) is a Division Bench judgment wherein Section 29 of the Pepsu Holdings (Consolidation and Prevention of Fragmentation) Act (5 of 2007 BK) was considered which is in pari materia with S. 30 of the Act. In that case a land-owner transferred a part of his holding to his son by way of gift after the publication of notification under S. 14 of that Act without obtaining permission of the Consolidation Officer. The Additional Director gave effect to the gift deed on the ground that the same was made before the notification was actually published in the village although after the publication of notification in the Official Gazette. The opposite party who was affected in the re-partition, filed a writ petition in this Court and a learned single Judge of this Court held that S. 29 of that Act prohibited the alienations after the issue of notification under S. 14 of that Act and, therefore, the gift had to be ignored and whole of the land had to be held to belong to the original land-owner and the valuation of the properties had to be fixed on that basis and re-partition made according to the scheme and, consequently, allowed the writ petition and issued the necessary directions. The original land-owner filed a Letters Patent Appeal, which was dismissed. The relevant observations are these:—

"One thing is clear that this section does not in any way affect the question of title. Any transfer can be made and the transferee will be given good title, and all that is provided is that such a transfer will not be taken into consideration for affecting the rights of the land-owners under the scheme of consolidation. It is well known that the scheme of consolidation normally provides that the land-owner should be given his take at his first major portion and if his percentage is not higher as compared with the other landowners, then he should be shifted to his second major portion and so on. Thus a transfer made during the pendency of the consolidation proceedings could be with a view to change the major portion from one place, where the landowner has inferior land, to another place, where he has got better quality land. It is to avoid such an eventuality that S. 29 has been enacted."

10. In view of the above, the finding recorded by the Courts below that the two sale transactions between the parties are void is hereby reversed and it is held that in spite

of S. 30 of the Act, the title of the Khasra numbers measuring 71 Kanals 10 Marlas described in para 1 of the plaint passed on from Mam Chand to the present two sets of plaintiffs as vendees in equal share and the vendees would, therefore, be entitled to follow the land allotted in the subsequent consolidation in lieu of the above. Since the sale transaction took place during the pendency of the consolidation, therefore, mutations could not be entered in the names of the vendees and because of the provisions of S. 30 of the Act, the allotment of new land had to be fictionally in the name of Mam Chand, the original owner but otherwise the title of the same would vest in the two sets of vendees who are plaintiffs before me.

11. This brings me to the consideration of S. 9 of the Act. I have already held above that S. 9 would apply to matters covered by Chap. II of the Act. Even if it is assumed that S. 9 can be looked into on the facts of the present case, I am of the opinion that since S. 30 of the Act is not in absolute terms to render all transactions void and only envisages that the same would not be given effect to so as to affect the rights therein of any other land-owner or tenant having right of occupancy, the sale transactions in dispute between the vendor and the vendees cannot be held to be void and the same could be ignored for purposes of carrying out the scheme of consolidation and by treating the vendor as the owner of the property. Hence, the impugned sales cannot be held to be contrary to any provision of the Act and, therefore, cannot be held to be void under S. 9 of the Act.

12. For the reasons recorded above, both the appeals are allowed and after setting aside the judgments and decrees of the Courts below both the suits for possession are decreed as prayed for with costs throughout.

Appeals allowed.

AIR 1982 PUNJAB AND HARYANA 193

P. C. JAIN, J.

Kiran Cinema Patti, Dist. Amritsar, Petitioner v. The Sub-Divisional Officer (Civil) Patti, Dist. Amritsar and others, Respondents.

Civil Writ Petn. No. 856 of 1969, D/- 17-9-1981.

Punjab Municipal Act (3 of 1911), Ss. 237 and 84 — State Government could under

LY/LY/F866/81/TVN/LGC

1982 P. & H./13 VI G-39

Section 237 modify or reverse Sub-Divisional Officer's order made in appeal under S. 84.

Rejecting the contention that the State Government's power under S. 237 to modify or rescind any order of any officer of the State passed or purporting to have been passed under the Act was confined to executive orders and hence an order of the Sub-Divisional Officer made in an appeal under Section 84 being a judicial one was not amenable to such power, it was held that Section 237 conferred very wide and unfettered power on the State Government and made no distinction between orders made under S. 84 or under the other provisions of the Act. The order of the Sub-Divisional Officer on appeal was one made under the Act and it could therefore be modified or reversed by the State Government under Section 237. In this case, the State Government's order under S. 237 rescinding Sub-Divisional Officer's order granting exemption to a cinema house from payment of house tax in an appeal under S. 84 was upheld.

(Para 8)

H. L. Sarin, Sr. Advocate with J. B. Malhotra, for Petitioner; A. S. Sandhu, Addl. Advocate General (Punjab) (for Nos. 1 and 2) and Y. P. Gandhi (for No. 3), for Respondents.

ORDER:— Prem Kumar Jain, Manager of Kiran Cinema, Patti, has filed this petition under Arts. 226 and 227 of the Constitution of India for quashing the tax demand bills, copies Annexures 'C', 'D' and 'E', order of the Sub-Divisional Officer, Patti, dated 24th Dec., 1968 (copy Annexure 'F' to the petition) and the order of the State Government, dated 9th July, 1968 (copy Annexure 'B' to the petition).

2. The facts of the case, in order to appreciate the controversy raised before me, may briefly be stated thus:—

3. A building bearing house No. 151/12 situate in Patti, District Amritsar, is being used for non-residential purposes, i.e., for running a cinema known as Kiran Cinema. The Municipal Committee, Patti, wished to impose house tax and consequently objections were invited against the assessment after publication of the list of assessment. The petitioner filed objections, but the same were rejected and an amount of Rs. 675/- per annum was imposed as house tax. Feeling aggrieved from the imposition of the house tax, the petitioner preferred an appeal under S. 84 of the Punjab Municipal Act,

1911 (hereinafter referred to as the Act) which was allowed by the Sub-Divisional Officer (Civil), Patti, vide his order, dated 30th March, 1966 (copy Annexure 'A' to the petition) on the ground that under the rules, the building was exempt and no house tax could be imposed up to 22nd April, 1967 and, therefore, the order of the Committee, dated 2nd Jan., 1966, imposing house tax on the building could not legally be sustained. A copy of the order is attached with the petition as Annexure 'A'. It appears that fresh proceedings for the assessment of the house tax were taken, and on the basis of those proceedings the tax bills dated 17th Feb., 1968 (copies Annexures 'C', 'D' and 'E') were issued by respondent No. 2, demanding the house tax at the rate of Rs. 675/- per annum from the petitioner. Feeling aggrieved from the demand, the petitioner again filed an appeal under S. 84 of the Act, but the same was rejected on the basis of the order of respondent No. 2, dated 9th July, 1968 (Annexure 'B') the relevant portion of which reads as under:—

"In exercise of powers conferred by Section 237 of P. M. A., 1911, the Governor of Punjab is pleased to rescind the orders of S. D. O. (Civil), Patti dated 30-3-66 granting exemption to Kiran Cinema, Patti from house tax up to 22-4-67."

It is in these circumstances that the present writ petition has been filed calling in question the legality of the demand notices and of the order of respondent No. 2, dated 9th July, 1968.

4. The petition came up for motion hearing on 10th April, 1969, and was admitted.

5. Separate written statements have been filed on behalf of respondents Nos. 2 and 3 in which the material allegations made by the petitioner have been controverted.

6. The only point urged before me by the learned counsel for the petitioner was that the order of the Sub-Divisional Officer, dated 30th March, 1966 (Annexure 'A' to the petition) passed on appeal under S. 84 of the Act was a judicial order and that the said order could not legally be rescinded by the State Government in exercise of its power under S. 237 of the Act. On the other hand, it was submitted by the learned Additional Advocate General, whose contention was adopted by Mr. Gandhi, learned counsel appearing for respondent No. 3, that the State Government was empowered under Section 237 of the Act to set aside any order that may have been passed by any officer under the Act, and that no distinction has been drawn between the orders passed on

appeal or the orders passed which may be executive in nature.

7. In order to find out as to which argument is more plausible, it would be appropriate to notice and analyse the provisions of Section 237 of the Act, which read as under:—

"Notwithstanding anything in this Act, the State Government shall have the power of reversing or modifying any order of any officer of the State Government passed or purporting to have been passed under this Act, if it considers it to be not in accordance with the said Act or the rules or to be for any reason inexpedient, and generally for carrying out the purposes of this Act the State Government shall exercise over its officers all powers of superintendence, direction and control."

8. From the bare perusal of the above quoted section, it is quite evident that very wide and unfettered power has been given to the State Government to reverse or modify any order of any officer of the State Government passed or purporting to have been passed under this Act. There can be no gainsaying that the order of the Sub-Divisional Officer on appeal is passed under the Act. That being, so, I do not find any justification in the contention of Mr. Sarin, learned counsel for the petitioner, that under Section 237 of the Act, an order passed by the Sub-Divisional Officer on appeal is not liable to be reversed or modified. The Legislature has not drawn any distinction between the order passed under S. 84 and the orders passed under any other provision of the Act. The language employed in the section is not at all ambiguous. The Legislature, in its wisdom, had thought it proper to cover all orders that may be passed under the Act and overall power of superintendence and control has been given to the State Government over its officers. The Sub-Divisional Officer, who hears the appeal, is an officer of the State. In this view of the matter, I find no escape from the conclusion that an order passed under S. 84 of the Act would be amenable to review by the State Government in exercise of its power under S. 237 of the Act. The contention of Mr. Sarin, therefore, has no merit and is consequently rejected.

9. No other point has been urged.

10. For the reasons recorded above, this petition fails and is hereby dismissed. However, in the circumstances of the case, I make no order as to costs.

Petition dismissed.

AIR 1982 PUNJAB AND HARYANA 195**MADAN MOHAN PUNCHHI, J.****Amar Nath, Appellant v. Prem Nath, Respondent.****Regular Second Appeal No. 149 of 1972, D/- 24-12-1981.***

Civil P. C. (5 of 1908), O. 7, R. 7; O. 6, R. 2 — Alternative relief — Suit for eviction — Landlord sticking to his original claim and not taking alternative plea based on tenancy as alleged by tenant — Tenancy as alleged by landlord found not subsisting — Landlord is not entitled to relief on basis of case pleaded by tenant. (T. P. Act (1882), S. 111).

In the instant case, the plaintiff-landlord filed a suit for eviction on ground of arrears of rent alleging that the tenant was occupying a shop in the building owned by the landlord. The tenant in his written statement alleged that by private arrangement between himself and the landlord, the tenant had shifted to another shop in the same building and thus there was no question of his being in arrears of rent in respect of the shop as alleged by the landlord. The tenant specifically denied the tenancy as alleged in the plaint, but the landlord in his replication stuck to the original claim made in the plaint though while insisting on the facts alleged in the plaint, he could have taken an alternative plea on the strength of the written statement.

Held that the landlord could not claim that the decree should have been passed qua the property which the tenant admitted to be in his tenancy. Tenancy as pleaded by the tenant was neither admitted by the landlord nor was it otherwise proved with regard to the premises in occupation of the tenant. That finding not being there, there was nothing to grant any relief to the landlord. Case law discussed. (Para 12)

Cases Referred: Chronological Paras

AIR 1981 Punj & Har 297 : (1981) 2 Rent	
LR 314	11

AIR 1980 SC 299 : (1980) 1 SCC 1	11
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AIR 1972 SC 1548	11
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AIR 1951 SC 177 : 1951 AL LJ 64	10, 12
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D. V. Sehgal and P. S. Rana, for Appellant; N. S. Gujral, for Respondent.

JUDGMENT:— This is a plaintiff's regular second appeal against the concurrent judgments and decrees of the Courts below,

*From decree of M. L. Mirchia, Addl. Dist. J., Amritsar, D/- 30-10-1971.

BZ/CZ/A530/82/DVF

whereby his suit for ejectment of the defendant-respondent from a shop situated in Amritsar Town and for recovery of Rupees 2,135/- on account of arrears of rent and damages for use and occupation thereof, was dismissed with costs.

2. The plaintiff Amar Nath filed this suit on the ground that he was owner of a shop forming part of building No. 952-53/1-9 situated in a business locality of Amritsar. He alleged that the said shop was rented out by him to the defendant on 24-2-1965 at a monthly rent of Rs. 115/- for a period of 11 months. He claimed that the property being newly constructed was exempt from the provisions of the East Punjab Urban Rent Restriction Act, 1948. The plaintiff claimed that the defendant was in arrears of rent from 24-4-1967 to 23-4-1968 (a period of one year) at the rate of Rs. 115/- per mensem, and another sum of Rs. 805/- at the same rate as damages for use and occupation of the said shop for the period from 24-4-1968 to 23-11-1968 (a period of seven months). He claimed that he had terminated the tenancy, vide notice dated 2-4-1968 but the said amount had not been paid to him despite requests and the notice.

3. The defendant, on the other hand, denied that the building was exempt from the provisions of the rent control legislation. He pleaded a counter version. According to him, he had initially taken on rent on 24-2-1965 a shop from the plaintiff at the monthly rate of Rs. 115/-, which he had vacated on 30-4-1967. He claimed to have paid rent up to 23-4-1967 and for the succeeding period of 7-8 days, the rent due was forgone by the plaintiff due to a private arrangement arrived at between the parties, whereunder he vacated that shop and was given possession of another shop in the same building bearing shop No. 4 at a monthly rent of Rs. 80/-. He conceded that rent at the aforesaid rate of Rs. 80/- per mensem was due from him for the shop which was presently in his possession with effect from 1-5-1967, but nothing was due from him on account of the shop the possession of which he had abandoned. He claimed that he had made several requests to the plaintiff to accept rent at the rate of Rs. 80/- per mensem for the shop which was in his possession but the plaintiff had ignored them.

4. Significantly, the written statement of the defendant-respondent attracted a replication from the plaintiff. Instead of diverting his claim against the shop which was in possession of the defendant on terms as alleged in the return, the plaintiff denied all the al-

legations made in the written statement, and in his statement before issues, rather reiterated that the suit was with regard to the shop which he had only once given on tenancy to the defendant and that too at the rate of Rs. 115/- per mensem. In other words, the chance of an alternative plea was not availed of and the plaintiff stuck to his guns as pointed in the plaint and did not turn the guns towards the defendant as raised by the latter in the written statement.

5. The trial Court framed the following issues :—

(1) Whether the property in dispute is exempt from the provisions of Act III of 1949?

(2) Whether rent of the premises is already paid as forgone by the plaintiff, as alleged in paragraph No. 2, on merits of the written statement?

(3) Whether possession of the premises in dispute was delivered to the plaintiff, as alleged in para No. 2, on merits of the written statement? If so, what?

(4) Whether the notice terminating the tenancy served on the defendant is not valid? If so, what is its effect?

(5) Whether the plaintiff is entitled to possession of the premises in dispute?

(6) To what amount of arrears of rent, if any, is the plaintiff entitled?

(7) Relief.

6. The trial Court, in a painstakingly long and elaborate judgment, dismissed the suit with costs. It took into account the inspection note prepared by it when a visit was paid to the premises in question. The lower appellate Court agreed with the trial Court and dismissed the appeal of the plaintiff necessitating him to approach this Court in second appeal.

7. The crucial issue for the plaintiff in the instant litigation rested on the outcome of issue No. 3 and what was the premises in dispute. According to the plaintiff-appellant, the premises in dispute were the premises which were presently in occupation of the defendant and those were in tenancy with the latter by virtue of rent-note Exhibit P-7 and described in plan Exhibit P-8. According to the defendant, the rent-note Ext. P-7 pertained to another shop marked as 'Y' in the plaintiff's plan Exhibit PW4/1 wherein the other shop marked as 'X/1' was presently in possession of the defendant. According to the plaintiff, the rent was Rs. 115/- per mensem but, according to the defendant, the rent of Rs. 115/- per mensem pertained to shop marked as 'Y', but presently he was to pay Rs. 80/- per mensem for the shop marked as 'X/1' presently in his possession.

Thus, the intrinsic question under issue No. 3 was: "What is the premises in dispute and whether it was in possession of the defendant?" The trial Court took into consideration all the oral evidence, the documentary evidence, the inspection note, the inferences drawn therefrom as also the demeanour of the plaintiff and his witnesses and came to the following conclusions under issue No. 3:—

"In view of the above discussion, therefore, I find absolutely no difficulty in coming to the conclusion that originally the shop marked 'Y' was rented out to the defendant by the plaintiff by means of the rent-note Exhibit P-7 at a monthly rent of Rs. 115/- and it may not really be incorrect that by reason of a mutual agreement between them, he was shifted to shop No. 4, now marked as X-1 in the plan Exhibit PW4/1, on the condition of the plaintiff forgoing about a week's rent for the first shop and also on the condition of his reducing the existing monthly rent of Rs. 115/- to Rs. 80/-. In other words, it seems quite clear to me that the defendant is not occupying the shop originally rented out to him by the plaintiff and he came to occupy the shop in dispute, marked X-1, subsequently, by reason of some mutual agreement between the parties."

The trial Court also held :—

"... .. the fact remains that he is not occupying the shop originally rented out to him, and this also is undisputed that the present suit instituted by the plaintiff relates to the same shop which he had originally rented out to the defendant. Since I have already held above that the shop now in the occupation of the defendant is not the one originally let out to him, I am not concerned to deal with the rights of the parties in respect of that shop, for the suit does not relate to that shop at all. In these circumstances, therefore, it must be said that the defendant occupies the shop in dispute by reason of a mutual agreement with the plaintiff and is not in possession of the shop originally rented out to him by virtue of the rent note Exhibit P-7, regarding which the present suit is being filed by the plaintiff. The issue is thus decided accordingly."

8. On the aforesaid findings, on issues Nos. 1 and 5 with regard to the exemption of the rent control legislation, the trial Court held that though there was no bar to pass a decree in favour of the landlord because of the exemption period, yet no decree could be passed in his favour, for the suit related to a property which had been vacated, as already discussed. He, thus, decided both

the issues against the plaintiff and in favour of the defendant. As a sequel to the decision of the afore-referred to three issues, the trial Court decided issue No. 2 also against the plaintiff holding that the rent for 7-8 days from 23-4-1967 to 30-4-1967 was forgone by the plaintiff and, in any case, since the suit related to another shop, the arrears were not claimable. Under issue No. 4, it was held that the notice, marked as 'X-1', served on the defendant by the plaintiff was invalid since the shop referred to therein stood already vacated by the defendant. In accord with the finding on issue No. 3, the finding on issue No. 6 also went against the plaintiff because the arrears of rent or damages were being claimed of the shop which was once tenanted to the defendant and, as per finding of the trial Judge, it pertained to the premises which stood vacated. Findings on all these issues were affirmed by the lower appellate Court on appeal as it was of the view that the evidence for reappraisal before it was cold-print whereas the trial Court had the advantage of observing the demeanour of the plaintiff when he appeared before it in evidence. The trial Court had specifically observed that the plaintiff as also his witness Gian Parkash Gupta PW6 had intentionally made false statements on oath before him and it had even initiated proceedings of perjury against them.

9. The findings of fact arrived at by the Courts below are unassailable in second appeal. More so, when it requires reappraisal of the oral and documentary evidence as also the inferences to be drawn therefrom. It is not open to me to entertain question of fact in second appeal. No authority for the proposition is needed, Section 100 of the Code of Civil Procedure itself is a pointer.

10. However, the learned counsel for the appellant has contended that on the case as pleaded by the defendant in his written statement, the plaintiff should have been granted relief on the pleaded case of the defendant. Reliance is placed on *Firm Srinivas Ram Kumar v. Mahabir Prasad*, AIR 1951 SC 177. The Supreme Court held therein as under (at pp. 179, 180):—

"A plaintiff may rely upon different rights alternatively and there is nothing in the Civil Procedure Code to prevent a party from making two or more inconsistent sets of allegations and claiming relief thereunder in the alternative. The question, however, arises whether, in the absence of any such alternative case in the plaint it is open to the Court to give him relief on that basis. The rule

undoubtedly is that the Court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which the other side was not called upon or had an opportunity to meet. But when the alternative case, which the plaintiff could have made, was not only admitted by the defendant in his written statement but was expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes. A demand of the plaintiff based on the defendant's own plea cannot possibly be regarded with surprise by the latter and no question of adducing evidence on these facts would arise when they were expressly admitted by the defendant in his pleadings. In such circumstances, when no injustice can possibly result to the defendant, it may not be proper to drive the plaintiff to a separate suit."

11. On the strength of the aforesaid passage, the learned counsel for the appellant claims that, since the defendant admitted himself to be a tenant of the plaintiff of the shop presently in possession, may be for a rental of Rs. 80/- per mensem, but since the suit was filed by the plaintiff within the statutory exempted period, a decree should be passed qua that property against the defendant, all the more, when his claim was based on premises depicted in plan Exhibit P-8 which pertains to none other than the premises in possession of the defendant. It was also highlighted that in plan Exhibit P-8, the dimensions of the property, as shown therein, were 8 feet of width in the front and 6 feet of width at the back. Both the Courts below have earmarked these premises as shop "X/1" on the composite plan Ext. PW4/1 and have even taken note of the dimensions of the said premises not tallying with rent-note Exhibit P-7 which pertains to a shop having width of 8 feet uniformly and, hence, deducingly applicable to shop marked 'Y' on the said plan. The learned counsel for the appellant contended that the identity of the property should be taken to be the one as pleaded by the defendant and on that score he must get a decree for which there was no bar, since the suit was filed within time. Reliance was also placed by him on *Firm Amar Nath Basheshar Dass v. Tek Chand*, AIR 1972 SC 1548, and the law reiterated by this Court in *Ram Parkash v. Smt. Surinder Sharma*, (1981) 2 Rent LR 314 : (AIR 1981 Punj and Har 297), clarifying the apparent conflict of the aforesaid decision of the Supreme Court and the later decision in *Mani*

Subrat Jain v. Raja Ram Vohra, (1980) 1 SCC 1 : (AIR 1980 SC 299).

12. So far as the point that a decree can be granted if a suit has been filed within the exemption period, there can be no doubt about it. There can also be no doubt that the instant suit was filed within the period of exemption and logically a decree can be passed in favour of the plaintiff without any difficulty. But, still the question remains whether the plaintiff is entitled to the decree and pertaining to what property. Now, it is claimed that the decree should be passed qua the property which the defendant admits to be presently in his tenancy. To my mind, such plea is not open to the plaintiff-appellant, especially when in the replication and the statement before issues he has struck on to the claim made in the plaint. It is well understood that replication is a part of pleadings, and in that the plaintiff could have, while insisting on the facts alleged in the plaint, taken an alternative plea on the strength of the written statement. But, he missed the opportunity and rather spurned it. This gave occasion to the trial Court to take a positive view that it was not possible for him to determine the rights of the parties in the matter of tenancy or otherwise in respect to the shop at present in occupation of the defendant. This view was endorsed by the lower appellate Court leaving the controversy at that level. In other words, tenancy as pleaded by the defendant was neither admitted by the plaintiff nor was it otherwise proved with regard to the premises presently in occupation of the defendant. That finding not being there, there is nothing to go on further so as to grant any relief to the plaintiff. In the Supreme Court authority, *Firm Srinivas Ram Kumar's case* (AIR 1951 SC 177) (supra), there was a positive finding by the Courts below that the defendants, who had pleaded receipt of money from the plaintiff as loan and not in any other manner as suggested by the plaintiff, had succeeded in proving that the said sum was by way of a loan and not part payment of the consideration money. It is in those circumstances, on facts found, that the suit was partially decreed inasmuch as the suit was dismissed for the claim of specific performance but the plaintiff was held entitled to a money decree for the sum of Rs. 30,000/- against the defendants taken by them as loan. Now, here in the instant case, there is no such finding that a tenancy stood established between the plaintiff and the defendant on the shop which was presently in possession of the defendant. All what was held was that the shop, named

by the plaintiff on tenancy with the defendant, was not in possession of the defendant any more; but he was in possession of another shop by way of a private arrangement. On these found facts, which cannot be improved upon in second appeal, the plaintiff cannot be allowed to succeed on the defendant's case. As a corollary to the aforesaid statement, no claim for money with regard to rent or for use and occupation and on what rate can also be entertained for the plaintiff against the defendant.

13. The upshot of the above discussion leaves me to conclude that there is neither any scope to upset or modify the concurrent views taken by the Courts below nor is there any scope for improvement of the case of the appellant any further on the defence plea by the defendant. Resultantly, this appeal fails and is hereby dismissed but, in the circumstances of the case, there will be no order as to costs in this Court.

Appeal dismissed.

AIR 1982 PUNJAB AND HARYANA 198

G. C. MITAL, J.

Bara Singh and others, Appellants v. Chain Singh and others, Respondents.

Second Appeal No. 310 of 1971, D/- 9-12-1981.*

Punjab Pre-emption Act (1 of 1913), Ss. 15, 17 — Suit by one set of co-sharers — Another suit by different set of co-sharers of equal degree filed and decreed during pendency of earlier suit — Pending suit is liable to be dismissed. (Pre-emption).

If a person having a right of pre-emption of the same degree purchases the land from the vendee within one year of the sale or gets a pre-emption decree after filing a suit within limitation earlier to the rival pre-emptor then he stands substituted in place of the vendee and once a co-sharer is substituted in place of the vendee, a suit by another co-sharer to pre-empt the same sale cannot be decreed because of the fact of substitution. The suit in law would be against a co-sharer vendee and suit for pre-emption cannot be decreed unless the right of pre-emptor is superior to that of the vendee. If a pre-emptor of the equal degree does not purchase from the vendee within the period of limitation nor files a suit for pre-emption within limitation but purchases the land from the vendee

* From decree of I. P. Anand, Addl. Dist. J., Hissar, D/- 27-11-1970.

beyond limitation then he does not get substituted for the vendee but only gets right to defend in place of the vendee on the pleas open to the vendee and not to him. AIR 1958 SC 838, Explained and Rel. on.

(Para. 5)

Where during pendency of a suit for pre-emption filed by one set of co-sharers a suit is filed by another set of co-sharers of equal degree and the same is decreed, held that both sets of co-sharers had equal right of pre-emption and therefore the suit filed earlier could not be decreed. (Para. 8)

Cases Referred: Chronological Paras
(1959) 61 Pun LR 774 3; 7
AIR 1958 SC 838 3, 5, 6, 7

A. S. Sarhadi and Manmohan Singh, for Appellants; P. S. Jain and Mr. Harash, for Respondents.

JUDGMENT:— The point of substance which arises in this appeal is the effect of a pre-emption decree obtained by a co-sharer in a civil suit filed by another co-sharer to pre-empt the same sale which had not been decided by the time the earlier pre-emption decree was passed.

2. On 13th June, 1966 Harnam Singh sold certain agricultural land to Chain Singh and his sons for Rs. 20,000/-. On 12th June, 1967, Bara Singh and others filed a suit to pre-empt the aforesaid sale as a co-sharer. On the following day, namely, 13th June, 1967, Charan Singh and others yet filed another suit to pre-empt the same sale as co-sharers. In the suit filed by Charan Singh and others the vendees conceded the claim with the result that on 2nd of December, 1967 the suit for pre-emption filed by Charan Singh and others was decreed. In pursuance of the decree, the pre-emption amount was deposited and possession was obtained on 17th June, 1968. When Bara Singh and others (plaintiffs in the other pre-emption case) came to know of the aforesaid decree and taking over of possession by the rival pre-emptors, they amended the suit and impleaded Charan Singh and others as defendants and challenged the pre-emption decree obtained by them. Both the Courts below came to the conclusion that Charan Singh and others had the right of pre-emption as co-sharers and were substituted in place of the vendees. Since the rival pre-emptors were substituted in the place of vendees, Bara Singh and others who are plaintiffs in the other pre-emption suit, having equal right of pre-emption, could not succeed against them. On this basis the suit was dismissed. Thus,

the plaintiffs have come up in second appeal to this Court.

3. Learned counsel, Shri Ajit Singh Sarhadi, appearing for the plaintiffs, has urged that if Charan Singh and others, the rival pre-emptors, had either purchased the land in dispute from the vendees or had deposited the decretal amount in pursuance of the pre-emption decree within one year of the date of sale, only then they could be held to have been substituted in place of the vendees and in that event alone the suit of his clients could be dismissed and not otherwise. For this submission reliance was placed on Bishan Singh v. Khazan Singh, AIR 1958 SC 838. It was further urged that the Courts below were in error in recording a finding that the appellants were not proved to be co-sharers in the land in dispute. Both the points have been controverted by the counsel for the rival pre-emptors and it is urged that Bishan Singh's case (Supra) rather supports the decisions of the Courts below. Reliance is also placed on Mst. Dhapan v. Shri Ram, (1959) 61 Pun LR 774.

4. After hearing the learned counsel for the parties, I am of the view that the second point raised by the counsel for the appellants deserves to be decided in favour of the appellants and the Courts below erred in law in concluding that the appellants failed to prove that they were co-sharers with the vendor. The appellants purchased share in the land in dispute vide registered sale deed dated 8th June, 1959 (Exhibit P-1) which sale was depicted in Jamabandi Exhibit P-5 and concluded that it does not show that the appellants continued to be co-sharers till the date when the impugned sale was made on 13th June, 1966. Even the defendants produced Jamabandi of the year 1962-73 as Exhibit D-3 which clearly recites the purchase of share made by the plaintiffs vide sale deed Exhibit P-1 on the basis of which mutation No. 50 was sanctioned. The plaintiffs have also produced a copy of mutation as Exhibit P-6. There is mention of mutation No. 50 even in the jamabandi Ext. P-5 although other details are not mentioned therein. Once it is found that the plaintiffs had purchased a share in 1959 vide Ext. P-1, they will continue to be co-sharers till they part with the same. No evidence has been brought on record by the defendants to show if the appellants parted with their share any time before the sale was made on 13th June, 1966 or by the time the trial Court decided the suit or even till today. Under the circumstances, I am of the view that they continued to be co-sharers in the land in dispute

and the finding to the contrary recorded by the Courts below is clearly erroneous and is hereby reversed.

5. Coming to the first legal proposition, a reading of the judgment in case *Bishan Singh v. Khazan Singh* (Supra) does go to show that some of the paragraphs support the appellants' contention while some other paragraphs and ultimate conclusion of the decision support the respondents' contention. The real crux of the decision in *Bishan Singh's* case (supra) is that if a person having a right of pre-emption of the same degree purchases the land from the vendee within one year of the sale or gets a pre-emption decree after filing a suit within limitation earlier to the rival pre-emptor then he stands substituted in place of the vendee and once a co-sharer is substituted in place of the vendee, a suit by another co-sharer to pre-empt the same sale cannot be decreed because of the fact of substitution. The suit in law would be against a co-sharer vendee and suit for pre-emption cannot be decreed unless the right of pre-emptor is superior to that of the vendee. It is also clearly held that if a pre-emptor of the equal degree does not purchase from the vendee within the period of limitation nor files a suit for pre-emption within limitation but purchases the land from the vendee beyond limitation then he does not get substituted for the vendee but only gets right to defend in place of the vendee on the pleas open to the vendee and not to him. The facts of *Bishan Singh's* case (Supra) were that the sale was made on August 26, 1949 and was registered on February 15, 1950. The first suit for pre-emption as a co-sharer was filed on August 26, 1950 in which a compromise pre-emption decree was passed on January 23, 1951 and the pre-emption amount was deposited on April 23, 1951 and possession was obtained on May 17, 1951. Within the limitation another suit for pre-emption was filed by another set of co-sharers, although after the compromise decree, but before the amount was deposited and possession obtained. On the aforesaid facts, the final conclusion contained in paragraph 23 of the report was as follows:—

"This judgment is, therefore, a clear authority for the position that the pre-emptor is not substituted in the place of the original vendee till conditions laid down in the decree are fulfilled. We cannot, therefore, agree with the learned counsel that the compromise decree itself perfected his clients' right in derogation to that of the plaintiffs. But as we have held that the appellants complied with the conditions laid down in the

compromise decree, they were substituted in the place of the vendee before the present suit was disposed of".

6. The aforesaid quotation clearly shows that the learned Judges of the Supreme Court were not considering a pre-emptor to have been substituted for the vendee in case substitution took place within one year of the sale but also allowed substitution in a case which took place beyond one year because admittedly the amount was deposited on 23-4-1951, which was beyond one year of registration of sale and yet the pre-emptor in the first suit was held to have been substituted on the date of deposit which was a condition of the decree because if the deposit had not been made within the prescribed time then the suit for pre-emption would have stood dismissed. It is also clear from the facts of *Bishan Singh's* case (AIR 1958 SC 838) (supra) that on the date of deposit by the first set of rival pre-emptors, the second suit was pending and that is why they have said that where substitution takes place before the second suit was disposed of, the plaintiffs of the second suit cannot get decree. Precisely are the facts before me.

7. The main strain of the argument of *Shri Ajit Singh Sarhadi* was that the substitution of a rival pre-emptor to bar second pre-emption suit must take place within one year of the sale, i.e., within the period of one year's limitation whether by private sale from vendee to the pre-emptor or by decree of a Court and if the rival pre-emptor purchases from the vendee beyond one year or gets a decree beyond one year and deposits the amount in time, in that event he would not be deemed to have been substituted in place of the vendee and would only have a right to defend the second suit in place of the vendee and on the grounds on which vendee alone could defend the second suit and not on the ground that he stood substituted in place of the vendees. This argument may be tested from an illustration. Suppose one suit for pre-emption was filed by 'A' on the ground of being a son of the vendor and another suit for pre-emption was filed by 'B' to pre-empt the same sale on the ground of being co-sharer with the vendor and if both the suits are decided together then the usual form of the decree is that 'A' gets a decree for pre-emption and he is given a date for deposit and in case he deposits by the due date, the suit filed by 'B' is deemed to be dismissed because 'A' had a right preferential to 'B'. It is further provided in the decree that in case 'A' does not deposit by the due date then his suit would be deemed to be

dismissed and 'B' is given further time to deposit. In case he deposits by that time, his suit stands decreed and in case he does not deposit by the due date, his suit also stands dismissed. However, if both the suits are tried separately and if A's suit is decreed first although beyond one year from the date of sale and the deposit is also made beyond one year of the date of sale but within the time allowed then according to the argument of Mr. Sarhadi if he wants to defend the suit filed by 'B', he would only represent the interests of the vendee and would be entitled to continue the suit on the objections available to the vendee and not to him. If this would be the situation then B's suit would be decreed against 'A' as well in spite of the fact that 'A' had a superior right of pre-emption over 'B'. This anomaly can be avoided only if it is considered that 'A' pre-emptor is substituted in place of the vendee either by purchase within one year of the sale or in a suit filed by him within time, though decreed beyond one year. Once 'A' would be deemed to have been substituted for the vendee then 'A' would have a right to defend B's suit and plead that he had a right superior to 'B' and, therefore, B's suit cannot be decreed. This is the only correct way of reading the Supreme Court decision in Bishan Singh case (AIR 1958 SC 838) (supra). Otherwise 'A' in spite of having a superior right over 'B' and also having obtained a decree prior to 'B' would lose his right of pre-emption or in any case a difficult situation would arise because both of them will have a pre-emption decree and it would be a matter of serious consideration as to what would be the effect of the two decrees. This clearly demonstrates that the ultimate analysis of Bishan Singh's case (supra) is what I have stated above and does not support the stand taken by Mr. Sarhadi. This view is confirmed by the decision of I. D. Dua, J., in *Mst. Dhapan's case* (supra).

8. For the reasons recorded above, I do not find any merit in this appeal because the rival pre-emptor had been substituted for the vendee during the pendency of the suit filed by the plaintiff in the present suit and since both had equal right of pre-emption, the suit by the plaintiff against a person with equal right of pre-emption cannot succeed. Consequently, the appeal fails and is hereby dismissed. No costs.

Appeal dismissed.

AIR 1982 PUNJAB AND HARYANA 201 SURINDER SINGH, J.

Narinder Singh, Appellant v. Devinder Singh and others, Respondents.

Regular Second Appeal No. 27 of 1971, D/- 30-11-1981.*

(A) Hindu Minority and Guardianship Act (32 of 1956), S. 8 (2) — Sale of immovable property of minor by guardian — Validity — Sale by guardian without permission of Court — Invalid. (Para 2)

(B) Civil P. C. (5 of 1908), Ss. 109, 100-A, 101 — Second appeal — New point — Contention as to non-applicability of S. 8 of Hindu Minority and Guardianship Act to interest of minor in joint family property — No averment in pleadings that minor was member of joint family — Matter not incorporated in any of the issues framed — It could not be permitted to be raised for first time in second appeal. (Para 2)

Cases Referred: Chronological	Para
AIR 1969 Madh Pra 32	2
AIR 1961 Guj 68	2

J. K. Sharma, for Appellant; Inder Singh (for Nos. 1 to 5) and Roshan Lal Sharma (for Nos. 11 and 12), for Respondents.

JUDGMENT:— This is a second appeal against a concurrent decision of two Courts below, which has arisen in the circumstances, which are these. Devinder Singh and other respondents filed a suit for possession of agricultural land to the extent of 1/4th share, and for a declaration in respect of the remaining 3/4th share, to the effect that the sale of the land effected by defendants Nos. 1 to 4, would not affect their reversionary rights. It may be mentioned here that Amar Kaur defendant acting as a guardian of the plaintiff-respondents along with defendant No. 1, had sold 79 Kanals and 19 Marlas of land, as described in the plaint. The sale was effected without obtaining the permission of the Court, as required under S. 8 of the Hindu Minority and Guardianship Act, and on this score the sale was challenged to be void. The suit was resisted by the defendants on several grounds. The trial Court framed various issues to cover the points in controversy arising from the pleadings of the parties, and after considering the evidence produced by them, the suit of Devinder Singh respondent was decreed for possession to the extent of 1/4th share in the land, on pay-

* From decree of K. C. Grover, Addl. Dist. J., Karnal, D/- 28-4-1970.

ment of Rs. 1,500/- plus some charges to the vendees or their successors-in-interest. The suit for declaration in regard to the remaining land was, however, dismissed. The appellant filed an appeal which was heard by the Additional District Judge, Karnal, who dismissed the same and affirmed the decision of the trial Court.

2. It is apparent from a perusal of the judgments of the Courts below that the only point which requires consideration in the present case is, as to whether the sale of the land effected by Amar Kaur, guardian of Devinder Singh plaintiff-respondent without obtaining the permission of the Court was valid, or not. There is no dispute that at the time when the sale was effected, the plaintiff was a minor and he was about 19 years of age, at the time when the suit was filed. Section 8 (3) of the Hindu Minority and Guardianship Act, 1956 clearly lays down that any disposal of immovable property by a natural guardian, in contravention of sub-sec. (1) or sub-sec. (2), is voidable at the instance of the minor or any person claiming under him. Sub-section (2) referred to above, enacts that the natural guardian shall not, without the previous permission of the Court, alienate any immovable property or part thereof, belonging to the minor. Mr. J. K. Sharma, learned counsel for the appellant has referred to *In re Krishnakant Maganlal*, AIR 1961 Guj 68 and *Smt. Sugga Bai v. Smt. Hiralal*, AIR 1969 Madh Pra 32, in support of his contention that the provisions of S. 8 of the Hindu Minority and Guardianship Act, are not applicable to a joint interest of the minor in the joint family property. The learned counsel, however, ignores the fact that there was no averment in the pleadings of the parties that the plaintiff-respondent was a member of the undivided Hindu family, nor was this matter incorporated in any of the issues framed in this case. The matter cannot be permitted to be raised for the first time in second appeal, as the determination thereof would require the recording of evidence. The mere fact that the plaintiff-respondent claimed 1/4th share in the property, would not necessarily mean that he was member of an undivided Hindu family. The contention of the learned counsel must, therefore, be repelled. The finding of the Courts below that the sale by the guardian of the plaintiff-respondent without the permission of the Court was invalid is, therefore, quite correct and is affirmed.

3. No other point has been argued in this appeal which is without force, and is con-

sequently dismissed, but with no order as to costs.

Appeal dismissed.

AIR 1982 PUNJAB AND HARYANA 202 RAJENDRA NATH MITTAL, J.

Jagir Singh, Appellant v. Baboo Singh and others, Respondents.

Regular Second Appeal No. 508 of 1971, D/- 20-11-1981.

Hindu Succession Act (30 of 1956), S. 14
Compromise decree allowing gift of land to married daughters as limited estate — Land to revert to father's collaterals on death of last daughter — Last surviving daughter not being a full owner is not entitled to make a gift of the said land in favour of her grandson.

Under the customary law of the Punjab, the married daughters have got no pre-existing right in the property of their father. Therefore, in the present case, they got the right in the property by virtue of the gift-deed. That right was restricted by the decree to their lifetime. Therefore, S. 14 (2) of the Act is applicable to the present case and the surviving daughter could not make a gift of the property in favour of her grandson. AIR 1978 SC 1051, Rel. on. (Para 10)

Cases Referred:	Chronological	Paras
AIR 1979 SC 993		8, 9
AIR 1978 SC 1051		10
AIR 1977 SC 1944		7
AIR 1977 SC 2024		8

B. S. Khoji, for Appellant; B. N. Aggarwal, for Respondents.

JUDGMENT :— This appeal has been filed by defendants Nos. 1 and 2 against the judgment and decree of the District Judge, Hoshiarpur, dated 5th Jan., 1971, affirming the judgment of the trial Court.

2. Briefly, the facts are that Narain had three daughters, namely, Smt. Nami, Smt. Parmeshwari and Smt. Chinti, and no male issue. He gifted the property in dispute in favour of the three daughters and the mutation was sanctioned in their favour on 16th July, 1919. Tara Singh and Bachitter Singh, near collaterals of Narain, filed a usual declaratory suit challenging the gift. It was dismissed by the trial Court. The collaterals went up in appeal before the District Judge where a compromise was arrived at between the parties, according to which the appeal was allowed and a decree for declaration was granted to the effect that the gift would not

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affect the reversionary rights of the plaintiffs after the death of Narain donor in respect of half of the land gifted and in respect of the other half, the donees would have no power of alienation and it would revert to the plaintiffs on the death or remarriage of the last survivor of the three daughters.

3. Narain died somewhere in 1927-28 and after his death the two plaintiffs in that suit, namely, Tara Singh and Bachitter Singh took possession of half of his property from the daughters. The other half of the property, after the death of Smt. Parmeshwari and Smt. Chinti, came to Smt. Nami. She gifted the same vide registered gift-deed to her grandson Jagir Singh on 28th Aug., 1965. The plaintiffs filed the present suit for declaration to the effect that the gift, in view of the earlier decree, was invalid and not binding on them.

4. The suit was contested by the defendants who controverted the above allegations and inter alia pleaded that Smt. Nami, after coming into force of the Hindu Succession Act, 1956 (hereinafter referred to as the Act), became full owner of the property and was competent to make the gift of the property in favour of Jagir Singh.

5. The learned trial Court held that the gift-deed read with the decree fell within the purview of sub-sec. (2) of S. 14 of the Act and, therefore, Smt. Nami did not become full owner of the property. Consequently, it decreed the suit of the plaintiffs. On appeal by defendants Nos. 1 and 2, the District Judge, Hoshiarpur affirmed the judgment of the trial Court and dismissed the same. They have now come up in second appeal to this Court.

6. The only question that arises for determination is as to whether Smt. Nami becomes full owner of the property by virtue of sub-sec. (1) of S. 14 or remains a limited owner by virtue of sub-sec. (2) of the said section. The facts of the case are not disputed. In the earlier suit by the reversioners, a restriction was put on the right of the daughters regarding alienation and it was further said that the property would revert to the plaintiff-collaterals. All the daughters were married at that time and they had no pre-existing right in the property. Section 14 of the Act reads as follows:—

"14. Property of a female Hindu to be her absolute property.—(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation.—In this sub-section 'property' includes both movable and immovable property acquired by a female Hindu by inheritance or device, or at a partition, or in lieu of maintenance or arrears of maintenance, by gift from any person, whether a relative or not before at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act.

(2) Nothing contained in sub-sec. (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a Civil Court or under an award where the terms of the gift, will or other instrument or the decree, order or, award prescribe a restricted estate in such property."

7. There has been a lot of controversy regarding the interpretation of sub-secs. (1) and (2) *ibid.* Ultimately, the controversy has been laid to rest by a decision of the Supreme Court in *Vaddeboyina Tulasamma v. Vaddeboyina Sesha Reddi*, AIR 1977 SC 1944. In that case, Tulasamma appellant had claimed maintenance out of the joint family properties in the hands of the respondent who was her deceased husband's brother. The claim was decreed in favour of the appellant and in execution of the decree for maintenance, a compromise was arrived at between the parties allotting the properties in question to the appellant for her maintenance and giving her limited interest in such properties. It was held by the Bench that since the properties were acquired by the appellant under the compromise in lieu of satisfaction of her right of maintenance, it was sub-sec. (1) and not sub-sec. (2) of S. 14 of the Act which would be applicable and hence the appellant must be deemed to have become full owner of the properties notwithstanding that the compromise prescribed a limited interest for her in the properties. The following observations of the learned Bench may be read with advantage (at pp. 1947, 1948):—

"Sub-sec. (1) of S. 14 is large in its amplitude and covers every kind of acquisition of property by a female Hindu including acquisition in lieu of maintenance and where such property was possessed by her at the date of commencement of the Act or was subsequently acquired and possessed, she would become the full owner of the property. Sub-sec. (2) is more in the nature of a proviso or exception to sub-sec. (1). It excepts certain kinds of acquisition of property by a

Hindu female from the operation of sub-section (1) and being in the nature of an exception to a provision which is calculated to achieve a social purpose by bringing about change in the social and economic position of woman in Hindu society, it must be construed strictly so as to impinge as little as possible on the broad sweep of the ameliorative provision contained in sub-sec. (1). It cannot be interpreted in a manner which would rob sub-sec. (1) of its efficacy and deprive a Hindu female of the protection sought to be given to her by sub-sec. (1).

Sub-sec. (2) must, therefore, be read in the context of sub-sec. (1) so as to leave as large a scope for operation as possible to sub-sec. (1) and so read, it must be confined to cases where property is acquired by a female Hindu for the first time as a grant without any pre-existing right, under a gift, will, instrument, decree, order or award, the terms of which prescribe a restricted estate in the property. Where, however, property is acquired by a Hindu female at a partition or in lieu of right of maintenance, it is in virtue of a pre-existing right and such an acquisition would not be within the scope and ambit of sub-sec. (2), even if the instrument, decree, order or award allotting the property prescribes a restricted estate in the property."

8. From the above observations, it is clear that if a limited right is given by any instrument, decree, etc. to a female in lieu of her pre-existing right, she becomes full owner of that property under sub-sec. (1), but if she derives her right for the first time by virtue of any instrument, decree, etc. under which restrictions are put on alienation, then sub-s. (2) applies and she does not become full owner of the property under sub-section (1). The said view was followed in *Santhanam Kachapalaya Gurukkal v. V. Subramanya Gurukkal*, AIR 1977 SC 2024 and *Bai Vajia v. Thakorbbhai Chelabhai*, AIR 1979 SC 993.

9. In *Bai Vajia's* case (supra), it was held that the widow's right to maintenance, though not an indefeasible right to property, is undoubtedly a pre-existing right. It is true that a widow's claim for maintenance does not ripen into a full-fledged right to property, but nevertheless it is undoubtedly a right which in certain cases can amount to a right to property where it is charged. It cannot be said that where a property is given to a widow in lieu of maintenance, it is given to her for the first time and not in lieu of a pre-existing right. The claim to maintenance, as also the right to claim property in order to maintain herself, is an in-

herent right conferred by the Hindu Law and, therefore, any property given to her in lieu of maintenance is merely in recognition of the claim or right which the widow possessed from before. It has further been held that it cannot be said that such a right has been conferred on her for the first time by virtue of the document concerned and before the existence of the document the widow had no vestige of a claim or right at all.

10. Under the customary law of the Punjab, the married daughters have got no pre-existing right in the property of their father. Therefore, in the present case, they got the right in the property by virtue of the gift deed. That right was restricted by the decree to their lifetime. Therefore, sub-section (2) of S. 14 of the Act is applicable to the present case and the surviving daughter could not make a gift of the property in favour of her grandson. The heirs of the two plaintiffs in the earlier suit are entitled to succeed to the property after the death of Smt. Nami. In the above view, I am fortified by the observations of the Supreme Court in *G. Appaswami Chettiar v. R. Sarangapani Chettiar*, AIR 1978 SC 1051. In that case, a contention was raised that after the Hindu Succession Act came into force, the life estate which was conferred on the daughter had ripened into an absolute estate under the Act. The learned Bench rejected the contention holding that the life estate which she was entitled to was under the will of her father and, therefore, S. 14 (2) of the Act would be applicable and the life estate would not be enlarged into an absolute estate.

11. For the aforesaid reasons, I do not find any merit in this appeal and dismiss the same with no order as to costs.

Appeal dismissed.

AIR 1982 PUNJAB AND HARYANA 204

B. S. YADAV, J.

Phula Singh, Appellant v. Gram Panchayat, Sheron and another, Respondents.

Regular Second Appeal No. 919 of 1970, D/- 30-10-1981.*

Punjab Gram Panchayat Act (4 of 1953), Ss. 82 (2), 81 (1) (f) and 85 — Punjab Land Revenue Act (17 of 1887), S. 78 — Lease for removing dead animals from street of

*From decree of O. P. Singla, Sr. Sub J., Sangrur, D/- 26-3-1970.

BZ/BZ/A409/82/MVJ

village — Lessee to pay lump sum to Panchayat — Recovery of dues — Dues cannot be recovered as land revenue — Suit for injunction against Panchayat is maintainable.

Where a lease is taken for removing the dead animals from the streets of the village from the Gram Panchayat on payment of a certain sum, any amount due from such lessee is not recoverable as land revenue under the Gram Panchayat Act. A suit for Injunction by the lessee against the Panchayat restraining the latter from recovering the amount is not barred by S. 78 of Land Revenue Act. (Para 16)

The amount due was treated by both the parties as contract money. It was not the case of the Panchayat that it imposed this fee upon the plaintiff for cleaning the streets or sanitation of the village. Otherwise also by no stretch of imagination this amount can be said to be a fee levied under S. 82 (2) of the Act by the Gram Panchayat upon the plaintiff. (Para 8)

Section 81 (1) (f) clearly indicates that the Gram Panchayat is entitled to the sale proceeds of the dead bodies of the animals which are not claimed by any person in accordance with any custom or usage. Thus the contract given to the plaintiff for removal of the dead bodies of the animals from the village amounts to selling of the dead bodies of the animals to the plaintiff. Instead of selling dead body of an animal as and when one dies, the Gram Panchayat sold to the plaintiff against lumpsum the dead bodies of the animals which might die during a year. Therefore, the amount sought to be recovered from the plaintiff is on the basis of a contract entered into by the Gram Panchayat under S. 81 of the Act with the plaintiff. (Para 10)

Section 85 of the Act empowers the Collector to recover any sum due under the Act as if they were arrears of land revenue. There is no provision in the Act that contract money can be recovered as arrears of land revenue. Section 85 of the Act empowers the Collector to recover any sum due under the Act as arrears of land revenue. If the same is not due under the Act then it cannot be recovered as arrears of land revenue and consequently S. 78 of Punjab Land Revenue Act will have no application. (Para 14)

Cases Referred: Chronological Paras

1978 Pun LJ 109: 1978 Rev LR 301 13

AIR 1957 Punj 58: (1956) 58 Pun LR 490 15

AIR 1953 Punj 21 15

AIR 1952 Punj 389 15

AIR 1951 Mad 930 15

AIR 1927 Lah 161: 28 Cri LJ 230 11

S. P. Gupta, for Appellant; S. S. Dhaliwal, for Advocate General (Punjab) and Ashok Bhan for Gram Panchayat, for Respondents.

JUDGMENT:— The brief facts leading to this second appeal by the plaintiff Phula Singh, according to the plaint, are as follows:—

The plaintiff had taken a lease for removing the dead animals from the streets of the village from the defendant No. 1 Gram Panchayat of village Sheron for the year 1962-63 for Rs. 3,800/-. He had paid that amount to the Panchayat. However, defendant No. 1 sent a report to the Block Development Officer giving wrong facts and thereupon a warrant was issued in the name of the plaintiff for the recovery of the above amount as arrears of land revenue. This amount is not recoverable as arrears of land revenue as it does not fall within the definition of Sec. 12 of the Punjab Village Common Lands (Regulation) Act and S. 82 of the Punjab Gram Panchayat Act, 1952 (hereinafter called the Act).

2. Upon the above facts the plaintiff prayed for an injunction restraining the defendants from recovering the above amount from him as arrears of land revenue.

3. The defendants contested the suit and pleaded that the contract for removing the dead bodies of the animals was made with the plaintiff for the year 1962-63 for Rupees 6,300/-, out of which he had paid Rs. 3,100/- leaving a balance of Rs. 3,200/-. Rs. 600/- are due from the plaintiff as balance of the contract money for the year 1961-62 and thus Rs. 3,800/- are due from the plaintiff and this amount can be recovered as arrears of land revenue.

4. Upon the pleadings of the parties, the trial Court framed the following issues:—

1. Whether the plaintiff had the contract of removing dead animals for Rs. 3,800/- for the year 1962-63.

2. Whether the plaintiff had taken contract of removing of dead animals for Rs. 5,000/- for the year 1961-62 and for Rs. 6,300/- for the year 1962-63.

3. If issue No. 2 is proved whether the plaintiff had made the payment of the entire contract for the year 1961-62 and 1962-63 and if not how much sum is due from the plaintiff to the Panchayat-defendant?

4. Whether the sum of Rs. 3,800/- is not recoverable as arrears of land revenue?

5. Relief.

5. Issue No. 1 was decided against the plaintiff as he did not lead any evidence. Under issue No. 2 the learned trial Court held that the plaintiff had taken contract for removing dead animals for Rs. 5,000/- for the year 1961-62 and for Rs. 6,300/- for the year 1962-63. Under issue No. 3 it was held that the contract money for the year 1961-62 has been fully paid by the plaintiff and Rs. 3,200/- are due from him as a balance of the contract money for the year 1962-63. Under issue No. 4 it was held that the amount of Rs. 3,200/- was recoverable from the plaintiff as arrears of land revenue. Consequently, the plaintiff's suit was dismissed but it was remarked that defendant Gram Panchayat was entitled to recover only Rs. 3,200/- as arrears of land revenue through the Block Development Officer.

6. The plaintiff filed an appeal which was heard by the Senior Sub Judge (with enhanced appellate powers), Sangrur. He dismissed the appeal. Feeling aggrieved the plaintiff has come to this Court in second appeal.

7. The only point that was argued before me was whether the defendant-respondent Gram Panchayat was entitled to recover the balance of contract money amounting to Rs. 3,200/- from the plaintiff as arrears of land revenue or not. Both the Courts below had dismissed the suit of the plaintiff on the ground that under S. 82 (2) of the Act, the Gram Panchayat is empowered to levy fee in respect of the items enumerated under that sub-section and the contract money which is sought to be realised from the plaintiff falls under item No. (ii) of the said sub-section. Relevant portion of sub-section (2) of S. 82 of the Act reads as follows :—

82 (2). The following fees may be levied by a Gram Panchayat—

XX XX XX XX

(ii) service fee including fee on cleaning of streets and lighting of streets and sanitation :

XX XX XX XX

8. I am of the view that both the Courts below have fallen in error in holding that the amount sought to be realised from the plaintiff amounts to fee levied by the Gram Panchayat in the discharge of its duties for the cleaning and sanitation of the streets. Both the parties are referring to the amount as contract money. It is not the case of the Panchayat that it imposed this fee upon the plaintiff for cleaning the streets or sanitation

of the village. Otherwise also by no stretch of imagination this amount can be said to be a fee levied under S. 82 (2) of the Act by the Gram Panchayat upon the plaintiff.

9. The learned counsel for the plaintiff has invited my attention to the provisions of Section 81 (1) (f) of the Act. The relevant portion of this section reads :—

“81 (1). The following moneys shall be credited to the Gram Fund—

XX XX XX XX

(f) the sale proceeds of all dust, dirt, dung or refuse collected by the servants of the Panchayats and dead bodies of animals not claimed by any person in accordance with any custom or usage and the trees and other produce of the land vested in the Gram Panchayat.

XX XX XX XX”

10. A reading of this provision clearly indicates that the Gram Panchayat is entitled to the sale proceeds of the dead bodies of the animals which are not claimed by any person in accordance with any custom or usage. Thus the contract given to the plaintiff for removal of the dead bodies of the animals from the village amounts to selling of the dead bodies of the animals to the plaintiff. Instead of selling dead body of an animal as and when one dies, the Gram Panchayat sold to the plaintiff against lump sum the dead bodies of the animals which might die during a year. Therefore, the above amount sought to be recovered from the plaintiff is on the basis of a contract entered into by the Gram Panchayat under Section 81 of the Act with the plaintiff.

11. Section 85 of the Act empowers the Collector to recover any sum due under the Act as if they were arrears of land revenue. The question that arises is whether the present amount due from the plaintiff is due under the Act. I am of the opinion that this amount cannot be said to be due under the Act. I may quote here *Maya Das v. Municipal Committee, Chiniot*, AIR 1927 Lah 161. The facts of that case are that the Municipal Committee, Chiniot, had provided a stand for tumtums within the municipal limits. Every tumtum owner had to pay a certain sum by way of rent or toll for the use of the aforesaid stand. The collection of this toll or rent was leased by the Municipal Committee to Bhagwan Das and Maya Das who were petitioners in that case, for the year 1923-24 in lieu of Rs. 904/-. An agreement by the lessees was duly executed. Some amount remained due from the lessees. The Municipal Committee resolved that the Secretary should apply to the District Magis-

trate under S. 81 of the Punjab Municipal Act for recovery of the arrears due by the lessees. The Secretary of the Committee gave the necessary application and the Magistrate ordered issue of a warrant for realization of the amount and in execution of it some moveable property of the lessees was attached. The lessees filed a revision before the Sessions Judge who referred the case to the High Court. The relevant portion of the reference reads as follows :—

"On the merits I am of opinion that the action of the Magistrate was ultra vires. Under S. 83 of the Punjab Municipal Act, 3 of 1911, it is open to a Municipal Committee to farm out the collection of any octroi, toll or terminal tax for a period not exceeding one year. However, the amount due by the farmer is not amount due under the Act. It is an amount due under a simple lease or contract and only recoverable by law suit."

12. The High Court held that the view taken by the Sessions Judge was correct. The above observations clearly apply to the present case.

13. The learned counsel for the respondent Gram Panchayat argued that the suit for injunction is not maintainable. In support of his contention he has cited Punjab State v. Kirpal Singh, 1978 Pun LJ 109. In that case a certain sum was sought to be recovered from the plaintiff as the balance of the sum payable by him for running a canteen. The Collector had initiated proceedings for the recovery of the outstanding amount as arrears of land revenue. The plaintiff filed a suit for declaration and injunction. The trial Court dismissed the suit but the appellate Court accepted the appeal and decreed the suit. The State of Punjab filed second appeal in this Court which was heard by C. S. Tiwana, J. who observed as follows :—

"The lower appellate Court went in error when it tried to discard the provision of Section 78 of the Punjab Land Revenue Act merely on the ground of a defective notice. It was incumbent on the plaintiff to make the payment under protest and then to institute a suit for the recovery of the amount paid. He could not simply sue for obtaining this kind of injunction against the State that it should be restrained from making any recovery. The appeal is consequently accepted."

14. The above ruling does not apply to the present case. In that case rent due in respect of the leased public premises was be-

ing recovered as arrears of land revenue. The Punjab Public Premises and Land (Eviction and Rent Recovery) Act, 1969, vide Section 10-D has specially provided that if any person refuses to pay the arrears of rent within the time, if any, specified therefor, in the order relating thereto, the Collector shall proceed to recover the amount due as arrears of land revenue. There is no provision in the Act that contract money can be recovered as arrears of land revenue. Section 85 of the Act empowers the Collector to recover any sum due under the Act as arrears of land revenue. If the same is not due under the Act then it cannot be recovered as arrears of land revenue and consequently S. 78 of Punjab Land Revenue Act will have no application.

15. I may also quote here the Custodian General of Evacuee Property, New Delhi v. S. Harnam Singh, (1956) 58 Pun LR 490 : (AIR 1957 Punj 58). The facts of that case are that towards the end of 1947, the Custodian of Evacuee Property invited tenders for the annual lease of a flour mill owned by a Muslim evacuee. One Harnam Singh gave a tender and it was accepted by the Custodian and the possession was delivered to the lessee. However, in view of certain instructions which were later on received from the higher authorities, the tender was rejected subsequently and the mill was sealed by the officers of the Rehabilitation Department. The Assistant Collector, Ambala, issued a writ of demand under S. 68 of the Land Revenue Act requiring the lessee to pay a certain sum on account of arrears of rent of the factory in question. The lessee appealed and the Additional Custodian held that although the petitioner was not a lessee of the premises and was not liable to pay rent therefor yet he was liable to pay compensation for use and occupation of the property as he had actually worked the factory. He also fixed a certain amount, after report, as due from the lessee for use and occupation. The lessee filed the revision petition to the Custodian General which was dismissed. Thereupon the lessee filed a writ under Article 226 of the Constitution of India. The writ was accepted. Letters Patent Appeal was preferred and one of the arguments on behalf of the State raised was that if the petitioner questioned his liability to pay the amount demanded of him, he should follow the procedure prescribed by S. 78 of the Land Revenue Act and make payment under protest and later bring a suit in a Civil Court for the recovery of the amount so paid. The Division Bench who heard the

Letters Patent Appeal observed as under (at pp. 59, 60 of AIR):—

"There can be no doubt in regard to the correctness of the submission put forward by the petitioner. It is a fundamental principle of law that every person who receives an injury is entitled to claim the protection of the Courts. Broadly speaking, the Courts alone have the power to decide justiciable controversies both on questions of fact as well as of law; they alone can protect the rights and interests of individual citizens and they alone have power to hear, determine and to enforce. Indeed S. 9 of Civil P. C. provides that the Courts shall have jurisdiction to try all suits of a civil nature excepting suits in which their cognizance is either expressly or impliedly barred. The Administration of Evacuee Property Act does not appear to bar the jurisdiction of ordinary Courts or to transfer the determination of rights and liabilities from ordinary Courts to executive officers. It is not a fiscal measure like the Income-tax Act or the Land Revenue Act in which the Income-tax Officer or the Revenue Officer is charged with the duty of producing revenue for the State. It was designed primarily to provide for the preservation, management and control of evacuee property. The Legislature, could never have intended under a general enactment like the present, to deprive the Courts of the jurisdiction which they possess in such cases and to empower the Custodian to adjudicate on the controversies which arise between him and the members of the public on disputed questions about the amount of compensation which should be recovered for use and occupation of property. The Custodian has no power to determine disputed questions of title (*M. B. Namazi v. Dy. Custodian of Evacuee Property*) (AIR 1951 Mad 930) or to determine whether a debt is barred by time or not (*F. Sahib Dayal Bakshi Ram v. Asstt. Custodian of Evacuee Property, Amritsar*) (AIR 1952 Punj 389) or to recover any debt under S. 48 when the debtor, declares that the debt is barred by time (*Firm Parit Shah Sadashiv v. Assistant Custodian of Evacuee Property, Amritsar*) (AIR 1953 Punj 21).

As the amount which is being demanded from the petitioner has not been admitted or proved to be due from him and as the amount is not due under the provisions of the Act, I am of the opinion that it was not within the power of the Custodian to direct the Assistant Collector, Ambala, to issue a writ of demand."

16. I have already held above that the amount is not due from the plaintiff under the Act and, therefore, it cannot be recovered as arrears of land revenue and the suit for injunction is not barred by S. 78 of the Punjab Land Revenue Act.

17. Consequently, I accept the present appeal and set aside the judgments and decrees of the Courts below and decree the suit of the plaintiff for permanent injunction, as prayed for. The Gram Panchayat however will be at liberty to recover the amount by due process of law. The plaintiff-appellant will be entitled to the costs throughout from the defendant-respondent No. 1 Gram Panchayat.

Appeal allowed.

AIR 1982 PUNJAB AND HARYANA 200

D. S. TEWATIA, J.

Smt. Harbhagan Kaur, Appellant v. Lt. Col. Bhagwant Singh, Respondent.

F. A. F. O. No. 2-M of 1981, D/- 10-9 1981.*

Hindu Marriage Act (25 of 1955), Section 13 (1A) (ii) — Decree for restitution of conjugal rights — Recording of satisfaction of decree on basis of statements of parties in Court that they were willing to live together does not tantamount to restitution of conjugal rights — There must be resumption of conjugal duties in fact.

To show that there has been restitution of conjugal rights there should be physical living together of the parties in the place that they call matrimonial home. That, too, not under force or duress but as a result of willingness on the part of both the sides. Thus, if the parties in a given case agreed in Court that they were prepared to live together and the Court recorded satisfaction of the decree, but evidence is forthcoming on the record that in fact the parties did not live even for a moment together either before the satisfaction of the decree was recorded or thereafter till the filing of the petition for divorce, then in such a case even if there has been an order regarding satisfaction of decree on the basis of statements of the parties in Court to the effect that they were prepared to live together that would not tantamount to restitution of conjugal rights. It would, however be a different matter if the statements were that

*From decree of Dist. Judge, Ludhiana, D/- 10-9-1980.

KY/LY/F218/81/HR/RSK

they had already resumed cohabitation and were living together as husband and wife, as in that case any party going back on that statement would be estopped from so doing unless that party was to prove that the statement that he or she had made in Court was made under coercion and in fact the statement made was a false statement. AIR 1980 Punj & Har 325 and AIR 1966 Punj 506, Disting. (Para 12)

Cases Referred: Chronological Paras
AIR 1980 Punj & Har 325: 1980 Cur LJ (Civ) 240 9, 10

AIR 1977 Punj & Har 167 (FB) 9

AIR 1966 Punj 506 6, 9, 10

Jijay Jhanji, for Appellant; H. L. Sarin, Sr. Advocate (R. L. Sarin and M. M. Singh Bedi, Advocates with him), for Respondent.

JUDGMENT:— This appeal arises out of a petition for divorce under Cl. (ii) of sub-section (1-A) of S. 13 of the Hindu Marriage Act (hereinafter referred to as 'the Act'). The matrimonial Court had granted the decree of divorce and dissolved the marriage.

2. The short point that has been canvassed is that the requirement of sub-cl. (ii) of sub-section (1-A) of S. 13 of the Act, had not been complied with. So the question is as to whether there had been no restitution of conjugal rights between the parties in compliance with the decree of restitution of conjugal rights obtained by the respondent-husband (hereinafter referred to as 'the husband').

3. The proposition abovementioned is to be judged against the backdrop of the facts which can be stated thus:

4. The parties were joined in marriage bond on May 10, 1972. Sometime in Dec. 1975, the husband moved a petition u/s. 9 of the Act against the wife for restitution of conjugal rights. On Aug. 20, 1977 a decree in favour of husband and against the wife for restitution of conjugal rights was granted. Thereafter both the parties moved applications on Oct. 24, 1977 for execution of the decree. When the matter was taken up for consideration, both the parties made statements before the Court to the effect that they had decided to live together. On the basis of their statements on Oct. 18, 1978, the Executing Court made an order Ext. R-3, to the effect that the application filed by the parties stand fully satisfied in view of the statements made by the parties and their counsel before the Court. On that very day, i.e., Oct. 18, 1978, however, both the parties moved petitions before the Executing

Court blaming each other for not agreeing to live together. The Court on that very day fixed Nov. 18, 1978 for consideration of these applications and necessary orders thereon. On Nov. 18, 1978, the Executive Court vide order Ext. A-6, dismissed the applications observing that the execution application had already been consigned to the record room as having been satisfied, therefore, these applications were not maintainable. The relevant provision of Cl. (ii) of sub-section (1-A) of S. 13 of the Act is in the following terms:—

"That there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties."

5. The position that emerges from the facts recapitulated above is that on Oct. 18, 1978, both husband and wife showed willingness to live together and on their statement, their execution applications were dismissed as having been fully satisfied. On that very day two fresh applications were moved blaming each other for not abiding by the statements made in Court. The question that would arise is as to whether from the mere statement of the parties in Court within the stipulated period that they were prepared to live together, the restitution of conjugal rights between them in terms of Cl. (ii) of sub-section (1-A) of S. 13 would be presumed, thus disentitling them to maintain thereafter a petition under the said sub-clause (ii).

6. Mr. Jhanji, learned counsel for the appellant made a reference to M. P. Shreevastava v. Mrs. Veena, AIR 1966 Punj 506, in which it was held that the party against whom a decree of restitution of conjugal rights is passed can make an application to the Executing Court showing willingness to comply with the decree and that the executing Court, on the application of that spouse could order that there had been satisfaction of the decree.

7. Mr. R. L. Sarin, learned counsel for the husband on the other hand has canvassed that the executing Court has no power to enforce and execute a decree of restitution of conjugal rights by physically handing over the spouse against whom the decree is passed to the spouse in whose favour the said decree is passed. The executing Court could only resort to symbolic execution of the decree by attaching the property of the spouse in question and if within the period

stipulated, as prescribed by O. 21, R. 32 of the Civil P. C., that spouse in response to the decree does not assume his or her conjugal duties then to sell the attached property and from the proceedings thereof make the payment to the other party to meet the cost of the execution application and to make over the balance to the party whose property it was.

8. According to the learned counsel a matrimonial decree is not satisfied till such time the parties resume their conjugal duties. Once the parties resume their conjugal duties, then a formal order of the executing Court is not necessary to that effect. Thus if the parties have not resumed their conjugal duties despite having shown willingness to do so in Court, then the satisfaction recorded by the Court of the decree on the basis of their willingness to resume conjugal duties would be of no consequence if in fact the parties had not resumed such duties, i.e., they do not start living together as husband and wife.

9. The learned counsel made a reference to a single Bench decision of this Court in *Santosh Kumari v. Mohan Lal*, 1980 Cur LJ (Civ) 240 : (AIR 1980 Punj & Har 325) wherein M. P. Shreevastava's case (AIR 1966 Punj 506) (supra) relied upon on behalf of the appellant-wife had been considered and distinguished. Learned Judge after taking note of the decision of Full Bench of this Court reported in *Smt. Bimla Devi v. Singh Raj*, AIR 1977 Punj & Har 167, inter alia laid down two meaningful propositions, one that a decree for restitution of conjugal rights can be executed symbolically under O. 21, R. 32 of the C. P. C. and secondly that simply because a spouse refused to resume cohabitation in spite of execution application filed by the other spouse, it cannot be said that the decree for restitution of conjugal rights stood satisfied and the spouse refusing the resumption of cohabitation was not entitled to divorce.

10. However, neither the ratio of the two propositions laid down in *Santosh Kumari's* case (supra) by the learned single Judge, nor the ratio of *M. P. Shreevastava's* case squarely cover proposition that arises for determination in the present case, whether recording of satisfaction of the decree on the basis of the statements of the parties in Court be deemed to be restitution of conjugal rights in terms of Cl. (ii) of sub-sec. (1-A) of S. 13 of the Act. The matter is truly *res integra*.

11. In my opinion in the peculiar facts of the present case, where the very next

moment the parties appear to have changed their mind to live together and moved application before the Court blaming each other, restitution of conjugal rights cannot be inferred from the order of the executing Court recording satisfaction of the decree on the statement of the parties. I am also further of the view that what a party is to show to be entitled to a decree of divorce in terms of Cl. (ii) of sub-section (1-A) of Section 13 is that there has been no restitution of conjugal rights after the passing of the decree of the restitution of conjugal rights, and the other spouse is to satisfy the Court, if it is to succeed in denying the decree of divorce to the petitioning spouse that there has been restitution of conjugal rights after the passing of the decree of the conjugal rights and before the filing of the petition for divorce.

12. Restitution of conjugal rights does not tantamount to reconciliation between the parties. To show that there has been restitution of conjugal rights there should be physical living together of the parties in the place that they call matrimonial home. That, too, not under force or duress but as a result of willingness on the part of both the sides. For instance the parties in a given case agreed in Court that they were prepared to live together and the Court recorded satisfaction of the decree, but evidence is forthcoming on the record that in fact the parties did not live even for a moment together either before the satisfaction of the decree was recorded or thereafter till the filing of the petition for divorce, then in such a case even if there has been an order regarding satisfaction of decree on the basis of statements of the parties in Court to the effect that they were prepared to live together that would not tantamount to restitution of conjugal rights. It would, however, be a different matter if the statements were that they had already resumed cohabitation and were living together as husband and wife, as in that case any party going back on that statement would be estopped from so doing unless that party was to prove that the statement that he or she had made in Court was made under coercion and in fact the statement made was a false statement.

13. In the present case admittedly there had been no restitution of conjugal rights in fact. The appellant-wife has sought to avoid the granting of decree of divorce to the husband merely on the strength of the order of the executing Court passed on the basis of their statements which are in the following terms :—

"Statement of the decree-holder (Major Bhagwant Singh — husband).

Stated that I am prepared to keep the applicant with me in village Chachrari.

Statement of Harbhajan Kaur — Respondent.

I state on oath that I am prepared to go with husband-decree-holder right from the Court."

14. On the basis of the above statements the order of the trial Court is in the following terms:—

"In view of the statements made by the parties and their counsel the present execution stands dismissed as fully satisfied."

15. As already observed such an order recording satisfaction by the executing Court is not enough to avoid the passing of the decree of divorce.

16. For the reasons aforementioned I find no merit in this appeal and dismiss the same with no orders as to costs.

Appeal dismissed.

AIR 1982 PUNJAB AND HARYANA 211

FULL BENCH

S. S. SANDHAWALIA, C. J., D. S. TEWATIA AND S. P. GOYAL, JJ.*

Mam Raj, Petitioner v. State of Haryana and others, Respondents.

Civil Writ Petn. No. 2332 of 1981, D/- 27-1-1982.

Punjab Co-operative Societies Act (25 of 1961), S. 55 (1) (b) — Dispute between Co-operative Society and employee, agent or member of another Co-operative Society — Falls within ambit of arbitration under S. 55 (1) (b) — Expression "persons claiming through" in cl. (b) must be given wide meaning — It does not include only successors-in-interest, heirs or legal representatives of members or past members. C.W.P. No. 414 of 1981, D/- 23-3-1981 (Punj), Overruled.

Per Majority:— A dispute between a Co-operative Society on the one hand and the employee, agent or member of another Co-operative

*In this case, the Judges of the Full Bench differ in their views. The majority view is taken by S. S. Sandhawalia, C. J. and D. S. Tewatia, J. and the minority view by S. P. Goyal, J.

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CZ/CZ/A930/82/GDR

Society would be within the ambit of the arbitration under S. 55 (1) (b) where the claim made is rooted through a person or a Society which in turn is a member of the claimant-Society. (Para 25)

To be within the ambit of its provisions, two pre-conditions have to be satisfied. Firstly, the disputes which are so referable must be one which touches the constitution, management or the business of a co-operative society. Once the pre-condition of the nature of dispute is satisfied, what is to be next looked for are the parties thereto. It is only if they come within the wide ranging ambit of the four clauses (which seem to have been framed deliberately to cast a wide net) that a dispute would be referable to arbitration by the Registrar.

(Paras 6, 7)

A glance at cls. (a), (b) and (c) would indicate that broadly these visualise the dispute inter se betwixt the society and its members, deceased members, officers, agents or employees of the society with a designed extension to non-members who may be claiming through a member, past member, or a deceased member. It is manifest that herein the legislature has deliberately widened the scope to bring in non-members as well if they satisfy the necessary condition. (Para 8)

In construing the provisions of S. 55 of the Act, in general, and of cl. (b) of subsec. (1) thereof, in particular, the larger purpose of the enactment cannot be lost sight of. Therefore a liberal construction should be placed on the language of S. 55 both as regards the nature of the dispute and the number of the parties thereto in order to advance the larger purpose of this statute as against the literal or constricted interpretation thereof. Thus the phrase "claiming through a member, past member or deceased member" as employed in S. 55 (1) (b), would not include only successors-in-interest, heirs or legal representatives as such artificial and constricted interpretation to the phrase would run counter to the larger purpose of the statute. C.W.P. No. 414 of 1981, D/- 23-3-1981 (Punj), Overruled. AIR 1975 Guj 18 and 1978 Pun LJ 46, Approved; 1976 Pun LJ 522, Distinguished.

(Paras 13, 14)

Per S. P. Goyal, J. (Contra): The words "person claiming through a member" in cl. (b) of S. 55 (1) mean a person who claims right or title through such a member. S. 55 of the Act does not create, declare or recognize any rights or liabilities of the parties concerned and instead only

provides an alternate forum for deciding the disputes between them. The rights and liabilities giving rise to the dispute must have their foundations on the common law of the land or the provisions of the Act. (Para 32)

Cases Referred: Chronological Paras

(1981) C.W.P. No. 414 of 1981, D/- 23-3-	
1981 (Punj & Har), Inderjit Singh v. State of Haryana	22
1978 Pun LJ 46: 1978 Rev LR 228 (1)	24
1976 Pun LJ 522: 1976 SLWR 585	23, 24
AIR 1975 Guj 18	20, 34
(1971) 12 Guj LR 355	11
AIR 1971 Punj & Har 423 (FB)	14
AIR 1969 SC 1320	19, 20, 31, 34
AIR 1943 Bom 341	6, 12
AIR 1938 Cal 327	6

G. S. Sandhu, for Petitioner; Prem Singh with C. R. Dahiya, for Respondents.

S. S. SANDHAWALIA, C. J. (Majority view):— Whether a dispute between a Co-operative Society on the one hand, and the employee, agent, or member, of another Co-operative Society (claiming through a member), is within the ambit of arbitration under S. 55 (1) (b) of the Punjab Co-operative Societies Act, 1961—is the significant question which has necessitated the hearing of this writ petition by the Full Bench. Also at issue is some discordance of precedent within this Court though at the motion stage.

2. Mam Raj petitioner was working as the salesman of the Imbli Co-operative Agriculture Service Society Ltd. which used to purchase fertilizers from the Jagadhri Co-operative Marketing-cum-Processing Society Ltd., Jagadhri (hereinafter called the 'Marketing Society') on a consignment basis. The commission earned by the Imbli Co-operative Agriculture Service Society Ltd. (hereinafter called the Imbli Society), on the sale of such fertilizers payable by the Marketing society was shared equally by the petitioner and the Imbli Society. A dispute arose between the Marketing Society and the Imbli Society inter alia with regard to the payment of the commission on fertilizers and the matter was referred to the Assistant Registrar, Co-operative Societies, Yamunanagar for arbitration under S. 55 of the Punjab Co-operative Societies Act, 1961 (hereinafter called 'the Act'). The arbitrator rendered an Award therein, which, however, was later quashed by the Civil Court. Thereafter, the Marketing Society sought another

arbitration claiming Rs. 16,721 from the petitioner. The arbitrator appointed in these proceedings gave his Award, Annexure P/1, against the petitioner as also the Mustafabad Farmers Co-operative Credit and Service Society Ltd., jointly and severally, with the further direction that the amount be recovered first from the petitioner and if it cannot be so done, then it should be recovered from the Mustafabad Farmers Co-operative Credit and Service Society Ltd. The petitioner appealed against the said Award and inter alia took up the stand that no arbitration was maintainable between the Marketing Society on the one hand and the petitioner on the other, because he was not a member of the said Society. The Joint Secretary to the Government, however, dismissed the petitioner's appeal vide annexure P/3. The present writ petition has been preferred against the said Award and was pressed primarily on the ground that no valid reference to the arbitration could be made as against the petitioner. At the motion stage, it was noticed that there were conflicting Division Bench decisions on the point and the writ petition was, therefore, admitted to a hearing by the Full Bench.

3. As before the Motion Bench, so before us, the primary and indeed the solitary challenge levelled on behalf of the petitioner is against the validity of the reference to the arbitration itself. It was contended that the petitioner not being a member of the Marketing Society, no valid reference to arbitration under Section 55 of the Act could be made against him. Consequently, the proceedings before the arbitrator and the appellate forum were vitiated qua the petitioner.

4. To appreciate the aforesaid contention, it is best to clear the factual matrix first. It is not disputed that the Imbli Society stands amalgamated with respondent No. 4, the Mustafabad Farmers Co-operative Credit and Service Society Ltd. (hereinafter called the 'Mustafabad Society'). Equally, it is the admitted position that the Imbli Society and the Mustafabad Society were themselves the members of respondent No. 3 the Marketing Society. The firm stand of the respondent further is that the petitioner acted as a partner of the Imbli Society in so far as the sharing of the profits of commission etc. on the sale of fertilizers betwixt him and the Imbli Society was concerned. The finding of the appellate authority vide annexure P/3 also is that the petitioner was acting on behalf of

the Imbli Society and as a partner, thereof.

5. Before proceeding further it is equally apt to recall that under S. 30 of the Act, every Society registered thereunder is a body corporate with perpetual succession. Consequently, it is clothed with a legal personality of its own. On settled principles, therefore, a Co-operative Society is a legal person having its individual corporate existence separate and distinct from its individual members whether they be natural persons or other corporate bodies. This distinction betwixt the legal personality of the Society and its constituent members, has always to be kept in mind.

5-A. Inevitably, the controversy here revolves around the language of S. 55 of the Act and in particular sub-sec. (1) thereof which may be read at the very outset:—

"55. Disputes which may be referred to arbitrator:

(1) Notwithstanding anything contained in any law for the time being in force, if any dispute touching the constitution, management or the business of a co-operative society arises—

(a) among members, past members and person claiming through a member, past members and deceased members, or

(b) between a member, past member or person claiming through a member, past member or deceased member and the society, its committee or any officer, agent or employee of the society or liquidator, past or present, or

(c) between the society or its committee and any past committee, any officer, agent or employee, or any past officer, past agent or past employee or the nominee, heirs or legal representatives of any deceased Officer, deceased agent or deceased employee of the society, or

(d) between the society and any other co-operative society, between a society and liquidator of another society or between the liquidator of one society and the liquidator of another society, such dispute shall be referred to the Registrar for decision and no court shall have jurisdiction to entertain any suit or other proceeding in respect of such dispute.

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6. Now a larger conspectus of the aforesaid provisions would indicate that to be within the ambit of its provisions, two pre-conditions have to be satisfied. Firstly, with regard to the nature of the dispute. It is not any and every dispute

which can be the subject-matter of a reference under the statute. The circumscribing of the disputes which are so referable is spelled out to be one which touches the constitution, management or the business of a co-operative society. This aspect lays down the qualitative condition of the nature of the dispute. In passing, it has to be noticed that the word 'dispute' as used in the statute, is apparently a wide ranging one. It does not necessarily visualise a rightful or legally valid dispute as noticed in *Dacca Co-operative Industrial Union Ltd. v. Dacca Co-operative Sankhya Silpa Samity Ltd.*, AIR 1938 Cal 327, in the following terms:

"Equally untenable is the view that because the claim of the Union was a bad one or even a false one, there was no dispute. There would in our judgment be a dispute, so long as a claim is asserted by one party and denied by the other, be the claim a false or a true one, or whether it ultimately turns out to be false or true....."

Equally the phrase 'touching the business of society' has been interpreted by Chagla, J. (as he then was) in *G.I.P. Railway Employees' Co-operative Bank Ltd. v. Bhikhaji Merwanji Karanjia*, AIR 1943 Bom 341. In view of this, there is hardly any doubt that in the present case, the nature of the dispute is well within the four corners of S. 55 (1) of the Act.

7. Clauses (a), (b), (c) and (d) of sub-sec. (1) of S. 55 of the Act then deal with the parties to such a dispute. Once the pre-condition of the nature of dispute is satisfied, what is to be next looked for are the parties thereto. It is only if they come within the wide ranging ambit of the four clauses (which seem to have been framed deliberately to cast a wide net) that a dispute would be referable to arbitration by the Registrar.

8. Again a glance at cls. (a), (b) and (c) would indicate that broadly these visualise the dispute inter se betwixt the society and its members, past members, deceased members, officers, agents or employees of the society with a designed extension to non-members who may be claiming through a member, past member, or a deceased member. It is manifest that herein the legislature has deliberately widened the scope to bring in non-members as well if they satisfy the necessary condition. The enumeration of the parties mentioned in these three clauses would show that herein what is envisaged by the statute are (to use a term of art) "intra-society dispute."

9. On the other hand cl. (d) visualises parties which are inter-societies. It seems to provide for disputes between two independent co-operative societies or between one society and the liquidator of another and even betwixt the liquidators of both such societies.

10. Now the firm stand on behalf of the respondents has been on the language of cl. (b) and specifically on the phrase 'person claiming through a member, past member or deceased member'. Mr. Prem Singh, their learned counsel contended that the petitioner came squarely within the ambit of this terminology.

11. In construing the provisions of S. 55 of the Act, in general, and of cl. (b) of sub-sec. (1) thereof, in particular, the larger purpose of the enactment cannot be lost sight of. One cannot in this context do better than to reproduce the oft-quoted words of Chief Justice Bhagwati (as he then was) speaking for the Division Bench in *Rasiklal v. Kailasgauri*, (1971) 12 Guj LR 355:—

"A co-operative society is a form of organisation in which persons voluntarily come together for promotion of their economic interests in accordance with co-operative principles. 'Co-operation' as pointed out by C. R. Fay, is 'an association for the purpose of joint trading among the weak and conducted always in an unselfish spirit on such terms that all who are prepared to assume the duties of membership may share its rewards in proportion to the degree in which they make use of their association.' It is essentially an association of persons of limited means and, as indicated in the preamble to the Bombay Co-operative Societies Act, 1925, its object is inter alia 'promotion of thrift, self-help and mutual aid among agriculturists and other persons with common economic needs.' It is based on the principle of equality and avoids selfish exclusiveness by recognising that its membership should be open to all who want to join it. The voting power in a co-operative form of organisation is not in proportion to the share-holding as in the case of a joint-stock company but each member is given one vote so as to ensure equal participation in management by all, irrespective of their wealth. Co-operation also seeks to eliminate the middle man by bringing producers and consumers closer to each other through the process of integration and aims at preventing the exploitation of the weaker sections of the community by the strong-

er ones. It stands for distributive justice to all who contribute to the earning of wealth including the consumers. It is a form of organisation which avoids the evils of capitalism and yet assures the human dignity of the individual. That is why it has been accorded a preferred place in our socio-economic set up. The Legislature enacting a law in regard to it might, therefore, well consider it desirable that a special machinery should be provided for adjudication of disputes touching the constitution, management or business of a co-operative society which would be much simpler and speedier and much less expensive than the ordinary remedy of adjudication by a Civil Court. It was with that end in view that the Legislature enacted the impugned sections. The object of providing the special machinery by the impugned sections is to bring about speedy settlement of disputes, to lessen cost of litigation and to secure dispensation of justice unhampered by technical rules of procedure so that Co-operative Societies do not get involved in long drawn out protracted litigation which would consume their time, energy and resources. This object having regard to the nature and character of the co-operative form of organisation, the principles on which it is founded and the objects it is intended to serve, would fully justify application of the special procedure to resolution of disputes touching the constitution, management or business of a society."

Adverting particularly to S. 55 of the Act there is no manner of doubt that the underlying object of the legislature herein is that once a dispute touches the constitution, management or the business of a Co-operative Society then such a co-operative society, its members, past members and persons claiming through them as also the officers, agents or employees, past employees and liquidators including therein even their nominees, heirs or legal representatives etc. (without being exhaustive) should be protected and saved from the long drawn out and tortious procedure of ordinary civil litigation for the purpose of resolving such a dispute. It is to achieve this object that the speedier and inexpensive remedy of a statutory arbitration is provided to the exclusion of all other remedies. It calls for repetition that the concluding portion of sub-sec. (1) of S. 55 in the clearest terms provides that in such a situation no Court shall have jurisdiction to entertain any suit or other

proceedings in respect of such dispute. To further reiterate this position, Sec. 82 (c) of the Act provides that no civil or revenue Court shall have any jurisdiction in respect of any dispute required under S. 55 to be referred to the Registrar or any matter in which proceedings under S. 55-A have been initiated. It would be thus clear that the whole thrust of the statutory provision herein is to bring the specified disputes qua the parties enumerated in S. 55 within the realm of statutory arbitration alone to the entire exclusion of the Civil and revenue Courts.

12. Again a broad look at the frame of the whole of S. 55 exhibits the legislature's concern to extend this arena of protection and the exclusion of the civil and revenue Courts both as regards the nature of the dispute as also the parties thereto. As to the former it is apt to recall the following observations of Chagla J. (as he then was) in *G. I. P. Railway Employees Co-operative Bank Ltd. v. Bhikhaji Merwarji Karanjia* AIR 1943 Bom 341 —

"It is not right to give a restricted meaning to the words 'touching the business of a society' used by the Legislature in S. 54 of the Act. The word 'business' is a very wide term and certainly it is not synonymous with the objects of a society. The expression 'touching the business of a society' would mean affecting the business of a society or relating to the business of a society. Although, it is not one of the objects of the company to employ or dismiss servants, it is something which it does in the ordinary course of its business. And whatever is done in the ordinary course of business certainly relates to or affects the business."

As regards the parties, the legislature has designedly brought within its ambit members, past members, deceased members and persons claiming through them as also the officers, agents, employees, past employees and their nominees, heirs or legal representatives etc. Therefore, it seems apt that a liberal construction should be placed on the language of Sections 55 both as regards the nature of the dispute and the number of the parties thereto in order to advance the larger purpose of this statute as against the literal or constricted interpretation thereof.

13. The core of the matter herein is the amplitude of the phrase 'claiming through a member, past member or deceased member' as employed in S. 55 (1) (b). It is obvious that so far as the disputes

betwixt a society and its past members are concerned they are plainly within the net of statutory arbitration. The legislature, however, deliberately extended the same when it employed the aforesaid phrase to bring non-members also within its ambit. The qualification or limitation expressly placed is that such a non-member must be either claiming through a member, past member or deceased member and as a necessary corollary be liable through them because if one claims through someone the inevitable legal consequences are that he would be equally answerable through him.

14. It was sought to be contended on behalf of the petitioner that the phrase 'claiming through a member, past member or deceased member' should be confined only to cases of devolution of interest and consequently would include only successors-in-interest, heirs or legal representatives. I am unable to give any such artificial and constricted interpretation to the phrase which, as already noticed, would run counter to the larger purpose of the statute. Reference in this context may be made to cl. (c) of subsec. (1) of S. 55. This in terms talks of nominees, heirs or legal representatives. The legislature was thus acutely conscious of this phraseology and if it was intended that the claim must be through only a nominee, heir or legal representative etc., then surely the same terminology would have been employed in Cl. (b) as well. These terms are well-known terms of art and the legislature has deliberately chosen to use the words 'claim' and 'through' and, therefore, couched it in language of wide general amplitude. I see no rationale in cutting down the plain and ordinary meaning of those words to the far constricted and limited concepts of a devolution of interest or successors-in-interest and legal representatives etc. of such a member or past member. In an analogous context the true meaning to be attached to the word 'through' fell for consideration by a Bench of five Judges in *Karta Ram Mansa Ram v. Om Prakash Hira Ram*, AIR 1971 Punj & Har 423. What fell for construction there was S. 15 (2) (a) of the Punjab Pre-emption Act. Therein it was held as follows (at p. 425) :—

"It is pertinent to mention that the word used in S. 15 (2) (a) of the Pre-emption Act is 'through' which means — 'by means of', 'on account of', 'by the instrumentality of', 'agency', by reason

of etc. This word 'through' is, therefore, of wide amplitude."

In the light of the aforesaid authoritative enunciation I see no reason to construe the word 'through' used in S. 55 of the Act in a constricted manner or impose any artificial limitation on a word of wide amplitude.

15. The actual application of the phrase 'touches the constitution, management or the business of a Co-operative Society' to the facts of the present case is equally instructive. Herein there is no dispute that the transaction giving rise to the dispute was betwixt respondent No. 3, the Jagadhri Co-operative Marketing Society and the Imbli Society which was a member of this Marketing Society acting in its capacity as a member. The petitioner on his own showing as the salesman of the Imbli Society was its agent or partner with regard to the sales and commission payable on fertilizers. The Imbli Society has been amalgamated with the Mustafabad Farmers Co-operative Credit and Service Society, respondent No. 4. There can thus be no doubt that the dispute betwixt respondents Nos. 3 and 4 plainly (comes) within S. 55 (1) (b) since it arises between a society and its member in the capacity of a member. Once that is so, an integral and indivisible off-shoot of this dispute is the claim of the Marketing Society against the petitioner in his capacity as the agent or partner of respondent No. 4 and, therefore, it is a claim through a member. It seems but logical that once the statutory reference is competent betwixt the Marketing Society and the Mustafabad Society then the connected claims like commission or other liability rooted through the member society should also be within the ambit of Cl. (b). Holding otherwise would in effect be rendering the purpose and the provision of Cl. (b) wholly nugatory. In my view limiting it to the strait-jacket of merely a case of devolution-in-interest alone like those of heirs or legal representatives etc. seems to be uncalled for.

16. The matter can be viewed from another angle if the situation is reversed. It is the petitioner's own case that he was sharing the commission on the fertiliser with the Imbli Society. Supposing such commission was not paid, the Imbli Society through the Mustafabad Society would be plainly entitled to claim an arbitration with regard to the dispute over the payment of commission. The petitioner would be equally a claimant

and a sharer in the commission. Can it be reasonably said that in spite of the wide language of Cl. (b) the petitioner would either be barred from making such a claim through the Mustafabad Society or joining it in a reference to arbitration for this purpose? The answer seems to be plain that he would be so entitled.

17. Equally instructive it is to view the matter in the light of the hallowed principle that the law abhors the multiplicity of proceedings for the same cause of action. Herein it cannot be disputed that a reference to arbitration betwixt respondents Nos. 3 and 4 two Co-operative Societies who are members inter se, would be patently maintainable and indeed any suit for the said claim would be barred. On the argument of the learned counsel for the petitioner if the Marketing Society, respondent No. 3 wishes to make a claim against the petitioner as well with regard to the commission jointly payable to him and the Imbli Society it must resort to a civil suit so far as the claim against the petitioner is concerned and to statutory reference against the Imbli Society because admittedly civil jurisdiction would be barred in this context. This obviously involves parallel proceedings where the dispute is not only intimately connected but is both indivisible and unseverable. Again it could not be disputed before us that if respondent No. 4 the Mustafabad Society has to agitate any claim or dispute with regard to the payment of the same commission against the petitioner it can certainly claim an arbitration under S. 55 of the Act. For the same dispute, therefore, two distinct references to arbitration would be open, namely, by respondent No. 3 against respondent No. 4 and by respondent No. 4 against the petitioner. Such a dispute can be resolved in a single arbitration on a plain interpretation of the phrase "Claiming through a member, past member or deceased member". There appears to be no reason why by giving a constricted interpretation thereto a multiplicity of arbitrations and civil suits should be compelled.

18. On the stand taken on behalf of the petitioner for the resolution of the same dispute, three separate parallel proceedings would have to be resorted to. Instead of a single arbitration resolving the whole dispute there would have to be (1) arbitration betwixt respondent No. 3 and respondent No. 4; and (2) arbi-

tration betwixt respondent No. 4 and 3, the petitioner and for the purposes of the claim of the Marketing Society (respondent No. 3) against the petitioner a separate suit must be filed in a civil Court. On the larger canon of construction also where an interpretation is likely to lead to such anomalous results and plainly works out to be a public mischief the same should be avoided and a multiplicity of proceedings mercifully avoided.

19. Having examined the matter primarily on principle and the provisions of the statute it is nevertheless inevitable to advert to precedent as well. In *Deccan Merchants Co-operative Bank Ltd. v. Dalichand Jugraj Jain*, AIR 1969 SC 1320 their Lordships were construing the somewhat analogous provision of the Maharashtra Co-operative Societies Act 1961. On the particular facts of the case they came to the conclusion that the lease which was the subject-matter of the dispute had been executed by the original owner not in his capacity as a member but as a mortgagor in possession. Therefore, the transaction having not been conducted by a member in his capacity as a member *stricto sensu* the whole dispute did not come within the ambit of the statutory reference to arbitration. However in an obvious reference to claims through members where the transaction would be within the ambit of reference it was categorically observed as follows (at pp. 1326, 1327):—

“* * * It seems to us that before a person can be said to claim through a member, the claim should arise through a transaction or dealing with which the member entered into with the society as a member. If a member entered into a transaction with the society not as a member but as a stranger, then he must be covered, if at all, by the provisions of S. 91 (1) (a) or (c). But once it is held that the original transaction was entered into by the member with the society as a member then any person who claims rights or title through that member must come within the provisions of S. 91 (1) (b).”

20. The case which, however, directly covered the issue is the Division Bench judgment in *Navjivan Paper Mart v. Rajkot Vibhagiya Nagrik Sahakari Bank Ltd.*, AIR 1975 Guj 18. Therein the virtually identical provision of S. 96 (1) (b) of Gujarat Co-operative Societies Act, 1962 had fallen for consideration. The petitioner therein also had taken up the

identical stand that because it was not a member of the Co-operative Society making the claim no reference against it was tenable. Rejecting this stand after an exhaustive discussion on principle and precedent and relying basically on the ratio in *Dulichand Jugraj Jain's* case (AIR 1969 SC 1320) (supra) it was held as follows (at p. 22):—

“The claim contemplated in the afore-said observations would also include the claim made against the non-member. If that claim made against a non-member arises through a transaction which the member entered into with the Society as a member, the non-member can be proceeded against under S. 96 provided the non-member is a person who claims his rights or title through that member.”

21. No meaningful challenge to the rationale of the above case could be raised by the learned counsel for the petitioner. The solitary submission sought to be made was that that was a case where the disputed property, namely, a printing machine stood hypothecated to the Co-operative Society. This appears to me as a distinction without any difference. The closest examination of the whole judgment would indicate that the decision thereon did not even remotely turn on this factor which do not even seem to have been noticed. The core of the reasoning turned therein on the phrase in Sec. 96 (1) (b) of the Gujarat Act with regard to a person claiming through a member, past member, or a deceased member of a Society as is the case before us. I would unhesitatingly agree with the line of reasoning in Gujarat case and follow the same.

22. It remains now to consider some intra-court discordance of view which indeed had necessitated the reference to the larger Bench. This, however, is only in the context of brief observations made at the motion stage. In *Inderjit Singh v. State of Haryana*, C. W. P. No. 414 of 1981, decided on 23rd March, 1981, the virtually identical point before us had come up for consideration though at the motion stage. A reference to the brief order would indicate that the matter was not adequately debated before the Bench. The specific provision of S. 55 (1) (b) was perhaps not relied upon by the counsel for the parties and was not even remotely adverted to by the Bench. In particular the crucial issue of claiming through a member, past member or deceased member was neither agitated nor pronounced upon. Reference consequent-

ly could not be made to the larger principles in this context nor to the relevant authorities which have been discussed in detail above. With the greatest respect it appears to me that for the aforesaid reasons Inderjit Singh's case does not lay down the law correctly and is hereby overruled.

23. A reference also must be made to the brief observations of O. C. Reddy and M. R. Sharma JJ. in *Narpat Singh v. Asst. Registrar, Co-operative Societies*, 1976 Pun LJ 522, holding that having regard to S. 55 no award can be made against the employee of an indebted Society. The facts therein would indicate that the Creditor Society was not claiming against the salesman through a member acting in his capacity as a member. S. 55 (1) (b) was, therefore, neither attracted nor was it remotely adverted to by the Bench. *Narpat Singh's* case, therefore, appears to me as distinguishable on the limited point that the employee of an indebted society is not ipso facto within the ambit of S. 55 of the Act.

24. The aforesaid view is plainly buttressed by the observations in the later Division Bench judgment, on which *Sharma, J.*, was a member, reported as *Amar Singh v. State of Haryana*, 1978 Pun LJ 46. Therein after referring to *Narpat Singh's* case (*supra*) it was held as follows:—

"The grievance made in the petition is that an award has been given by the Arbitrator appointed under S. 56 of the Punjab Co-operative Societies Act, 1961 (hereinafter called the Act), against a salesman of the Primary Society and in favour of the Central Society. It is argued on the basis of *Narpat Singh v. Asst. Registrar, Co-operative Societies*, 1976 Pun LJ 522, that a dispute between the salesman of a Primary Society and the Central Society cannot be referred for arbitration by the Registrar.

2. Written statements filed on behalf of the respondents have been seen. It has been averred therein that the petitioner was a member of the Primary Society, i.e. respondent No. 5, which was in turn a member of the Central Society, i.e. respondent No. 3. The petitioner claimed his right through respondent No. 5. Consequently, his case was covered by S. 55 (1) (b) of the Act and the reference of the dispute for adjudication was in order. In these circumstances, we see no force in this petition and order the same to be dismissed."

I am wholly in agreement with the aforesaid observations, brief as they are, and would unhesitatingly affirm the said view for the detailed reasons recorded earlier.

25. To conclude the answer to the question posed at the very outset is rendered in the affirmative and it is held that a dispute between a Co-operative Society on the one hand and the employee, agent or member of another Co-operative Society would be within the ambit of the arbitration under S. 55 (1) (b) where the claim made is rooted through a person or a society which in turn is a member of the claimant-society.

26. As noticed earlier the solitary point raised on behalf of the petitioner is thus concluded against him by the answer aforesaid. No other point was urged. The writ petition is, therefore, without merit and is hereby dismissed. There will be no order as to costs.

S. P. GOYAL, J. (Minority view):—

27. I have gone through the judgment prepared by my learned brother, the Chief Justice, but with utmost respect I regret my inability to concur with the same.

28. The facts as alleged in the petition are that Imbli Co-operative Agriculture Service Society, Limited, now represented by respondent No. 4, the Mustafabad Farmers Co-operative Credit and Service Society Limited (hereinafter called the Imbli Society) used to purchase on consignment basis fertilizers from the Jagadhri Co-operative Marketing-cum-Processing Society, Limited, Jagadhri (for short called the Jagadhri Society) and get commission on its sale at the agreed rate. It further appointed the petitioner, Mam Raj, as its salesman to receive the fertilizers from the Jagadhri Society and effect its sales. The petitioner was not paid any fixed salary but under the agreement entered into with the Imbli Society he was to be paid 50 per cent of the commission earned by the Imbli Society. The petitioner under the agreement was further required to deposit the sale proceeds directly with the Jagadhri Society. Certain amounts on account of the price of the fertilizers having remained unpaid, the Jagadhri Society moved the Assistant Registrar, Co-operative Societies under S. 55 of the Punjab Co-operative Societies Act, 1961 (for brevity called the Act) for settling their dispute who gave award in the amount of Rs. 16,721/- holding the peti-

tioner and the Imbli Society responsible for its payment severally and jointly with a further direction that the amount may be first realised from the petitioner. The petitioner went in appeal against the award and challenged it mainly on the ground that no reference under S. 55 of the Act was competent between him and the Jagadhri Society. His appeal was dismissed by the Joint Secretary to Government which led to the filing of the present petition under Art. 226 of the Constitution.

29. In the written statement filed by respondent No. 4, the averment of the petitioner that he was a salesman and employed by Imbli Society was denied and it was averred that according to the agreement between the parties, he used to receive commission on the sale of the fertilizers. However, before the Arbitrator no plea was raised that the petitioner was anything except the salesman of the said society and whole of the award proceeds on that basis. The Arbitrator has also referred to the agreement entered between the petitioner and the Imbli Society under which he had also furnished the security in the amount of Rs. 10,000/- for being appointed as salesman. It is only in the appellate order that the petitioner has been described as the salesman and partner of the society. The word, "partner" appears to have been used loosely by the Appellate Authority probably because the petitioner was not to be paid any fixed salary and was to share commission earned on the sales. Otherwise no facts or reasons have been given in the appellate order to hold the petitioner as partner with the society. If the petitioner was a partner with the society he could not be its salesman at the same time. Taking a clue of the use of the word, "partner" in the appellate order, respondent No. 4 for the first time pleaded in the written statement that the petitioner was a partner with the Society in the sale of the fertilizers. Although, respondent No. 4, the society was in possession of the agreement executed with the petitioner but it never chose to produce it with the written statement which could show the nature of the relationship between the parties. In the absence of the agreement, the relationship between the petitioner and respondent No. 4 has to be determined on the admitted facts between them and no conclusion can be based on the mere averments in the written statement or the

use of the word, "partner" by the appellate Authority in its order.

30. The admitted facts between the petitioner and respondent No. 4 relating to the actual relationship between them are that the Imbli Society, through a written agreement appointed the petitioner as its salesman, authorised him to take delivery of the fertilizers from the Jagadhri Society, effect its sales and deposit the sale proceeds with the Jagadhri Society directly. For all this job, he was to share equally the commission received by the Imbli Society on the sale of the fertilizers from the Jagadhri Society instead of fixed remuneration. From these facts it is evident that the petitioner never joined the Imbli Society as partner in the sale of the fertilizers but was only appointed as salesman or agent to effect sales on behalf of the former on payment of 50 per cent of the commission which was to be received from the Jagadhri Society.

31. The controversy between the parties centres round the interpretation of the words, "person claiming through a member" in cl. (b) of S. 55 of the Act. Under this section, any dispute touching the business of a Co-operative Society can be referred to an Arbitrator if it arises between the Society, its members and other persons mentioned in four Cls. (a) to (d). According to the petitioner, he is not covered by any of the said clause and as such no reference could be claimed against him whereas according to the respondent, his case is covered under Cl. (b), he being a person claiming through a member, i.e. the Imbli Society. It is not disputed that the Imbli Society was a member of the Jagadhri Society. The relevant provisions of S. 55 and Cl. (b) read as under:—

"55. Disputes which may be referred to arbitration.

(1) Notwithstanding anything contained in any law for the time being in force, if any dispute touching the constitution, management or the business of a co-operative society arises:—

(a) xx xx xx

(b) between a member, past member or person claiming through a member, past member or deceased member and the society, its committee or any officer, agent or employee of the society or liquidator, past or present, or

(c) and (d) xx xx xx

A similar provision as cl. (b) and the exact words, "claiming through a member" came up for consideration before

the Supreme Court. The matter in my view stands concluded by its judgment in *Deccan Merchants Co-operative Bank Ltd. v. Dalichand Jugraj Jain*, AIR 1969 SC 1320. It was an appeal against the judgment of the Bombay High Court who while interpreting the words, "claiming through a member" in S. 91 of the Maharashtra Co-operative Societies Act, 1961, ruled as under:—

"that the words, 'claiming through a member' must be given their ordinary meaning, that is, deriving title or rights through a member. At the same time weight must be attached to the word 'member' and the title or rights claimed must be those to which a member was entitled or which he could claim by virtue of his being a member. The words 'claiming through a member', therefore mean deriving such title or rights through a member as the member possessed or had acquired by reason of his being a member or in his capacity as member." The view of the Bombay High Court was approved by the Supreme Court in the following words (at pp. 1326, 27):—

" ** ** **
seems to us that before a person can be said to claim through a member, the claim should arise through a transaction or dealing which the member entered into with the society as a member. If a member entered into a transaction with the society not as a member but as a stranger, then he must be covered, if at all, by the provisions of S. 91 (1) (a) or (c). But once it is held that the original transaction was entered into by the member with the society as a member then any person who claims rights or title through that member must come within the provisions of S. 91 (1) (b)." Although the main stress in that case was laid on the fact that the member entered into the transaction with the society not as a member but as a stranger but all the same, the words "person claiming through a member" were stated to mean a person who claims right or title through such a member.

32. Before applying this test to the facts of the present case, it may also be observed that S. 55 of the Act does not create, declare or recognize any rights or liabilities of the parties concerned and instead only provides an alternate forum for deciding the disputes between them. The rights and liabilities giving rise to the dispute must have their foundations on the common law of the land or the provisions of the Act.

33. Now turning to the facts of the present case, we find that the petitioner was appointed as salesman by the Imbli Society on payment of half of the commission to be earned on the sales of the fertilizers and authorised to take its delivery from the Jagadhri Society on its behalf. The Imbli Society by its agreement with the petitioner never transferred any of its rights or liabilities under the agreement with the Jagadhri Society. By virtue of his agreement with the Imbli Society, the petitioner acquired no right or liability under the contract between the two societies and he was thus neither liable to render accounts to the Jagadhri Society for the sale proceeds of the fertilizers nor entitled to claim his share of the commission from it. He could not force the Jagadhri Society for delivery of the fertilizers or make any claim for damages for breach of the contract with the Imbli Society. He was just to act as authorised agent and was to be rewarded for the service rendered by the Imbli Society. For any dereliction of the duty or malpractice or misfeasance on his part, he was only answerable to its employer or the principal i.e. the Imbli Society. As he could neither claim anything under the agreement between the two societies nor was liable for payment of the price of the fertilizers to the Jagadhri Society by virtue of the said agreement, he cannot be said to be a "person claiming through a member" and, therefore, would not be covered by cl. (b) of S. 55 of the Act.

34. The learned counsel for the respondents, on the other hand, relied on *Navjivan Paper Mart, Rajkot v. Rajkot Vibhagiya Nagrik Sahakari Bank Ltd.*, Rajkot, AIR 1975 Guj 18 in support of his contention that the petitioner would be a "person claiming through a member." This decision, however, is distinguishable on facts and has no bearing on the present case. There, a member of the co-operative society had purchased a machine by securing a loan from a co-operative bank by creating a charge on that machine in favour of the Bank in respect of that loan. He subsequently sold the hypothecated machine to 'C' who was not a member of the co-operative society. On these facts it was held that the dispute as to the enforcement of the hypothecation in regard to the machine could be referred to arbitration and 'C' who was claiming through the member made a party to the dispute under S. 96 (1) (b) and nominee of the Registrar had

the jurisdiction to proceed against him to the extent of the hypothecated property purchased by him. Obviously, 'C' had derived the title to the hypothecated machine through a member of the society and was his successor-in-interest. That case, therefore, was fully covered by the rule laid down in Dalichand Jugraj Jain's case (AIR 1969 SC 1320) *supra*. Similarly, another argument raised by the respondents that if the petitioner is not joined in the present reference, it would lead to multiplicity of proceedings is of no consequence so far as the interpretation of the said cl. (b) is concerned for on such a consideration, its language can be stretched so as to bring within its net the persons otherwise not covered thereunder. The mischief to be avoided is also of not such magnitude that it may warrant stretching of the language of the statute because two separate references, one by the Jagadhri Society against the Imbli Society and the second by the latter against the petitioner could proceed together and disposed of simultaneously.

35. Much stress was laid by the learned counsel for the respondents on the purpose of S. 55 of the Act and the need to interpret cl. (b) so as to advance that purpose. Apparently, the purpose of Section 55 is to save the co-operative societies from long drawn litigation in Civil Courts and to provide speedy remedy by way of arbitration to settle their disputes between them inter se or with the other persons enumerated in its four clauses. It passes my comprehension as to what bearing this argument has on the question in hand or in what manner the purpose of the said section would be defeated if it is held that no reference could be claimed at the instance of the Jagadhri Society against the petitioner concerning the dispute arising out of the agreement to supply fertilizer and the payment of its price between Jagadhri and Imbli Societies because in any case the claim of the Imbli Society against the petitioner would be covered by cl. (b) and a reference competent against him to determine his liability.

36. For the foregoing reasons, this petition is liable to be allowed and the impugned award quashed so far as the petitioner is concerned.

D. S. TEWATIA, J. (Concurring with **SANDHAWALIA, C. J.**) :— 37. I have had the privilege of going through the judgments of Hon'ble the Chief Justice

and S. P. Goyal, J. I concur in the view of the Hon'ble the Chief Justice.

ORDER OF THE COURT

38. In accordance with the majority view, the writ petition is hereby dismissed.

39. There will be no order as to costs.
Writ petition dismissed.

AIR 1982 PUNJAB AND HARYANA 221 S. P. GOYAL, J.

Smt. Shakuntala Devi, Appellant v. Amar Nath, Respondent

F. A. F. O. No. 68-M of 1980, D/- 30-9-1981.*

(A) Hindu Marriage Act (25 of 1955), S. 3 (a) — Existence of custom — Marriage between children of a brother and a sister or the two sisters among Aroras — Riwaj-a-Am has presumptive evidentiary value.

Although the entries in the Riwaj-a-Am normally carry a presumptive evidentiary value the answers in it being generally based on views of the agricultural tribes and not high class Hindus, they were not relied upon for adjudicating on the existence or otherwise of a custom among the Aroras permitting marriage between the children of a brother and a sister or the two sisters. In view of the voluminous evidence in the form of instances pointing to the existence of the custom, some relating to the period more than 50 years, its existence was held proved. (Paras 3 to 6)

(B) Hindu Marriage Act (25 of 1955), Ss. 4 and 5 (iv) — S. 4 is subject to other provisions and S. 5 (iv) — Custom or usage permitting marriage between persons within prohibited degree of relationship is expressly saved. (Para 6)

(C) Evidence Act (1 of 1872), S. 32 — Evidence of premarital relationship between the two spouses by persons having personal knowledge was admissible — It was direct evidence which need not conform to S. 32.

Evidence about how the spouses were related to each other prior to their marriage, for instance, that they were the children of a brother and a sister or the children of the two sisters, by those having personal knowledge would be direct evidence and not opinion statements which alone should conform to the requirements of S. 32. (Para 7)

*From decree of M. K. Bansal, Addl. Dist. J., Karnal, D/- 3-4-1980.

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(D) Hindu Marriage Act (25 of 1955), Ss. 11 and 12 — Marriage solemnized in 1973 — Annulment sought in 1978 for alleged fraudulent obtaining of consent — Delay not being explained, relief was refused for laches. (Para 8)

(E) Hindu Marriage Act (25 of 1955), Ss. 12 and 13 — Application under S. 12 by husband seeking decree of nullity of marriage — Decree sought on ground that wife had failed to give birth to a child and that she had not been keeping good health — Held, that application was not maintainable as the grounds mentioned in the application were not grounds for divorce under S. 13 of the Act. (Para 8)

Cases Referred : Chronological Paras
(1963) 65 Pun LR 721 6

S. C. Sibal and G. C. Garg, for Appellant; Jwala Dass, for Respondent.

JUDGMENT:— The parties were married at Smalkha on June 18, 1973. After about five years, on April 22, 1978, the husband filed a petition under Ss. 11 and 12 of the Hindu Marriage Act, 1955, for the annulment of his marriage on the grounds that his consent had been procured by fraud and that the parties being the children of the real brother and sister were related within the prohibited degree and, therefore no valid marriage could be performed between them. The petition was opposed by the wife who denied all the material allegations and in the alternative pleaded that even if the alleged relationship between them was proved, there existed a custom amongst Aroras which permitted such a marriage. On the pleadings of the parties, the following issues were framed:—

1. Whether the parties are related to each other within prohibited degree as alleged in para No. 4 of the petition?

2. If issue No. 1 is proved then is there any custom in existence which validates such a marriage?

3. Whether the consent of the petitioner to this marriage was obtained by fraud and by concealment of facts as alleged in para No. 5 of the petition. If so to what effect?

After trial, issues Nos. 1 and 2 were answered in favour of the husband and issue No. 3 against him with the result that a decree annulling the marriage between them was passed by the learned Additional District Judge, Karnal, vide judgment dated April 3, 1980. Aggrieved thereby, the wife has come up in this appeal.

2. The findings of the trial Court on issues Nos. 1 and 3 were not challenged by the parties and are accordingly confirmed. So, the sole dispute between them is as to whether there exists a custom in the community of the parties which permits marriage between the children of a brother and a sister or the two sisters.

3. The appellant, to prove the alleged custom, gave her own statement and examined RW 2 Baldev Raj, RW 3 Tharu Ram, RW 4 Sant Lal Pruthi, RW 5 Sula-khan Singh, RW 6 Kishan and RW 8 Jodha Ram, her father. All the witnesses produced by the appellant are Arora by caste and have migrated from district Jhang in West Pakistan. They have with one voice deposed that there existed a custom amongst Aroras in the West Pakistan which allowed marriage between the children of a brother and a sister or two sisters and that after migration to India in the year 1947, this custom still continues to prevail amongst them. All of them have supported their statements by citing a couple of instances of such marriages. RW 2 Baldev Raj is a retired Judicial Officer and was practising Advocate at Bhiwani when he appeared in the witness box. He cited five examples of such marriages including his own. Most of these marriages had taken place in West Pakistan. Although he did not belong to district Jhang from which place the parties hail but that would be no ground to reject his evidence because the custom alleged was not confined to any territory in West Pakistan and was said to be prevailing generally amongst Aroras. All the remaining witnesses belonged to district Jhang and cited instances of the marriages between the persons related within the prohibited degrees of their own families and the near relations. In all, more than seventeen instances of the alleged custom found mention in their statements.

4. The respondent, to rebut this evidence, appeared as his own witness and examined AW 3 Bhagwan Dass. Both of them denied the existence of the alleged custom without citing any instance where such marriage was objected to or challenged. In the cross-examination when they were asked about the instances later on proved by the witnesses to the appellant, simply showed their ignorance or gave evasive replies. The respondent, thus led hardly any evidence to rebut the voluminous evidence produced by the appellant; The trial Court ignored all

that evidence simply on the ground that the instances cited by the witnesses did not relate to the persons belonging to Jhang district. This was obviously an erroneous approach because the custom alleged was never claimed as the one confined to Jhang district or to the Aroras coming from any particular area in West Pakistan.

5. However, to controvert the effect of the evidence led by the appellant, the learned counsel for the respondent relied on the answer to question No. 10 in the *Riwaj-a-Am* of Jhang district compiled by the Settlement Officer, Jhang, in the year 1925. For ready reference, the question and answer are reproduced below:—

Q. No. 10 (old question No. 1) Enumerate the relatives with whom the marriage is unlawful.

Ans. All tribes follow their personal law.

On the basis of this entry in the *Riwaj-a-Am* which normally carries a presumptive evidentiary value, it was argued that all the tribes in Jhang district followed their personal law as to the persons between whom marriage was not permissible and no custom, as alleged by the appellant was, therefore, in existence. I am unable to subscribe to the view put forward by the learned counsel. The answers contained in *Riwaj-a-Am* are generally based on the views of the agricultural tribes and not high class Hindus. Although in the introductory remarks it is stated that the questions were circulated to the big landowners and the members of the legal profession but that also would not show that the views were ascertained regarding the custom prevailing amongst the high class Hindus. On the contrary the answer itself shows that it was the view of all the tribes which obviously means of the agricultural tribes and not of the high class Hindus.

6. It was next contended that even if any custom or usage was prevailing prior to the Hindu Marriage Act, it stands repealed by the provisions of S. 4 which has the overriding effect and all laws or usages contrary to the provisions of the said Act stand repealed after its enforcement. The argument is wholly fallacious because the provisions of S. 4 are subject to the other provisions of the Act and S. 5 (iv) expressly saves custom or usage governing the parties which permits marriage between the persons with-

in the prohibited degree of relationship. Yet another argument raised was that on the basis of the instances proved which mostly relate to the recent period, no inference of custom or usage could be drawn because according to the provisions of S. 3 (a), the custom and usage signify any rule which having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family. To support his contention, the learned counsel for the respondent relied on a single Bench decision of this Court in *Smt. Gurnam Kaur v. Gurdip Singh* (1963) 65 Pun LR 721. This, again, is wholly misconceived argument because the custom proved by the witnesses is of very ancient origin beyond the human memory. Though most of the instances relate to the period after the partition of the country, yet some of the instances relate to the period more than 50 years back which coupled with oral evidence provide sufficient basis for upholding the alleged custom. So far as the decision in *Smt. Gurnam Kaur's* (case) (*supra*) is concerned, suffice it to say that the finding recorded there was based on the facts and circumstances of that case which obviously has no value as a precedent so far as this case is concerned. Moreover that case related to Khatri whereas the parties in the present case are Aroras who do not belong to the orthodox class of Hindus and are known to be much more liberal about the prohibited degree between the two spouses.

7. Lastly, it was contended that the instances of marriage cited in support of the alleged custom have no evidentiary value because there was no legal evidence on the record to show that the parties to those marriages were related to each other within the prohibited degree. According to the learned counsel, the only evidence to prove the said relationship would be one which is permissible under S. 32 of the Evidence Act. As the evidence produced does not satisfy the requirements of that section it would not be admissible to prove the relationship between the two spouses. This contention is equally devoid of any merit. All the witnesses deposed regarding the marriages of the members of their own families. They had, therefore, personal knowledge about the relationship between the two spouses and it being a direct evidence, was not required to satisfy the provisions of S. 32 of the Evi-

dence Act. Just as if a father or mother or brother is to depose as to the relationship of his or her son or brother or sister, the evidence need not conform to the requirements of S. 32 because all of them have the direct knowledge of the birth of the person concerned and their statement cannot be labelled as opinion statement as the one under S. 32 of the Evidence Act is.

8. Apart from the merits of the controversy between the parties, the petition was also liable to be dismissed on the ground of laches. The marriage between the parties took place on June 18, 1973 whereas this petition was filed on April 24, 1978, about five years thereafter. No explanation whatsoever has been offered by the respondent for this inordinate delay in moving the petition. On the contrary, it appears that the petition was filed because the wife had failed to give birth to a child and was not keeping good health for some time. As none of these two circumstances could provide a ground for divorce, the respondent thought of setting up the plea that the marriage between them was a nullity because they were related to each other within the prohibited degrees. It would not, therefore, be just to allow the husband to claim a decree of nullity after such an inordinate delay.

9. In view of the above findings, this appeal is allowed, the impugned judgment and decree set aside and the petition dismissed. As the wife was already been allowed litigation expenses, there would be no order as to costs.

Appeal allowed.

AIR 1982 PUNJAB AND HARYANA 224

J. V. GUPTA, J.

Dharam Chand, Petitioner v. Mathura Dass, Respondent.

Civil Revn. No. 848 of 1980, D/- 5-10-1981.*

East Punjab Urban Rent Restriction Act (3 of 1949), Ss. 13 (2) (ii) (b) and 11 — Shop let out to tenant for bakery business — Use of small portion of shop for residential purposes does not amount to change of user — Tenant is not liable to ejectment for contravention of S. 13 (2) (ii) (b).

*Against order of M. L. Merchea, Appellate Authority, Patiala, D/- 18-3-1980.

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Section 13 (2) (ii) (b) contemplates that the tenant would be liable to be ejected if the entire building or at least a major portion thereof is used for a purpose other than that for which it was leased. Moreover, in S. 11 prohibition that is contemplated is against converting a residential building into a non-residential building, but not vice versa. Therefore where the shop was let out to the tenant for bakery business the use of a small portion thereof for residential purposes would not amount to change of user so as to render the tenant liable to ejectment because the dominant purpose of the demised premises would still be the bakery business only a small portion thereof being used for residence. (1970) 2 SCC 290 and (1980) 1 Rent LR 33 (Punjab & Har) and AIR 1978 SC 1601 and AIR 1982 Punjab & Har 31, Rel. on; (1977) 2 Rent LR 83 (Him Pra), Dist. (Para 10)

Cases Referred : Chronological Paras

AIR 1982 Punjab & Har 31 3, 8

(1980) 1 Rent LR 33 (Punjab & Har) 3, 7

AIR 1978 SC 1601 3, 9

(1977) 2 Rent LR 83 : 1977 Sim LC 265 (Him Pra) 3, 5, 10

AIR 1977 NOC 222 : (1977) 2 Ren CR 156 (P & H) 3

ILR (1975) Him Pra 670 : (1978) 1 Rent LR 762 10

1973 Ren CR 425 : (1973) Cur LJ 354 (Punjab & Har) 3

(1970) 2 SCC 290 : (1970) 1 SCWR 487 3, 6

(1966) 68 Pun LR 367 : 1965 Cur LJ 394 3

1964 Cur LJ 513 (Punjab) 3

H. L. Sarin, Sr. Advocate with R. L. Sarin and M. M. S. Bedi, for Petitioner; J. N. Kaushal, Sr. Advocate with R. S. Ahluwalia, for Respondent.

ORDER :— The tenant-petitioner has filed this revision petition against the order of the Appellate Authority, Patiala, dated March 18, 1980, whereby the order of the Rent Controller, dated Feb. 15, 1979, directing his ejectment was maintained.

2. The landlord-respondent sought the ejectment of the petitioner from the demised premises inter alia on the ground of change of user as contemplated under S. 13 (2) (ii) (b) of the East Punjab Urban Rent Restriction Act, 1949 (hereinafter called the Act), which provides that if the tenant has used the building or the rented land for a purpose other than for which it was leased, he is liable to be ejected. It was averred in para 4 of the ejectment application that the tenant

had changed the user of the shop, in dispute, without the written consent of the landlord and as such, he was liable to be evicted therefrom, and that he had started residing there along with his family in addition to his bakery business. The rent-note, dt. March 6, 1958, executed for eleven months, stipulating a monthly rent of Rs. 30/-, is, Exhibit A. 1.

In the written statement it was stated that the tenant had not changed the user of the demised premises, he had taken the premises for use and occupation as his shop of bakery and also for his use and residence in part thereof, a part of it is used by him as residence ever since he took the rented premises on rent, the right of residence was not prohibited by the terms of the lease, his living in the part of the rented premises was essential part of his business, he was an old man of 70 years infirm and of weak eye-sight, his wife helped him in the business of the bakery, he cannot carry on his trade and business without living in the demised premises and that he guards the premises, in dispute, by living there.

It was also pleaded that he had been living in the demised premises for more than 19 years and during this period, the landlord had the knowledge of the same as he accepted the rent, never protested against such user, had always acquiesced in the user of the demised premises, and as such, he was estopped from taking this plea. In the replication filed on behalf of the landlord, it was stated that it was wrong that the shop, in question, was taken on rent by the tenant for residential purposes along with the business of bakery. The living of the tenant in a part of the rented premises was not an essential part of his business. It was wrong that his residence in the demised premises was required for guarding the building. It was also wrong that he had been living in the premises for the last 19 years and that it was also wrong that the landlord had acquiesced in the use of the premises, in dispute, for the residence of the petitioner. On the pleadings of the parties the learned Rent Controller framed the following issues :

1. Whether the respondent has changed the user of the demised premises? If so, to what effect?
2. Whether the respondent is liable for ejectment?
3. Relief.

On issue No. 1, it was found that the petitioner had changed the user of the demised premises. According to the Rent Controller, they were rented out for running a shop whereas on the admission of the tenant himself, he was also residing therein with his family. As a result, the order of ejectment was passed against the tenant. In appeal, this finding of the Rent Controller was maintained by the Appellate Authority. Feeling aggrieved against the same, the tenant has come up in revision to this Court.

3. The learned counsel for the petitioner, contended that no specific purpose was provided in the rent-note, Exhibit A. 1, nor was there any mention of any particular business to be carried on by the petitioner. The only recital therein is that the shop, in dispute, had been rented out to the petitioner at the rate of Rs. 30/- per month. According to the learned counsel, from the evidence on the record, it has been amply proved that the tenant was residing therein from the very beginning as it was necessary for him to reside therein for doing his bakery business. The premises, in dispute, are L-shaped and therefore, the hind portion of the shop is being used for residence whereas the front portion is being used for running the bakery business.

It was further contended that in any case, the major portion of the building was still being used for business purposes and it was only a small portion in which the tenant was residing and, therefore, there was no change of user of the building as such, i.e., the entire building as contemplated u/s. 13 (2) (ii) (b) of the Act. The argument proceeds that the dominant purpose of the demised premises is still the carrying on of the business and, therefore, he is not liable to be ejected therefrom. In support of his contention, the learned counsel placed reliance on *Sagar Mal v. Shree Seeta Ram*, (1980) 1 Rent LR 33; *Firm Himalayan Traders v. Narain Dass*, (1966) 68 Pun LR 367; *Rameshwar Dass v. Rishi Parkash*, 1964 Cur LJ 513; *Sant Ram v. Rajinder Lal*, AIR 1978 SC 1601; *Ram Niwas v. Union of India*, 1973 Ren CR 425 and *M. K. Palaniappa Chettiar v. A. Ponnuswamy Pillai*, (1970) 2 SCC 290. He also referred to a judgment rendered by me in Civil Revn. Petn. No. 631 of 1976, (*Amin Chand v. Gian Chand*) de-

cided on Aug. 25, 1981 : (reported in AIR 1982 Punj & Har 31).

On the other hand, the learned counsel for the landlord-respondent, submitted that according to the evidence of the tenant himself, he started residing first in the demised premises and then he started his bakery business therein. His family consists of six persons, i.e., two sons, two daughters, his wife and he himself. Even the marriage of one of his daughters was celebrated in the demised premises. Under the circumstances, it cannot be said that the dominant purpose is the carrying on of the bakery business; rather, according to the learned counsel almost the whole of the demised premises are being used for residential purposes though a very small portion thereof is being used as a shop. As the tenant never obtained any permission, either oral or in writing, for the change of the user of the demised premises, he is liable to be ejected therefrom u/s. 13 (2) (ii) (b) of the Act. According to the learned counsel, though there is no specific purpose for which the demised premises were rented out, but at the same time, what was rented out was a shop and, therefore, it would mean that it was for the purpose of carrying on of the business and not for residence. In support of this contention, the learned counsel placed reliance on *Chhaju Ram v. Tulsi Das*, (1977) 2 Ren CR 156 : (AIR 1977 NOC 222) (P & H) and *Balak Ram v. B. N. Gupta*, (1977) 2 Rent LR 83 (Him Pra).

4. I have heard the learned counsel for the parties at a great length and have also gone through the record.

5. According to the Appellate Authority, there is no evidence on the record that the petitioner took the demised premises for running a bakery and since it was a shop and was being used by the petitioner for residence which was never the intention of the parties when the rent-note, Exhibit A-1, was executed the petitioner is liable to ejection. Main reliance in this behalf was placed by both the Courts below on the judgment of the Himachal Pradesh High Court in *Balak Ram's case* (1977-2 Rent LR 83) (supra). In my considered opinion, both these findings arrived at by the learned Appellate Authority are wrong and against the record.

6. The landlord-respondent in his ejection application has himself stated that the tenant had started residing in the shop, in dispute, along with his family members, in addition to his doing the

bakery business. Thus, it cannot be said that the tenant was not using the premises, in dispute, for his bakery business. It is the common case of the parties that in addition to the bakery business, the tenant had also started residing therein, which according to the landlord, was for the last four or five years whereas according to the tenant, he was residing therein from the very inception of the tenancy as the demised premises were taken on rent for both the purposes. It is also the common case of the parties that the premises, in question, were L-shaped and the tenant was using the front portion as his shop and the rear portion for his residence. The landlord has not led any evidence to prove the total area of the demised premises and out of that how much is being used by the tenant for his residential purposes. The tenant produced *Hira Lal*, R.W. 4, who was an Assistant Engineer (retired). He filed the plan of the property, Exhibit RW4/A. The total area of the demised premises given therein is 918 square feet. According to this witness area measuring 714 square feet was being used for bakery purposes whereas the area measuring 204 square feet was being used for residence. There is no rebuttal to this evidence on behalf of the landlord. Thus, it has been amply proved on the record that only a small portion of the demised premises was being used for residential purposes. The argument raised on behalf of the landlord-respondent, however, is that the family of the tenant consisted of six persons and, therefore, it was not possible for them to reside in such a small accommodation. This contention cannot be accepted for the simple reason that in the first instance there is no evidence to this effect and secondly, it will depend upon the facts and circumstances of each case whether a family of six persons can live in such an accommodation or not. There is nothing uncommon in the present circumstances for the people to reside in such small accommodation particularly when the tenant-petitioner is doing only bakery business at a very small scale. Apart from that, the landlord-respondent has not proved his case that the tenant started residing in the demised premises four or five years back, as alleged by him, in his ejection application. In case, he was residing earlier somewhere else, then it was not difficult for the landlord to prove, by cogent evidence, the premises he was occupying earlier. On the other hand, it has been

proved on the record from the evidence of the tenant-petitioner that he was residing in the demised premises from the very inception of the tenancy. It may be that in the rent-note, no particular purpose for which the premises were rented out to him is given, but from the evidence on record, it is evident that the tenant-petitioner was residing therein from the very beginning of the tenancy and the landlord-respondent never objected to the same. Thus, both the said findings arrived at by the Appellate Authority are against the record and even against the case of the landlord-respondent as set up by him in his ejectment application. Under these circumstances, it can safely be held that the tenant-petitioner is occupying a very small portion of the demised premises for his residence. The dominant purpose is still the bakery business for which the premises were rented out to him. In *M. K. Palaniappa Chettiar's case* (1970-2 SCC 290) (supra), it has been held that when the landlord failed to show that any substantial part of the building was being used for a purpose different from the purpose for which the building had been let out, the claim of the landlord had to fail irrespective of the plea taken by the tenant to resist the application. In that case also, one of the grounds of ejectment was that the tenant had used the building for a purpose other than that for which it was leased out. On this finding the judgment of the Madras High Court was set aside, by their Lordships of the Supreme Court and the application for ejectment was dismissed.

7. Similarly, in *Sagar Mal's case* (1980-1 Rent LR 33) (Punj & Har) (supra), *R. N. Mittal, J.*, held that if the dominant purpose remains the same, it will not amount to the change of user of the building. In the said case, the building consisted of three rooms which were let out for business purposes and one of the rooms was used for residential purposes.

8. In Civil Revision Petition No. 631 of 1976, *Amin Chand's case* (supra) reported in AIR 1982 Punj. & Har 31 — I had also the occasion to consider the provisions of S. 13 (2) (ii) (b), of the Act. The view that I have taken therein is that if the premises were being used for the same purpose for which they were originally let out and in addition thereto a part of the building or the rented land was used for some other purpose, that per se would not give the landlord the

right to claim the eviction of the tenant from the demised premises.

9. In *Sant Ram's case* (AIR 1978 SC 1601) (supra) also it has been held that the landlord's acquiescence over a long stretch of time reinforces the case of the tenant that purpose was twofold. The common experience of life lends credence to this case and none, but those who live in ivory towers can refuse to look at the raw realities of life while administering justice. In view of these decisions the landlord-respondent has failed to prove that the tenant-petitioner has used the entire building for a purpose other than that for which it was leased to him.

10. The only contrary view can be said to have been taken by the Himachal Pradesh High Court in *Balak Ram's case* (1977-2 Rent LR 83) (supra). In that case, the main question to be decided was whether the disputed premises were non-residential premises because the character of those premises could be determined not by reference to the actual use to which they were put by the tenant, but by reference to the original purpose for which they were initially let out. In paragraph 5 of the judgment, it has been observed by the learned Judges that this was the most important question of law involved in that case. However, reply to this question has been given by the Hon'ble Judges in paragraph 15 of the judgment wherein it has been concluded that the character of the suit premises should be determined with reference to the actual user found on the date of eviction petition and that, therefore, the view taken by that Court in *Prem Chand v. Beni Madhav*, ILR (1975) Him Pra 670, was affirmed. Thus, the main consideration in that case was whether the use of the building at the time of the institution of the ejectment proceedings will determine the character of the building or the original purpose for which the same was rented out. Since the ejectment in that case was claimed on other grounds as well including that the landlord bona fide required the premises for his own use and occupation, it was held in that case that, the landlord had, according to the findings recorded by the Courts below, proved his bona fide personal requirement of the disputed premises and that being a pure finding of fact, it was not open to that Court to interfere with the same in the exercise of the revisional jurisdiction. In this view of the matter, I am of the considered opinion that the ratio of the said decision is not applicable to the facts of the pre-

present case. The language used in S. 13 (2) (ii) (b) of the Act is suggestive that while in view of S. 13 (2) (ii) (a), the tenant is liable to be ejected if he has sublet the entire building or the rented land or any portion thereof, but under S. 13 (2) (ii) (b) of the Act, he is liable to be ejected if he has used the building or the rented land for a purpose other than that for which it was leased to him. The words, "any portion thereof" in S. 13 (2) (ii) (a) of the Act, do not find any place in S. 13 (2) (ii) (b) of the Act and, therefore, the legislature seems to be of the view that in case a tenant is liable to be ejected under Section 13 (2) (ii) (b) of the Act, then the entire building, as rented out, or at least a major portion thereof, should have been used for a purpose other than that for which it was leased. In the present case, as held earlier, the dominant purpose of the demised premises, is still the bakery business and only a small portion thereof is being used by the petitioner for his residence. It is also in evidence that the portion which is being used for residence by the petitioner opens in a blind lane. There are no shops on that side. Under the circumstances, the dominant purpose of the demised premises is still the business which is being carried on by the tenant-petitioner. Moreover, there is evidence on the record, that the tenant is 70 years old and is on weak eye-sight. For running the bakery business, the help of his other family members is necessary and, thus, his residence in the premises, in dispute, is also required to run his bakery business satisfactorily.

11. The argument of the learned counsel for the landlord-respondent that the tenant-petitioner by using the demised premises for his residence along with his business, has converted the building from non-residential to residential, because the definition of non-residential building, as given in S. 2 (d) of the Act, is a building being used solely for the purpose of business or trade, and has, thus, rendered himself liable to ejection, has no force, because the ejection of a tenant can only be sought on the grounds, as given in S. 13 of the Act. The ejection of the petitioner in the present case is being sought on the ground that he has used the building for a purpose other than that for which it was leased. S. 11 of the Act deals with the conversion of a residential building into a non-residential building and provides that no person shall convert a residential building into a non-residential one except with the permis-

sion, in writing, of the Controller. In this section also, the prohibition, if any, is from converting a residential building into a non-residential building, but not vice versa.

12. From the above discussion, it is clear that the landlord-respondent has failed to prove that the tenant-petitioner has used the demised premises for the purpose other than that for which they were leased out to him. Consequently, this revision petition succeeds and is allowed. The order of the Appellate Authority is set aside and the application of the landlord-respondent for the ejection of the tenant-petitioner is dismissed with costs.

Petition allowed.

AIR 1982 PUNJAB AND HARYANA 228 FULL BENCH

S. S. SANDHAWALIA, C. J., J. M.
TANDON AND I. S. TIWANA, JJ.

Pritam Singh Gill, Petitioner v. State of Punjab and others, Respondents.

Civil Writ Petn. No. 3994 of 1977, D/-5-1-1982.*

(A) Constitution of India, Art. 226 — Society registered under Punjab Co-operative Societies Act — It is amenable to writ jurisdiction if it is instrumentality of State. AIR 1981 Punj & Har 107 (FB), partly modified in view of AIR 1981 SC 487. (Punjab Co-operative Societies Act (25 of 1961), Pre.)

(Paras 15, 44)

(B) Constitution of India, Arts. 12 and 226 — Punjab State Co-operative Land Mortgage Bank registered under Punjab Co-operative Societies Act — Not instrumentality of State and, hence, not "other authority" within Art. 12 — Not amenable to writ of certiorari. (i) Punjab Co-operative Societies Act (25 of 1961), S. 26; (ii) Punjab Co-operative Land Mortgage Banks Act (26 of 1957), S. 2).

The Punjab State Co-operative Land Mortgage Bank is not an instrumentality or agency of the State. Consequently, it cannot be deemed to be an "authority" within the meaning of Art. 12 and as such, is not amenable to a writ of certiorari under Article 226. In this connection, it cannot be

*Decided by Full Bench on order of reference made by I. S. Tiwana, J., on 26-8-1981.

CZ/DZ/B367/82/SNV

argued that it is such an instrumentality on the ground that the 4th test of deep and pervasive state control laid down in AIR 1981 SC 487 for determining whether a corporation or society is an instrumentality of the State is satisfied in view of provisions of Punjab Co-operative Societies Act read with Punjab Co-operative Land Mortgage Banks Act. (Paras 26, 42)

Section 26 of the Co-operative Societies Act generally or sub-section (4) thereof, in particular, by themselves cannot in the context of the other factors be said to vest a deep and all pervasive control of the State on the Mortgage Bank so as to render it an instrumentality of the State whilst conducting ordinary, fiscal, banking and business activities. In view of S. 26 (1), it is mandatory that the directors of the Bank would be elected in the manner prescribed and further have to be share-holders. Moreover, sub-section (2) gives only limited power to the Government to nominate at the highest, three members to the Board, on the express condition where the Government has subscribed to the share capital of a Co-operative Society or has guaranteed the repayment of the principal and the payment of interest on debentures issued for loans raised by a Co-operative Society. Now it would be plain that if the condition of subscription to the share capital or guarantee for payment is not satisfied, the State Government has not the least right to add to the elected members of the Board. Assuming, however, that in the case of a Mortgage Bank, the Government does subscribe to the share capital or guarantee the repayment of the principal and the interest of the debentures, then at the highest, it can nominate three persons only to the Board. It cannot possibly be said that the discretionary right of naming three persons on a Board of 18, gives an all pervasive total control to the State. Plainly, the nominees of the Government even where it does choose to nominate would be far out-numbered by the elected members. To label this limited right of nomination, as indicative of the Mortgage Bank, being an instrumentality of the State, by itself, is totally farcical. Under sub-section (4) also, the pre-condition for its inter-play is only where in a Co-operative Society in which shares have been subscribed for liability by way of guarantee for borrowing exceeding fifty per cent of the capital of the society, which has been undertaken by the Government itself. Unless this condition is satisfied, the rest of the provisions of sub-section (4) would not be attracted. However, even here all that is

prescribed is that in such a society, if there is a difference of opinion, in respect of any matters arising between the nominated members of the Committee and the other members thereof, the matter shall be referred to the Government. It bears repetition that the three nominated members invariably are in a minority, vis-a-vis the elected members of the Board. In the peculiar situation of sub-section (4), the added safeguard which is provided is that where in a particular case all the three nominated members differ on a specific matter from the others, then the same would not be resolved by majority, but would become the subject-matter of reference to the Government for its decision. It is not in each and every matter that the nominated members must be presumed to differ from the elected ones. Sub-section (4), therefore, prescribes merely of an exceptional situation. Even here it does not lay down that in such a situation, the view of the three nominated members even though in a patent minority would override those of the elected ones. In the event of a difference of opinion between the elected members on one side and the three nominated members collectively on the other, the matter is merely passed on to the Government for decision. By judicial precedent, it is now well settled that the Government in such a situation does not and cannot act arbitrarily like private individuals and in such a reference, would be bound to decide the issue on merits after considering the viewpoints of the elected members and those who are nominated. It is not that the view of the nominated members must inevitably prevail and the balance is evenly held by the Government on merits to decide the issue of difference in favour of either the elected members or those of the nominated members. There can be no warrant for the assumption that in such a situation the nominated members can impose their will on the remaining members of the Board. Therefore, a mere method or device for resolving a difference of opinion where the nominated members are unanimous against those who are elected, cannot be held as indicative of total and all pervasive control. (Case law discussed.)

(Paras 20, 23)

(C) Constitution of India, Art. 226 — Writs of Mandamus and Certiorari — Scope of, is not identical. Observations in 1981 Lab IC 942 (Andh Pra) as regards writ of certiorari, held obiter dicta.

(Paras 31, 34)

(D) Constitution of India, Art. 226 — Writ of mandamus — Issue of — Pre-con-

ditions. 1981 Lab IC 942 (Andh Pra) (Pt. D), Dissented from.

To successfully invoke the mandamus jurisdiction, the petitioner has not only to show a clear public or statutory duty laid on the respondent but an equally clear legal right to enforce the same. 1981 Lab IC 942 (Andh Pra), Dissented from. (Para 42)

Cases Referred :	Chronological	Paras
AIR 1981 SC 212		4
AIR 1981 SC 487	4, 12, 17, 24, 38	
1981 Lab IC 942 (Andh Pra)	28, 29, 30, 31, 32, 34, 35, 37, 38, 41, 43	
1981 Lab IC 1076 (Mad)	27	
AIR 1981 Punj & Har 107 (FB)	1, 4, 9, 14, 44	
AIR 1981 Punj & Har 282	24	
AIR 1979 SC 1628	10, 11, 12, 27	
AIR 1977 SC 112	9	
AIR 1976 SC 425 : 1976 Lab IC 303	38	
AIR 1975 SC 1329 : 1975 Lab IC 819	9	
AIR 1974 Delhi 119	33	
AIR 1973 SC 2216 : 1973 Lab IC 1212	41	
AIR 1973 Madh Pra 84	33	
AIR 1970 SC 245 : 1970 Lab IC 285	9	
AIR 1970 SC 1789	39	
AIR 1969 SC 1306	9, 41	
ILR (1967) Andh Pra 361 : (1965) 2 Andh WR 409	41	
(1967) 2 QB 864 : (1967) 3 WLR 348 : (1967) 2 All ER 770 (DC), Regina v. Criminal Injuries Compensation Board Ex parte Lain	35, 36	
AIR 1966 Mad 399	29	
(1963) 1 QB 539 (PC), Nakkuda Ali v. M. F. De. S. Javaratna	39	
(1963) 2 All ER 66 : (1964) AC 40 : (1963) 2 WLR 935 (HL), Ridge v. Baldwin	35, 37, 39	
AIR 1962 SC 1210 : (1962) 2 Supp SCR 144	41	
AIR 1961 Andh Pra 400	29	
AIR 1960 SC 1118	30	
AIR 1960 Andh Pra 518	29, 33	
(1959) 1 Lab LJ 554 (Andh Pra)	29	
AIR 1959 Mad 112	33	
AIR 1957 SC 529 : 1957 All LJ 682	41	
AIR 1955 SC 233	39	
AIR 1954 Mad 549	33	
(1953) 1 QB 704 : (1953) 2 WLR 342 : (1953) 1 All ER 327 (DC), Regina v. National Joint Council for the Craft of Dental Technicians	35	
AIR 1952 Cal 315	33	
AIR 1951 Mad 249	29, 33	
AIR 1950 SC 222	39	
(1928) 1 KB 411 : 97 LJKB 222 : 138 LT 399, The King v. Legislative Committee of the Church Assembly	37, 39	

(1924) 1 KB 171 : 93 LJKB 390 : 130 LT 164, Rex v. Electricity Commissioner

35, 36, 37, 38, 39, 40

I. S. Saini with Virender Kumar Jhangra, for Petitioner; J. L. Gupta with Rajiv Atma Ram, B. S. Khoji, J. C. Batra and S. P. Soni, for Respondents.

S. S. SANDHAWALIA, C. J.:— Whether a Society registered under the Punjab Co-operative Societies Act, which in essence is an instrumentality or agency of the State, would become amenable to the writ jurisdiction under the provisions of Art. 226 of the Constitution of India, is the meaningful question which has necessitated this reference to the Full Bench. Inevitably at issue in this context is the necessary elaboration or qualification of the ratio of the earlier Full Bench case in *Ajmer Singh v. Registrar, Co-operative Societies, Punjab*, AIR 1981 Punj & Har 107.

2. The facts deserve notice only in so far as they are relevant to the pristine issue aforesaid. The Punjab State Co-operative Land Mortgage Bank Ltd. respondent No. 3 (hereinafter called 'the Mortgage Bank') is an Apex Society, which on the petitioner's own showing is registered under the Punjab Co-operative Societies Act, 1961. Pritam Singh Gill, the writ petitioner, was originally appointed as a Legal Assistant in the Mortgage Bank on 15th March, 1963. It is averred that he was later promoted as Assistant Secretary (Admn.) in the year 1969. He was prematurely retired with effect from 1st June, 1974 from the service of the Mortgage Bank under the orders of its Administrator. He later illegally attempted to join the Bank and ultimately vide Annexure P-24, the impugned order of the Managing Director, it was directed that he stands retired from the service of the Mortgage Bank with effect from 1st June, 1974 and was consequently relieved forthwith from his duties.

3. The writ petitioner primarily seeks a writ in the nature of certiorari for quashing the impugned order of retirement Annexure P-24, and it was the common case that the primary relief sought was against the Mortgage Bank, respondent No. 3.

4. This case first came up before my learned brother I. S. Tiwana, J., sitting singly. Before him on the very threshold a preliminary objection was raised that no writ of certiorari lay against the respondent Mortgage Bank, which was a registered co-operative society and against whom the primary and indeed the only relief was sought to be claimed. Primary reliance for this preliminary objection was placed on the Full Bench

judgment of this Court in *Ajmer Singh's* case (AIR 1981 Punj & Har 107) (*supra*). However, on behalf of the writ petitioner the firm stand taken was that the respondent Mortgage Bank was in essence an instrumentality or an agency of the State itself, and, therefore, in view of the subsequent decisions of their Lordships in *Som Prakash Rakhi v. Union of India*, AIR 1981 SC 212 and *Ajay Hasia v. Khalid Mujib*, AIR 1981 SC 487, a writ of certiorari would lie against the Mortgage Bank despite the fact that it was a registered co-operative society. Noticing that in case the stand of the petitioner, that the Mortgage Bank was in essence an instrumentality of the State, were to be accepted then the view in *Ajmer Singh's* case (AIR 1981 Punj & Har 107) (FB) (*supra*) might well require some qualification in view of the observations made in the later decisions of the Supreme Court, the learned single Judge has referred the matter to the Full Bench.

5. Now in view of the reference order, the learned counsel for the parties were in total agreement that at the very threshold the issue which calls for determination is that on the assumption that the Mortgage Bank is an instrumentality of the State, would it, therefore, become amenable to a writ of certiorari despite the admitted fact that it is incorporated under the Punjab Co-operative Societies Act, 1961. It is this aspect to which, we must first turn our attention.

6. It is manifest from the above that the issue herein arises in the context of the provisions of the Punjab Co-operative Land Mortgage Banks Act, 1957 (hereinafter called 'the Mortgage Banks Act') read with Punjab Co-operative Societies Act, 1961 (hereinafter called 'the Act'). That being so it is obvious and indeed it was the common stand of the learned counsel for the parties that the matter should be examined primarily in the light of the aforesaid two statutes. The relevant provisions which first call for pointed notice are those of the defining Section 2 of the Mortgage Banks Act, which are in the following terms:—

"2. Definitions— In this Act, unless the context otherwise requires :

(a) to (c) xx xx xx

(d) "Mortgage Bank" means a Primary Land Mortgage Bank or State Bank registered or deemed to be registered under the Punjab Co-operative Societies Act, 1954*;

(e) xx xx xx

(f) "Primary Land Mortgage Bank" means a Co-operative Land Mortgage Bank regis-

tered or deemed to be registered under the Punjab Co-operative Societies Act, 1954, and affiliated as a member to the State Bank;

(g) "Registrar" means the person appointed by the State Government to be Registrar of Co-operative Societies for the State of Punjab, or any person appointed by the State Government to assist the Registrar, under Section 3 of the Punjab Co-operative Societies Act, 1954;

(h) "the State Bank" means the Punjab State Co-operative Land Mortgage Bank Limited to be established for the purposes of this Act;

(i) xx xx xx"
(*now Punjab Co-op. Societies Act, 1961)

7. Now a plain reading of the aforesaid provisions (as also of other sections of the Mortgage Banks Act) would pointedly show that this statute does not even remotely create any Primary Land Mortgage Bank or a State Co-operative Land Mortgage Bank at all. Indeed, it merely provides for their registration or incorporation under the Punjab Co-operative Societies Act either expressly or by deeming fiction of law. That being so it is the agreed position that the Mortgage Bank hereunder is not a body created by a statute. It is only a society registered under a statute, though this test is now authoritatively held to be no longer decisive, yet undoubtedly it still remains a relevant factor. Plainly enough, therefore, the Mortgage Bank does not come within the ambit of being a statutory authority on the ground of having been expressly created or brought into existence by a specific statute.

8. It next deserves to be highlighted that it was the common case before us and indeed the petitioner's own pointed averments to this effect in paragraph No. 1 of the writ petition are that the Mortgage Bank was duly registered under the Punjab Co-operative Societies Act, 1961. On this factual matrix the core question is that presuming the Mortgage Bank to be an instrumentality or an agency of the State, would it still be immune to a writ of certiorari because of the factum of being a body registered under the Co-operative Societies Act.

9. Now it appears that the aforesaid meaningful question before us is so well covered by the recent decisions of the final Court and so exhaustively elaborated thereunder that it seems not only unnecessary but wasteful to launch on dissertation on first principles. It, therefore, suffices to notice how the earlier ratio of the Full Bench in

Ajmer Singh's case (AIR 1981 Punj & Har 107) now calls for some elaboration in the light of the subsequent binding precedent of the final Court. Reference to the judgment in Ajmer Singh's case would show that therein the pointed question of a body being an instrumentality or the agency of the State was not even remotely raised far from being debated. Consequently the Full Bench considering the virtually unbroken line of precedent within this Court and placing particular reliance on the decision of the final Court in Praga Tools Corporation v. C. V. Imanual, AIR 1969 SC 1306, Co-operative Central Bank Ltd. v. Addl. Industrial Tribunal, Andhra Pradesh, Hyderabad, AIR 1970 SC 245; Sabhajit Tewary v. Union of India, AIR 1975 SC 1329 and The Nayagarh Co-operative Central Bank Ltd. v. Narayan Rath, AIR 1977 SC 112, had concluded as follows (at p. 109 of AIR 1981 Punj & Har 107 (FB)):

"In view of the above, affirming the earlier judgments of this Court, we would answer the question posed at the outset in the negative to the effect that a Society merely registered under the Act is not amenable to the writ jurisdiction under Art. 226 of the Constitution of India."

10. However, somewhat new dimensions in this context have been elaborately considered by the final Court in Ramanna Dayaram Shetty v. International Airport Authority of India, AIR 1979 SC 1628. Therein a strenuous objection was pressed on behalf of the respondents that the International Airport Authority of India even though created by the International Airport Authority Act, 1971, was not amenable to the writ jurisdiction because it was a Corporation not within the ambit of Art. 12. Repelling this stand on principle Bhagwati, J., speaking for the Court observed, as follows (at p. 1638 of AIR):

"If Government acting through its officers is subject to certain constitutional and public law limitations, it must follow a fortiori that Government acting through the instrumentality or agency of corporations should equally be subject to the same limitations. But the question is how to determine whether a corporation is acting as instrumentality or agency of Government. It is a question not entirely free from difficulty." And again after an exhaustive conspectus of the case law it was concluded in these terms:—

"If a statutory corporation, body or other authority is an instrumentality or agency of Government it would be an 'authority' and

therefore 'State' within the meaning of the expression in Art. 12."

11. The ratio in the International Airport Authority's case (AIR 1979 SC 1628) has now met with repeated affirmation in subsequent decisions despite some divergence of view with the earlier authorities. In Som Prakash Rekhi's case an identical stand was sought to be taken on behalf of the Bharat Petroleum Corporation Ltd., on the ground that it was merely a Government Company registered under the Companies Act and consequently beyond the pale of the writ jurisdiction. Relying expressly on the International Airport Authority's case, this stand was rejected out of hand with the following observations:

"The following factors have been emphasised in that ruling as telling, though not clinching. These characteristics convert a statutory corporation, a Government company, a co-operative society and other registered society or body into a State and they are not confined to statutory corporations alone."

With the ultimate conclusion:—

"The finale is reached when the cumulative effect of all the relevant factors above set out is assessed and once the body is found to be an instrument or agency of Government, the further conclusion emerges that it is 'State' and is subject to the same constitutional limitations as Government."

12. The recent decision constituting the trilogy is that of the Constitution Bench in Ajay Hasia's case (AIR 1981 SC 487). Therein also a similar objection was raised that the Society running the College was merely one registered under the J. & K. Registration of Societies Act, 1898 and was, therefore, not an authority within the meaning of Article 12. Repelling the same their Lordships authoritatively formulated the tests and concluded (at p. 496):—

"We may summarise the relevant tests gathered from the decision in the International Airport Authority's case (AIR 1979 SC 1628) as follows:

"(1) One thing is clear that if the entire share capital of the corporation is held by Government it would go a long way towards indicating that the corporation is an instrumentality or agency of Government.

(2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character.

(3) It may also be a relevant factor whether the corporation enjoys monopoly status which is the State conferred or State protected.

(4) Existence of "deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality."

(5) If the functions of the corporation of public importance and closely related to the governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government.

(6) "Specifically, if a department of Government is transferred to a corporation it would be a strong factor supportive of this inference of the corporation being an instrumentality or agency of Government."

If on a consideration of these relevant factors it is found that the corporation is an instrumentality or agency of Government, it would, as pointed out in the International Airport Authority's case (AIR 1979 SC 1628) be an 'authority' and therefore, 'State' within the meaning of the expression in Art. 12.

13. From the aforesaid authoritative enunciation it is now well settled that once it is established that a body is an instrumentality or agency or projection of the State, then its mere legal garb, under which it is clothed, namely, whether it is a co-operative society, or a company or a society registered under the Societies Registration Act, ceases to have dominance. In a way the law now pierces the veil of mere form to arrive at the kernel of true substance. It has, however, to be highlighted that the aforequoted six tests may not individually be decisive and their cumulative effect in each particular case has to be taken into account. Consequently if on the basis of these tests the inevitable conclusion is reached that a co-operative society is in essence an instrumentality of the State, then the mere fact that it was registered under the Co-operative Societies Act would in no way render it immune to the writ jurisdiction. This inevitably follows from the consistent observations of the final Court in the trilogy of cases wherein a Government company incorporated under the Companies Act, a society registered under the Societies Registration Act and an authority specifically created by a statute have all been deemed to be within the ambit of Article 12, if they were established to be the instrumentality or the agency of the State in essence.

14. Indeed, faced with the stonewall of impenetrable and binding precedent Mr. J. L.

Gupta, learned counsel for the mortgage bank conceded that in view of the decisions of the final Court it has to be inevitably held that the instrumentalities and agencies of the State could no longer be beyond the pale of the writ jurisdiction. However, we are not at all basing ourselves on any concession by the learned counsel, because it seems to be plain on binding precedent that the ratio in Ajmer Singh's case (AIR 1981 Punj & Har 107) (FB) has now to be qualified accordingly.

15. To conclude on this aspect we would answer the question posed at the very outset in the affirmative and hold that where a society registered under the Punjab Co-operative Societies Act is in essence an instrumentality or agency of the State it would become amenable to the writ jurisdiction under Art. 226 of the Constitution of India in the same manner as the State itself is.

16. Though the learned counsel for the petitioner succeeds in his stand on the aforesaid issue, yet this is no more than a pyrrhic victory. This is so because his attempts to establish that the mortgage bank herein is an instrumentality or agency of the State, appears to border on a total futility. Mr. Saini very fairly conceded that in the writ petition not the least factual foundation whatsoever has been laid to show that the functions of the mortgage bank were either governmental in nature *stricto sensu* or so closely analogous thereto that it can be labelled as a projection of the State so as to come within the ambit of what has now become virtually a term of art, namely, an instrumentality or agency of the State.

17. It had to be conceded by the learned counsel for the petitioner that there was no material worth the name which could establish tests Nos. 1, 2, 3, 5 and 6 as authoritatively laid and quoted above in para No. 12 from Ajay Hasia's case (AIR 1981 SC 487) (supra). Only a lame attempt was made on behalf of the petitioner to bring his case within test No. 4 on the ground that there appears to be a modicum of governmental control over the bank's activities. However, what deserves highlighting herein is the fact that it is not any final kind of State control which is adequate to satisfy the stringent conditions spelled out in test No. 4. It can perhaps be said that with the ever extending activities of the welfare State, there would hardly be a field wherein it may not exercise some modicum of control or interference. However, this is not the kind of control which would convert any and every legal person into a State for the purposes of Arti-

cle 12 of the Constitution of India. What their Lordships have highlighted is that, firstly, the State control must be both deep and pervasive. Not only that, its depth and pervasiveness must be of a kind as to lead to a clear pointer that the body indeed is either a State agency or an instrumentality thereof. It is, in essence, this kind of control which is authoritatively visualised and it is on this anvil that we have now to judge whether the mortgage bank satisfies even one of the six prescribed tests.

18. It appears to me that the learned counsel for the petitioner was virtually forced to clutch at a straw in adverting to the provisions of Ss. 11 and 40 of the Mortgage Banks Act for attempting to contend that these were evidence of all pervasive deep control by the State over the Banks. Section 11 merely confers the power on the Board of Directors of the State Bank to make regulations. Indeed, far from showing an all pervasive State control over the Board, this provision in fact confers statutory power on the Board to make regulations. The solitary limitation on this power is that these regulations would ultimately have sanction subject to the approval of the trustee and the State Government. The five clauses of Section 11 further circumscribe the area within which these regulations can be made by the Board of Directors of the State Bank. The power to make bye-laws and regulations for effective working is elementary and this ordinary power is invariably conferred on bodies or corporations and consequently nothing flows from S. 11, which in any way can satisfy the test of deep and pervasive control indicative of the corporation being an instrumentality or agency of the State.

19. What has been said with regard to Section 11 seems to apply doubly in the context of S. 40. Herein again, the section confers a power on the Board to make regulations. In contrast to S. 11, this power of the Board to do so is not subject in any way to either the State Government or any one of its agencies. Therefore, S. 40 far from indicating any control by the State Government only confers a power on the Board itself for controlling and exercising general supervision over the primary land mortgage banks subject to the obvious limitations that they are not inconsistent with the Mortgage Banks Act or the rules framed thereunder. It seems unnecessary to elaborate the matter and counsel's reliance on S. 40 in this context seems to be hardly well-conceived. Then a last ditch attempt in this context was made by making a reference to S. 12 of the Mort-

gage Banks Act which empowers the Registrar to order recoveries by distraint and sale of the produce of the mortgaged land etc. A larger reading of S. 12 is plainly indicative of the fact that it is indeed far removed from in any way showing any deep or pervasive control of the State over the bank. It only indicates an enabling remedy to the bank to apply to the Registrar for the recovery of instalments due to it, by way of distraint and sale of produce of the lands mortgaged with the bank. One fails to see how the providing of remedy for applying to the Registrar for certain relief is indicative of total State control of the authority. Further, sub-section (2) of S. 12 merely says that on receipt of such an application by the bank, the Registrar may take such action as necessary to distraint and sell such produce. Registrar's action here again is discretionary and not mandatory. Indeed, the provisions of S. 12 only show that the bank is at best a suppliant at the door of the Registrar for seeking an added remedy for the recoveries of either instalments of debts due to it in addition to any other remedy available to it. It seems to be plain that this remedy of applying to the Registrar for distraint or sale of property, which in his discretion he may order or not, cannot even for a moment be labelled as a deep and all pervasive control indicative of the mortgage bank being an instrumentality or agency of the State.

20. Mr. I. S. Saini, the learned counsel for the petitioner, frankly conceded before us that far from relying on any particular part of S. 26 of the Punjab Co-operative Societies Act, and making the requisite pleadings therefor, the very reference to this section was altogether missing in the whole of the voluminous writ petition. Nevertheless, as a matter of special consideration, we allowed the learned counsel's prayer to make submissions on the basis of the provisions of S. 26, if these could ipso facto tend to advance his case. However, a close analysis of the relevant provision far from aiding the case of the petitioner, seems to have a contrary effect thereto. Reliance in this context was primarily on sub-ss. (2) and (4) and to appreciate the same, it is apt to quote relevant parts of the section:—

“(2) Notwithstanding anything contained in sub-section (1).—

(a) where the Government have subscribed to the share capital of a co-operative society or has guaranteed the repayment of the principal of and payment of interest on debentures issued for loans raised by a co-operative society, the Government or any person

authorised by it in this behalf shall have the right to nominate on the committee such number of persons, not exceeding three or one-third of the total number of members thereof, whichever is less, as the Government may determine :

Provided that where the Government have subscribed to the share capital of a co-operative society to the extent of twenty lacs of rupees or more, the Government may, notwithstanding anything contained in the bye-laws of the society,—

(a) appoint one of the members nominated in the aforesaid manner as Chairman of the committee of such society; or

(b) nominate another member in addition to those nominated in the aforesaid manner and appoint him as Managing Director;

Provided further that no person shall be appointed to act as Managing Director unless he is a member of the Indian Administrative Service, Punjab Civil Service (Executive Branch) or a Deputy Registrar, a Joint Registrar or an Additional Registrar, Co-operative Societies.

(b) where the Industrial Finance Corporation, the State Finance Corporation or any other financing institution notified in this behalf by the Government has provided finance to a co-operative society, the Industrial Finance Corporation, State Finance Corporation or other financing institution as the case may be, shall have the right to nominate one person on the committee."

X X X X X

(4) Where, in a co-operative society in which shares have been subscribed for liability by way of guarantee for borrowing exceeding fifty per centum of the working capital of the society has been undertaken by the Government a difference of opinion in respect of any matter arises between the nominated members of the committee and other members thereof, the matter shall be referred by the committee to the Government whose decision thereon shall be final and will operate as if the same were a decision taken by a committee."

Now it was the admitted position at the bar that the Board of Directors of the State Bank consisted of as many as 18 Directors. In view of S. 26 (1) of the Act, it is mandatory that these would be elected in the manner prescribed and further have to be shareholders. Moreover, sub-sec. (2) gives only a limited power to the government to nominate at the highest, three members to the Board, on the express condition where the govern-

ment have subscribed to the share capital of a Co-operative Society or has guaranteed the repayment of the principal and the payment of interest on debentures issued for loans raised by a Co-operative Society. Now it would be plain that if the condition of subscription to the share capital or guarantee for payment is not satisfied, the State Government has not the least right to add to the elected members of the Board. Assuming, however, that in the case of a mortgage bank, the Government does subscribe to the share capital or guarantee the repayment of the principal or the interest of the debentures, then at the highest, it can nominate three persons only to the Board. Can it possibly be said that the discretionary right of naming three persons on a Board of 18, gives an all pervasive total control to the State? The answer has to be in a categorical negative. Plainly, the nominees of the government even where it does choose to nominate would be far outnumbered by the elected members. To label this limited right of nomination, as indicative of the mortgage bank, being an instrumentality of the State, by itself, appears to me as a totally farcical.

21. Reference was then made to the proviso to sub-sec. (2) (a) and its sub-clauses which, under specific conditions enables the government to appoint one of the nominated members as a Chairman and the Managing Director of the Society. Herein again what deserves highlighting is that these provisions come into play only if the pre-eminent condition is satisfied that the government's contribution to the share capital is to the extent of twenty lacs of rupees or more. In the case before us, there is indeed no averment whatsoever to this effect. It would follow, therefore, that even in cases where the government's subscription to the share capital is to the tune of Rs. nineteen lacs, it has no overriding power of nominating a Chairman or the Managing Director. Assuming, however, that the contribution to the share capital does exceed the prescribed limit, can it be said that the mere discretionary or enabling power to appoint a Chairman or a Managing Director, out of the three nominated members, would necessarily turn the mortgage bank into an instrumentality of the State? I do not think so. As at present advised, no exceptional or total controlling power is spelled out in the Chairman or the Managing Director of the mortgage bank. The Chairman of the Board again would only be one of the 18 other Directors of the Bank, the vast majority of whom are elected members and in no way subservient to the State. It

deserves highlighting that invariably the ultimate control of the mortgage bank vests in its Board of Directors. As long as the vast majority of the Board continues to be those of elected persons, far out numbering, the three nominated members, (if at all so done) it cannot even remotely be argued that the mortgage bank or its Board becomes an instrumentality or the projection of the State. Nor can one hold that in specified conditions, the power to appoint one nominated member as the Managing Director in case of contribution to share capital to the tune of rupees twenty lacs, would be tantamount to total State control. The Managing Director, in the ultimate analysis, directs the day-to-day working of the Board. The ultimate control of the mortgage bank, as has already been highlighted, vests in the Board of Directors in which the majority would always be of persons elected in the manner prescribed. Further, the discretion — to appoint the Managing Director — is not absolute and the purpose seems to be no more that in cases where the governmental aid by way of finance is above twenty lacs, then to safeguard its financial interest, the management should be with a qualified expert who is a member of either the Indian Administrative Service or Punjab Civil Service or a high official of the Co-operative Department.

22. Lastly, in this context, reference may be made to sub-sec. (4) of S. 26 of the Act. Herein again, the precondition for its interplay is only where in a Co-operative Society in which shares have been subscribed for liability by way of guarantee for borrowing exceeding fifty per cent of the capital of the society, which has been undertaken by the government itself. Unless this condition is satisfied, the rest of the provisions of sub-section (4) would not be attracted. However, even here all that is prescribed is that in such a society, if there is a difference of opinion, in respect of any matters arising between the nominated members of the Committee and the other members thereof, the matter shall be referred to the government. It bears repetition that the three nominated members invariably are in a minority, vis-a-vis; the elected members of the Board. In the peculiar situation of sub-sec. (4), the added safeguard which is provided is that where in a particular case all the three nominated members differ on a specific matter from the others, then the same would not be resolved by majority, but would become the subject matter of reference to the government for its decision. It is not in each and every matter that the nominated members must be pre-

sumed to differ from the elected ones. Sub-sec. (4), therefore, prescribes merely for an exceptional situation. Even here it does not lay down that in such a situation, the view of the three nominated members even though in a patent minority would override those of the elected ones. In the event of a difference of opinion between the elected members on one side and the three nominated members collectively on the other, the matter is merely passed on to the government for decision. By judicial precedent, it is now well settled that the government in such a situation does not and cannot act arbitrarily like private individuals and in such a reference, would be bound to decide the issue on merits after considering the view points of the elected members and those who are nominated. It is not that the view of the nominated members must inevitably prevail and the balance is evenly held by the government on merits to decide the issue of difference in favour of either the elected members or those of the nominated members. There can be no warrant for the assumption that in such a situation the nominated members can impose their will on the remaining members of the Board. Therefore, a mere method or device for resolving a difference of opinion where the nominated members are unanimous against those who are elected, cannot be held as indicative of total and all pervasive control. It is significant that under sub-sec. (4), the three nominated members even when differing with the elected ones do not have a veto power to block the issue. At the highest it necessitates a reference to the government for final decision. Learned counsel for the respondent was on plausible ground in contending that even vesting a veto power in a person or a body, does not necessarily mean that thereby a total or all pervasive control of the same is passed over to him. A rather well-known example was highlighted that in the United Nations, the big five powers are clothed with a power of veto in a particular situation, but that does not mean that each of these powers exercising the veto, has deep and all pervasive control of the world organization. What indeed calls for notice here in the larger perspective is that under these provisions, it would seem that even where the government's financial contribution to the institution may be either total or nearly 100 per cent, still the right to nominate members to the Board under sub-sec. (2) of S. 26 of the Act is limited to three or 1/3rd of the total number of the members of the Board whichever is less. It would thus appear that the majority of the controlling

body of the authority, namely; the Board of Directors consists of non-governmental personnel. It is not, therefore, easy to label such a body as either an instrumentality of the government or an agency or projection of the State.

23. To conclude on this aspect, I am unable to hold that S. 26 of the Act generally or sub-sec. (4) thereof, in particular, by itself can in the context of the other factors, noticed earlier, be said to vest such a deep and all pervasive control of the State on the mortgage bank so as to render it as an instrumentality of the State whilst conducting ordinary, fiscal, banking and business activities.

24. Particular reference in this context must also be made to *Satish Kumar v. Punjab State Co-operative Bank Limited*, Chandigarh, AIR 1981 Punj & Har 282. Therein an identical stand was sought to be taken on behalf of the petitioner that the Punjab State Co-operative Bank Ltd. (which admittedly was a society registered under the Co-operative Societies Act), was an instrumentality or agency of the State and, therefore, amenable to the writ jurisdiction. My learned brother Tandon, J. in a judgment of remarkable perspicacity tested that claim on the anvil of the six tests enunciated in *Ajay Hasia's case* (AIR 1981 SC 487) (supra), and concluded as follows (at p. 287):—

"In view of discussion above, I hold that the Bank (Ludhiana Central Co-operative Bank) is not an instrumentality or agency of the State nor is it its projection. It is, therefore, not an authority within the meaning of Art. 12 of the Constitution, amenable to writ jurisdiction under Art. 226 of the Constitution."

What has been said in the aforesaid *Satish Kumar's case* applies with equal, if not with greater, force in the present case. It would consequently be prolix to restate all that was said therein. It suffices to highlight that it was rightly pointed out therein that none of the six tests spelled out in *Ajay Hasia's case* (supra) is either conclusive or clinching and it is the cumulative effect of all those tests which is decisive. As has already been noticed herein, not even a single test so prescribed, stands conclusively satisfied in the present case. To avoid wasteful repetition, it more than amply suffices that we agree entirely with the line of reasoning in *Satish Kumar's case* (AIR 1981 Punj & Har 282) (supra), which is unhesitatingly affirmed.

25. From the above, the conclusion, therefore, is inevitable that it has not even remotely been established that respondent

No. 3 the mortgage bank (against which alone the primary relief is claimed), is an instrumentality or agency of the State. Consequently, it cannot be deemed to be an authority within the meaning of Art. 12 of the Constitution of India and thus not amenable to a writ of certiorari under Art. 226 of the Constitution of India, which is the primary relief sought.

26. Repelled on his primary plank to establish that the mortgage bank was an instrumentality of the State and consequently amenable to the writ jurisdiction (despite the fact of its being registered under the Co-operative Societies Act), Mr. Saini made a tactical retreat to make a flanking attack which seems to be equally futile. It was forcefully contended that in spite of the fact that the mortgage bank may not be an authority under Art. 12 of the Constitution of India, a writ of certiorari will nevertheless still lie for quashing the order of the Managing Director of the respondent-mortgage bank, whereby the petitioner has been compulsorily retried. This contention might merit some dubious tribute to the ingenuity of the learned counsel but the same is patently fallacious.

27. Reliance for this radical proposition was first placed by Mr. Saini on certain passing observations of the Division Bench of the Madras High Court in *General Manager, United India Fire & General Insurance Co. Ltd. v. A. A. Nathan*, 1981 Lab IC 1076. Therein the pointed question was whether the *United India Fire & General Insurance Co. Ltd.* was amenable to the writ jurisdiction, particularly in the context of the *General Insurance Business (Nationalisation) Act*, (57 of 1972). The Division Bench tested the question on the anvil of the tests spelled out in the *International Airport Authority of India's case* (AIR 1979 SC 1628) (supra) and concluded as follows (at p. 1081 of Lab IC):—

"... Having regard to three special features, we have no hesitation whatsoever in coming to the conclusion that the appellant company will come within the scope of the expression 'other authorities' occurring in Article 12 of the Constitution. In the first place, under S. 24 of the Act, a right and exclusive privilege to carry on the general insurance business in India is conferred only on the four companies. It is such a right that has been conferred and protected by the statute. Secondly under S. 31 of the Act every officer or other employee of the Corporation as well as of the acquiring company shall be deemed to be a public servant for the purpose of

Chap. IX, Indian Penal Code. Thirdly, under S. 32 an indemnity is provided by the Central Government and the Corporation and the acquiring company in respect of the discharge of duties by the officers and other employees of the Corporation or acquiring company. It is pertinent to note that under Section 32, for the purpose of the indemnity, every officer or other employee of the company is treated on a par with the officers of the Central Government. These three circumstances cumulatively, in our opinion, in addition to the other provisions contained in the statute, will clearly establish that the appellant company will come within the scope of 'other authorities', occurring in Art. 12 of the Constitution, as has been explained by the several decisions of the Supreme Court."

It is obvious from the above that the Division Bench clearly concluded that the United India Fire & General Insurance Co. Ltd. therein was plainly within the ambit of Article 12 of the Constitution and therefore, amenable to the writ jurisdiction. This judgment, therefore, is plainly distinguishable and of no aid to the petitioner.

28. However, particular and pointed reliance of the learned counsel for the petitioner, in this context, is on the observations of the learned single Judge of the Andhra Pradesh High Court reported in *T. Gattaiiah v. Commr. of Labour*, 1981 Lab IC 942. Therein, the issue was raised in the context of the lay off and retrenchment of 87 workmen of I. D. L. Chemicals Ltd., Hyderabad. An objection was raised therein that the said I. D. L. Chemicals Ltd. being a company registered under the Companies Act, was not amenable to the writ jurisdiction. Rejecting the aforesaid objection, the learned single Judge, however, held in favour of the petitioner and granted a writ of mandamus against the respondent-Company, namely, M/s. I. D. L. Chemicals Ltd. There is no gainsaying the fact that the ratio of the said decision, and in particular some wide-ranging observations made therein, would lend a handle to the submissions now sought to be made on behalf of the petitioner.

29. However, with the greatest deference to the learned single Judge, in the aforementioned *T. Gattaiiah* case (1981 Lab IC 942) (Andh Pra), I am wholly unable to subscribe to that line of reasoning and feel compelled to record the strongest dissent therefrom. Because of the larger ramifications regarding the very nature and scope of a writ of certiorari under Art. 226 of the Constitution involved, it becomes necessary to extend the compliment of a rational refutation to

each one of the premises underlying the said judgment. With the greatest respect, it appears to me that certain observations made in the said judgment seem to be destructive of the very theory of precedent on which our judicial system rests, because they patently run counter to the main stream of the authoritative precedent of the final Court itself and curiously enough to the larger benches of the Andhra Pradesh High Court and equally to innumerable Division Benches and Full Bench judgements of this Court and other High Courts. Indeed the learned single Judge, even after expressly noticing the directly contrary view in the matter *Re: Nagabhushan Reddy*, AIR 1951 Mad 249; *Narasimhan v. Chicacole Co-operative Central Bank Ltd.*, (1959) 1 Lab LJ 554 (A Division Bench judgment of the Andhra Pradesh High Court itself); *Re: V. S. Hariharan*, AIR 1960 Andh Pra 518; *M. Durgaiiah v. Agent, Tandur Collieries*, AIR 1961 Andh Pra 400 and *R. Lakshmi v. Neyveli Lignite Corporation*, AIR 1966 Mad 399 further observed as follows (at p. 948 of Lab IC) :—

"These cases and others of the Punjab and Calcutta, Jammu and Kashmir High Courts which have been referred to by the learned counsel for the respondent-company, do undoubtedly furnish abundant authority for the argument of the respondent-company that no writ would lie against it which was incorporated under the Companies Act. If I were to follow these judgments, I should have rejected this writ petition on the ground that it was not maintainable. But, I regret to say that both on principle and on present authority of our Supreme Court and the English Courts, I am unable to follow these judgments."

30. It would be unnecessary to advert to the innumerable precedents of the final Court now settling authoritatively that a single Judge of the High Court is bound by the larger Benches of its own Court and cannot even differ from a single Bench of its own Court and in the latter eventuality the only course open is to refer the matter to a larger Bench. It suffices in this context to refer to the categoric observations in *Jai Kaur v. Sher Singh*, AIR 1960 SC 1118, as under (at pp. 1122, 1123) :—

"... .. It is true that they did not say in so many words that these cases were wrongly decided; but when a Full Bench decides a question in a particular way every previous decision which had answered the same question in a different way cannot but be held to have been wrongly decided. We

had recently occasion to disapprove of the action of a Division Bench in another High Court in taking it upon themselves to hold that a contrary decision of another Division Bench on a question of law was erroneous and stressed the importance of the well-recognised judicial practice that when a Division Bench differs from the decision of a previous decision of another Division Bench the matter should be referred to a larger Bench for final decision. If, as we pointed out there, consideration of judicial decorum and legal propriety require that Division Benches should not themselves pronounce decisions of other Division Benches to be wrong, such considerations should stand even more firmly in the way of Division Benches disagreeing with a previous decision of the Full Bench of the same Court."

Contrary to the above rule the learned single Judge in *T. Gattaiiah* case (1981 Lab IC 942) (Andh Pra) (supra) chose to plough a lonely furrow against obviously binding precedents of his own High Court on his own tenuous dictum that all earlier judgments were either contrary to principle or the present judgments of the Supreme Court and the English Courts. With the greatest respect, I am unable to see therein any violation of settled principles or any conflict of authority either with the final Court or with the English Courts.

31. I proceed now to analyse what with great humility, appear to me as the basic fallacies in *T. Gattaiiah's* case (1981 Lab IC 942) (Andh Pra). At the very threshold it may be recalled that the learned single Judge himself pointedly noticed as follows (at p. 951 of Lab IC):—

"It must be particularly noted that what we are concerned in this case is with the issuance of a writ of mandamus. "A writ of mandamus is always held to be available even against corporate bodies and companies

Thus even though the issue was narrowly confined in the context of a writ of mandamus, the learned single Judge made wide ranging observations about a writ of certiorari. It is settled beyond doubt that the scope and nature of the writs of mandamus and certiorari are very far from being identical. Inevitably, therefore, the observations in *T. Gattaiiah's* case (supra) made with regard to the nature of the writ of certiorari are clearly obiter dicta when the sole issue before the Court was the issuance of otherwise of a writ of mandamus alone.

32. Now apart from the above, the basic premise, which seems to underlie the view of the learned single Judge in *T. Gattaiiah's* case

(1981 Lab IC 942) (Andh Pra), that even a writ of certiorari would lie against a private person, seems to be the rather wide language in which Art. 226 of the Constitution is couched. Because this Article uses the words "any person", it was sought to be assumed that every and any writ could issue against a private person as well thereunder. Specifically, it was observed as follows (at p. 949):—

"... .. The very wide and special language of Art. 226 of the Constitution occurring as it does in a primordial document like the Constitution must, in my opinion, be given its full meaning. In doing so we must take note of the fact that the Constitution itself declares that the General Clauses Act would apply to its interpretation. According to the General Clauses Act, the word 'person' refers not only to a natural person but even to a legal person, if so done, there is no doubt, in my opinion, that a writ under Article 226 of the Constitution would be available not only against an authority or Government, but also against a private person

33. That the aforesaid stand is patently erroneous, is now so well settled that it would be wasteful to examine this issue on principle. It seems at the dawn of the promulgation of the Constitution an argument of this nature based on the overly literal construction of Art. 226 of the Constitution was sought to be raised but was scotched at its very inception by authoritative precedent, which has not been departed from. Reference in this connection may be made to *Re: Gadea Nagabhushana Reddi*, AIR 1951 Mad 249; *Carlsbad Mineral Water Mfg. Co. Ltd. v. H. M. Jagtiani*, AIR 1952 Cal 315; *Indian Tobacco Corporation v. State of Madras*, AIR 1954 Mad 549; *National Traders v. Hindustan Soap Works*, AIR 1959 Mad 112; *re. V. S. Hariharan*, AIR 1960 Andh Pra 518; *S. P. Manocha v. State of Madhya Pradesh*, AIR 1973 Madh Pra 84 and *Sudarshan Kumar Kalra v. Union of India*, AIR 1974 Delhi 119. Perhaps it would suffice to quote what is now a living authority which after a conspectus of all the precedent on the point has concluded as follows in the *Constitutional Law of India* by H. M. Seervai (Vol. II) at page 816:—

"As a result of the authorities already cited, it may be taken as settled that the principles governing the issue of writs of habeas corpus, mandamus, prohibition, certiorari and quo warranto have not been affected merely by reason of the wide language used in Art. 226."

34. What next calls for particular notice is the fact that the insidious fallacy, which seems to have crept in T. Gattaiiah case (1981 Lab IC 942) (Andh Pra), arises from treating the writs in the nature of habeas corpus, prohibition, quo warranto and certiorari, as being all at par or identical. With great humility, if one may say so, the confusion in the judgment is arising from the assumption that the writ of certiorari is identical in scope, its nature, and to whom it can issue, with the wide variety of other writs. It is settled beyond doubt that the long and ancient history of the specific writs in English law makes meaningful and significant distinctions betwixt the scope and nature of the different writs and to whom and when they should be lawfully issued. To treat all the different and wide varieties of writs as if they were identical or synonyms is, therefore, basically fallacious. This is evident from the fact that it was not seriously contested before us at the bar that a writ of habeas corpus might well lie against a private person masquerading in the garb of some authority and illegally depriving the citizen of his liberty. Similarly, a writ of quo warranto would also issue against a private person who is a mere pretender to a public office. Again it has been authoritatively settled by their Lordships of the Supreme Court that a mandamus may also issue to a private person provided that the basic pre-condition of there being a public duty imposed upon him is satisfied equally along with the clear legal right in the petitioner to claim the relief. From this, it does not follow and indeed it would be fallacious to presume that the writ of certiorari would, therefore, be invariably available against every and any private person. It was apparently under a misconception stemming from treating all the varied writs as identical that the learned single Judge in T. Gattaiiah's case (1981 Lab IC 942) (Andh Pra) (supra) attempted to rely on Arts. 17, 18, 23 and 24 of the Constitution. These provide for the abolition of untouchability, abolition of titles, prohibition of traffic in human beings and forced labour, and to prohibition in employment of children in factories etc. It is not quite easy to see how a writ of certiorari is available in the context of some of the aforesaid Articles of the Constitution. With the greatest respect, it would appear that some of these provisions have indeed little or no relevance to the nature, the scope, to whom it can be directed and the basic requirements for the issuance of a writ of certiorari.

35. Again a close reading of T. Gattaiiah's case (1981 Lab IC 942) (Andh Pra) would show that the basic premise underlying the view of the learned single Judge seems to be that the classic exposition of Lord Justice Atkin in *Rex v. Electricity Commissioners*, (1924) 1 KB 171, with regard to the nature of the writs of prohibition and certiorari stands virtually overruled and no longer holds the field. With respect, this assumption is wholly untenable though it is undeniable that during the passage of 60 years since that judgment was rendered some development of law in that field has inevitably taken place. The hallowed dictum was spelt out in the following terms by Lord Justice Atkin :—

"... .. The matter comes before us upon rules for writs of prohibition and certiorari which have been discharged by the Divisional Court. Both writs are of great antiquity, forming part of the process by which the King's Courts restrained Courts of inferior jurisdiction from exceeding their powers. Prohibition restrains the tribunal from proceeding further in excess of jurisdiction; certiorari requires the record or the order of the Court to be sent up to the King's Bench Division, to have its legality inquired into, and, if necessary, to have the order quashed. It is to be noted that both writs deal with questions of excessive jurisdiction, and doubtless in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as a Court of Justice. But the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognized as, Courts of Justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs"

There is no gainsaying the fact that the aforesaid statement of Lord Justice Atkin is not exhaustive. But it is a far cry therefrom to say that the same has no longer any relevance. Indeed, nearly 30 years later it was reaffirmed by Lord Goddard, C. J. in *Regina v. National Joint Council for the Craft of Dental Technicians (Disputes Committee)*, (1953) 1 QB 704. Therein a writ of certiorari or prohibition was sought against the Disputes Committee of the National Joint Council for the Craft of Dental Technicians. Un-

reservedly declining to issue such a writ Lord Goddard, C. J., observed as follows:—

“... .. Certiorari lies to bring up the decision or record of the inferior Court to this Court with a view to it being quashed. It is granted and directed to one of the inferior Courts, such as magistrates' Courts and county Courts, and it has been extended to the various bodies which have been entrusted by Parliament with duties partly of an administrative character and partly of a judicial character in some cases, but cases in which subjects may be affected by their decisions. There is no instance of which I know in the books where certiorari or prohibition has gone to any arbitrator except a statutory arbitrator, and a statutory arbitrator is a person to whom by statute the parties must resort.”

The learned single Judge in *T. Gattaiiah's case* (1981 Lab IC 942) (Andh Pra) has raised veiled doubts that the aforesaid two judgments have ceased to be relevant because of the observations in *Regina v. Criminal Injuries Compensation Board, Ex Parte Lain*, (1967) 2 QB 864 and *Ridge v. Baldwin*, (1963) 2 All ER 66.

36. With respect, the inferences sought to be made from *Lain's case* (supra) in this context again do not seem to be tenable. In *Lain's case* (supra) a writ of certiorari was sought against Criminal Injuries Compensation Board. Lord Parker, C. J. noticed that the Board clearly performed public duties and delineated its functions in the following terms:—

“Moreover, it is quite clearly under a duty to act judicially and indeed no argument to the contrary has been presented. It is to consist of a chairman of wide legal experience and five other members who are legally qualified (see paragraph 1 of the scheme). It is charged with assessing compensation on the basis of common law damages save as varied by the scheme (see paragraphs 9-13). Its procedure involves the examination and cross-examination of witnesses and it is provided that the burden is on the applicant to make out his case and that the decision shall be arrived at solely in the light of the evidence brought out at the hearing (para 18).”

On the aforesaid assumption it was held that the Criminal Injuries Compensation Board was amenable to the writ jurisdiction. I am unable to see that this judgment in any way overrules or renders irrelevant the dictum of Lord Justice Atkin in *Rex v. Electricity Commissioners' case* (1924-1 KB 171) (supra).

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Nor is it any warrant for the proposition that writ of certiorari would lie against a private person. Indeed the observations made therein give the lie direct to any such stand. In this context Lord Parker, C. J. observed as follows:—

“The position as I see it is that the exact limits of the ancient remedy by way of certiorari have never been and ought not to be specifically defined. They have varied from time to time being extended to meet changing conditions. At one time the writ only went to an inferior Court. Later its ambit was extended to statutory tribunals determining a *lis inter partes*. Later again it extended to cases where there was no *lis* in the strict sense of the word but where immediate or subsequent rights of a citizen were affected. The only constant limits throughout were that it was performing a public duty. Private or domestic tribunals have always been outside the scope of certiorari since their authority is derived solely from contract, that is, from the agreement of the parties concerned.”

Ashworth J. observed as follows:—

“... .. If persons agree that issues which have arisen or may arise between them are to be referred to an arbitrator or a body of persons, this Court will not entertain an attempt to obtain relief by means of a prerogative writ. In other words private or domestic tribunals are outside the range of an order of certiorari

... .. For my part I doubt whether Atkin L. J. was propounding an all-embracing definition of the circumstances in which relief by way of certiorari would lie. In my judgment the words in question read in the context of what precedes and follows them, would be of no less value if they were altered by omitting “the rights of” so as to become “affecting subjects”. I regard the duty to act judicially, in a public as opposed to a private capacity, as the paramount consideration in relation to relief by way of certiorari.”

It would be manifest from the above that public capacity and a duty to act judicially is still the paramount consideration for the issuance of a writ of certiorari.

37. I have with the closest attention perused the celebrated judgment of the House of Lords in *Ridge v. Baldwin* (1963-2 All ER 66) (supra) and find nothing therein which in any manner overrules or wipes

away Lord Justice Atkin's celebrated observations in *Electricity Commissioners' case* (1924-1 KB 171) (supra). Indeed, Lord Reid after noticing the judgment closely analysed and explained its ratio and held only that the subsequent gloss placed thereon by Lord Hewart, C. J. in *The King v. Legislative Committee of the Church Assembly*, (1928) 1 KB 411, was not authoritative and disagreed with the same. In essence, therefore, *Ridge v. Baldwin* is a reaffirmance of the *Electricity Commissioners' case*. As is more than well known, the primary issue in *Ridge v. Baldwin* case (1963-2 All ER 66) (supra) was with regard to the rules of natural justice and their applicability and the nature, scope and the authorities to whom a writ of certiorari would issue did not even remotely come in for consideration. I must, therefore, hold that the rationale for the under-mentioned observations of the learned single Judge in *T. Gattaiiah's case* (1981 Lab IC 942) (Andh Pra) (supra), in my humble view, are wholly unsustainable:—

"... .. All in all, it must now be taken that the famous judgment of Atkin L. J. in *Rex v. Electricity Commrs.*, (1924) 1 KB 171 (supra) cannot be fully applied to our Constitution and the above quoted decisions which have merely followed that judgment can no longer be taken as laying down a correct law... .."

38. Yet again, some support was sought from the observations in *Rohtas Industries Ltd. v. Rohtas Industries Staff Union*, AIR 1976 SC 425, by the learned single Judge in *T. Gattaiiah's case* (1981 Lab IC 942) (Andh Pra) (supra) that a writ of certiorari would lie against a private person. With the greatest respect, the aforesaid judgment is not open to any such construction. One of the issues before their Lordships of the Supreme Court in *Rohtas Industries' case* (supra) was whether a writ lies against the award of the Arbitrator under S. 10-A of the Industrial Disputes Act. Now there is no manner of doubt that the tribunal appointed to adjudicate on reference under S. 10-A of the Industrial Disputes Act is both a statutory tribunal and is patently one under a duty to act judicially or in any case quasi-judicially. On these premises it was obviously undeniable that a writ would lie and the observations made therein again were with regard to the generality of all the writs under Art. 226 of the Constitution. Nevertheless their Lordships of the Supreme Court sounded up a pungent note of caution in the following terms (at p. 429 of AIR):—

"... .. But it is one thing to affirm the jurisdiction, another to authorise its free exercise like a bull in a china shop."

The aforesaid wise and authoritative warning has to be heeded rather than flouted by attempting to extend the jurisdiction beyond what their Lordships rightly called as wholesome inhibitions. Nor am I able to see how the authoritative judgment of their Lordships in *Ajay Hasia v. Khalid Mujib Sehravardi*, AIR 1981 SC 487, in any way overrules or atrophies the dictum of Lord Justice Atkin in *Electricity Commissioners' case* (1924-1 KB 171) (supra). Indeed the latter judgment did not even remotely come in for consideration. Particular question with regard to the scope or nature of writ of certiorari was never before the Court. All that flows from the judgment is that the instrumentality of the State or its projection was as much within the writ jurisdiction as the State itself under Art. 12 of the Constitution. Therein it is nowhere said nor can it be even remotely inferred that a writ of certiorari could issue against a private person irrespective of the consideration whether he is charged with the duties of public or private nature or being obliged by law to act judicially or quasi-judicially.

39. In the aforesaid context it is equally necessary to recall that Chief Justice Kania speaking for the majority in the Constitution Bench in *Province of Bombay v. Khushaldas S. Advani*, AIR 1950 SC 222, expressly noticed with approval the observations of Lord Justice Atkin in the *Electricity Commissioners' case* (1924-1 KB 171) (supra) and concluded as follows (at p. 227):—

"..... Inconvenience or want of adequate remedy does not create a right to a writ of certiorari. It is clear that such writ can be asked for if two conditions are fulfilled. Firstly, the decision of the authority must be judicial or quasi-judicial, and secondly, the challenge must be in respect of the excess or want of jurisdiction of the deciding authority. Unless both those conditions are fulfilled, no application for a writ of certiorari can succeed. As, in my opinion, the decision of the Provincial Government about public purpose is not a judicial or quasi-judicial decision, there is no scope for an application for a writ of certiorari."

Now it seems to be true that C. J. Kania, as some other Judges agreeing with him also accepted as correct what is now universally labelled as the gloss of Lord Hewart, C. J. in *Legislative Committee of the Church As-*

sembly's case (1928-1 KB 411) (supra) on the dictum of Lord Atkin in Electricity Commissioners' case (supra). Indeed this was so done also by the Privy Council in Nakkuda Ali v. M. F. De S. Jayaratna, (1963) 1 QB 539. However, this superadded gloss of Lord Hewart, C. J. has now been authoritatively rejected by the House of Lords in Ridge v. Baldwin (1963-2 All LR 66) (supra) and in terms by the final Court in Rampur Distillery and Chemical Co. Ltd. v. Company Law Board, New Delhi, AIR 1970 SC 1789. Consequently without the superadded gloss of Lord Hewart, C. J. the basic dictum of Atkin, L. J. in Electricity Commissioners' case (1924-1 KB 171) (supra) stands approved by the final Court, in terms. No later judgment of the Supreme Court was even remotely brought to our notice in which the Electricity Commissioners' case (supra) has either been deviated from or in any way disapproved or dissented. Once the final Court has placed its seal of approval on the rule in Electricity Commissioner's case (supra), it appears to me that it would hardly be the province of the High Courts to hold to the contrary in view of Art. 141 of the Constitution of India. Reference in this context may also be made to the well-known case of Hari Vishnu Kamath v. Ahmad Isahque, AIR 1955 SC 233. Therein, the scope and nature of a writ of certiorari came in for close examination. Reliance inevitably was placed before the Court on Electricity Commissioner's case (supra) which was in terms noticed by the Court without a hint of dissent of deviation therefrom. That the nature and scope of each one of the celebrated writs is different is manifest from the fact that in Hari Vishnu Kamath's case (supra) their Lordships draw a clear line of distinction between a writ of certiorari and one of prohibition, though these are closely allied in nature.

40. That the dictum of Lord Justice Atkin in Electricity Commissioners' case (1924-1 KB 171) (supra), with some inevitable developments therein with the passage of sixty years, still holds the fields, is plain from the consideration of the subject in the authoritative work of the Constitutional Law of India by H. M. Seervai. Therein the whole discussion of the writ of certiorari has been made on the avail of Lord Atkin's statement of the principles. Particularly with regard to the writ of certiorari in India, the learned author says as follows:—

Certiorari

"16.159. As before, the law will be stated with reference to Atkin, L. J.'s statement of

the principles which underlies the Court's jurisdiction to issue certiorari.

16.160. The writ of certiorari lies not only against inferior Courts *stricto sensu*, but to any person, body or authority having the duty to act judicially or the duty to act fairly"

41. Lastly I am of the view that apart from the issuance of a writ of certiorari even in the context of a writ of mandamus, the view taken by the learned single Judge in T. Gattaiah's case (1981 Lab IC 942) (Andh Pra) (supra) is patently contrary to the binding precedent. The learned single Judge had directed the mandamus against a limited company (in no way held to be a Government Company or an instrumentality or projection of the State) to continue the retrenched employees in their service with back wages for some alleged infraction of Chapter 5-B of the Industrial Disputes Act. In this context it deserves to recall that in R. Natarajan v. Regional Assistant Commissioner of Labour, Hyderabad, ILR (1967) Andh Pra 361, 40 workmen had filed a writ petition seeking a mandamus against the Praga Tools Corporation Ltd. for challenging their retrenchment in violation of settlement duly recorded under the provisions of the Industrial Disputes Act. An objection was taken before the learned single Judge that no writ petition for mandamus could lie against an employer company registered under the Companies Act. However, the learned single Judge without deciding this preliminary objection, dismissed the writ petition on merits. On appeal the Division Bench of the Andhra Pradesh High Court held that the company being one registered under the Companies Act and not having any statutory duty or function to perform was not one against which a writ petition for a mandamus or any other writ could lie. However, the Division Bench proceeded to grant a declaration in favour of the three workmen on the ground that the impugned agreement was illegal and void and dismissed the writ petition subject to the said declaration. On appeal by the Praga Tools Corporation, their Lordships of the Supreme Court in Praga Tools Corporation v. C. V. Imanual, AIR 1969 SC 1306, noticed that the only question which arose therein was whether in spite of the view of the High Court that the writ petition was not maintainable against the company, it could still grant the said declaration. Upholding the view of the High Court in this context, their Lordships of the Supreme Court first observed (at p. 1309):—

"..... In our view the High Court was correct in holding that the writ petition filed under Art. 226 claiming against the company mandamus or an order in the nature of mandamus was misconceived and not maintainable"

and again observed (at p. 1310):—

"The company being a non-statutory body and one incorporated under the Companies Act there was neither a statutory nor a public duty imposed on it by a statute in respect of which enforcement could be sought by means of a mandamus, nor was there in its workmen any corresponding legal right for enforcement of any such statutory or public duty. The High Court, therefore, was right in holding that no writ petition for a mandamus or an order in the nature of mandamus could lie against the company."

and concluded as follows (at p. 1310):—

".....In our view once the writ petition was held to be misconceived on the ground that it could not lie against a company which was neither a statutory company nor one having public duties or responsibilities imposed on it by a statute, no relief by way of a declaration as to invalidity of an impugned agreement between it and its employees could be granted. The High Court in these circumstances ought to have left the workmen to resort to the remedy available to them under the Industrial Disputes Act by raising an industrial dispute thereunder. The only course left open to the High Court was therefore to dismiss it. No such declaration against a company registered under the Companies Act and not set up under any statute or having any public duties and responsibilities to perform under such a statute could be issued in writ proceedings in respect of an agreement which was essentially of a private character between it and its workmen. The High Court, therefore, was in error in granting the said declaration."

It would be plain from the above that there is binding precedent for the proposition that no writ of mandamus can issue to a mere company registered under the Companies Act for the violation of any settlement expressly recorded or sanctified by the Industrial Disputes Act itself. In holding as above, their Lordships referred with approval to the earlier observations in *Sohan Lal v. Union of India*, AIR 1957 SC 529, wherein it was observed as follows (at p. 532):—

"..... Normally, a writ of mandamus does not issue to or an order in the nature of mandamus is not made against a private individual. Such an order is made against a

person directing him to do some particular thing, specified in the order, which appertains to his office and is in the nature of a public duty (Halsbury's Laws of England, Vol. II, Lord Simonds Edition, p. 84)."

In *Dr. Rai Shivendra Bahadur v. Governing Body of the Nalanda College, Bihar Sharif*, AIR 1962 SC 1210, the petitioner had sought a mandamus for appointment as Principal by virtue of statutes framed under the University of Bihar Act. Negativising such a claim their Lordships of the Supreme Court therein observed as follows (at p. 1211):—

"..... In order that mandamus may issue to compel the respondents to do something it must be shown that the Statutes impose a legal duty and the appellant has a legal right under the Statutes to enforce its performance. It is, however, wholly unnecessary to go into or decide this question or to decide whether the Statutes impose on the Governing Body of the College a duty which can be enforced by a writ of mandamus because assuming that the contention of the appellant is right that the College is a public body and it has to perform a public duty in the appointment of a Principal, it has not been shown that there is any right in the appellant which can be enforced by mandamus. According to the Statutes all appointments of teachers and staff have to be made by the Governing Body and no person can be appointed, removed or demoted except in accordance with Rules but the appellant has not shown that he has any right entitling him to get an order for appointment or reinstatement. Our attention has not been drawn to any Article in the Statutes by which the appellant has a right to be appointed or reinstated and if he has not that right he cannot come to Court and ask for a writ to issue. It is therefore not necessary to go into any other question."

Reiterating the aforesaid view by reversing the grant of mandamus by this Court, their Lordships of the Supreme Court in *State of Haryana v. Subash Chander Marwaha*, AIR 1973 SC 2216, held as follows (at pp. 2220, 21):—

"It must be remembered that the petition is for a mandamus. This Court has pointed out in *Dr. Rai Shivendra Bahadur v. The Governing Body of the Nalanda College*, (1962) 2 Supp SCR 144: (AIR 1962 SC 1210), that in order that mandamus may issue to compel an authority to do something, it must be shown that the statute im-

poses a legal duty on that authority and the aggrieved party has a legal right under the statute to enforce its performance. Since there is no legal duty on the State Government to appoint all the 15 persons who are in the list and the petitioners have no legal right under the rules to enforce its performance the petition is clearly misconceived."

42. It would be manifest from the above that to successfully invoke the mandamus jurisdiction, the petitioner has not only to show a clear public or statutory duty laid on the respondent but an equally clear legal right to enforce the same.

43. For the aforesaid detailed reasons, to conclude on this aspect, I would record my emphatic dissent from the observations in T. Gattaiyah's case (1981 Lab IC 942) (Andh Pra) (supra), both as regards the nature and scope of the writ of certiorari (which, as noticed, did not arise for decision), as also with regard to the particular context in which the writ of mandamus has been granted.

44. To sum up it is held that where a society registered under the Punjab Co-operative Societies Act is in essence an instrumentality or agency of the State, it would become amenable to the writ jurisdiction under Art. 226 of the Constitution of India in the same manner as the State itself. The ratio in the earlier Full Bench case in Ajmer Singh v. Registrar, Co-operative Societies, Punjab (AIR 1981 Punj & Har 107) (supra) is elaborated or qualified to the extent aforesaid.

45. It is further held that the Punjab Co-operative Land Mortgage Bank Limited (respondent No. 3) is not an instrumentality or a projection of the State.

46. For the detailed reasons recorded above, the primary relief of a writ of certiorari, claimed against respondent No. 3, is not maintainable and the petition has, therefore, to be necessarily dismissed. In view of the somewhat ticklish questions involved, we leave the parties to bear their own costs.

Petition dismissed.

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S. S. SANDHAWALIA, C. J. AND

G. C. MITAL, J.

Sardarni Sampran Kaur and another,
Petitioners v. Sant Singh and another,
Respondents.

Civil Revn. No. 280 of 1977, D/- 19-2-1982.*

(A) East Punjab Urban Rent Restriction Act (3 of 1949), Ss. 13 (3) (a) (iii), 2 — Word "building" — Meaning — It includes the integrated larger building as a whole rather than part thereof demised to tenant.

The word 'building' in S. 2 is not in terms absolute but is subject to contextual limitations. The very opening part of the said section makes it explicit that the definition is to apply only if there is nothing repugnant in the subject or the context. Consequently the use of the word "building" in S. 13 (3) (a) (iii) has to be viewed in its particular textual context and not with any inflexible absoluteness of the literal terms of cl. (a) of S. 2. Therefore, it is possible to construe the word "building" as used in S. 13 (3) (a) (iii) to include the integrated larger building as a whole rather than the part thereof demised to a particular tenant alone. 1981 Cur LJ (Civil) 500 (Punj & Har), Approved. (Para 9)

(B) East Punjab Urban Rent Restriction Act (3 of 1949), S. 13 (3) (a) (iii) — Ejectment for reconstruction — Substantial part of integrated larger building becoming unsafe for human habitation — Tenant of part of such building can be ejected even though the demised part is in good condition. C. R. No. 1711 of 1977, decided on 18-4-1980 (Punj & Har), Overruled. (Para 19)

Cases Referred: Chronological Paras

1981 Cur LJ (Civil) 500: (1981) 2 Rent LR 563 (Punj & Har)	9
(1980) 1 Rent LR 573: (1980) 1 Ren CJ 566 (Punj & Har)	12
(1980) C. R. No. 1711 of 1977, D/- 18-4-1980 (Punj & Har), Amar Nath v. Nand Kishore	5, 13, 14, 15, 16
(1978) 1 Rent LR 596: (1978) 1 Ren CR 276 (Punj & Har)	12
AIR 1975 SC 2260: (1975) 2 SCC 791: 1975 Tax LR 2129	14, 15

*From order of Harbans Singh Chaudhary, Appellate Authority under Rent Restriction Act, (Dist. J.) Kapurthala, D/- 28-9-1976.

1975 Ren CJ (SN) 11: (1980) 2 Ren CJ
225 (Punjab & Har) 4, 12
(1970) 72 Pun LR 411: 1970 Ren CJ 536
12, 13
(1968) 70 Pun LR 803: 1968 Cur LJ 517
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(1967) 69 Pun LR 251 4
1966 Cur LJ 772 (Punjab) 13
(1949) 2 KB 481: (1949) 2 All ER 155:
93 SJ 424. Seaford Court Estates Ltd.
v. Asher 15

D. V. Sehgal with K. S. Raipuri, Vinod Kataria and P. S. Rana, for Petitioners; H. L. Sarin, Sr. Advocate with R. L. Sarin, B. R. Behl and L. M. Suri, for Respondents.

S. S. SANDHAWALIA, C. J.:— The question posed for determination by the Division Bench in the reference order of the learned single Judge is in the following terms:—

"Whether the ejectment of a person, who is a tenant of a demised premises which is part and parcel of a bigger building, can be ordered, to enable the landlady to reconstruct the dilapidated building if the other portion of the building which is in possession of the landlady is found to be unsafe for human habitation?"

2. At the outset, however, it may be mentioned that the learned counsel for the parties are agreed that the core question here can be more felicitously formulated in general terms as under:—

"Whether a tenant of the demised premises which are an integral part of a larger building, can be ejected under the provisions of Section 13 (3) (a) (iii) of the East Punjab Urban Rent Restriction Act, 1949, on the ground of the building having become unsafe and unfit for human habitation despite the fact that the particular portion in the occupation of the tenant may not be so."

3. The facts may be delineated with relative brevity with particular reference to the question aforesaid.

3-A. An application under S. 13 was preferred by Sampuran Kaur and Rajinder Kaur against their tenants Sant Singh and the firm M/s. Sobha Singh Sant Singh for their ejectment from the shop No. 203 situate in Sadar Bazar, Kapurthala. One of the grounds which was pointedly pressed before the Courts below was that the landladies sought eviction because the building was in a dilapidated condition, and was unfit for human habitation and the whole of it was needed for the reconstruction thereon. The stand on behalf of

the petitioners was that the demised premises, namely, the shop was part and parcel of a bigger building, which consisted of a ground floor and the first floor. Another adjoining shop towards the west was shown in the site plan Exhibit AW4/2 to be in dilapidated condition and in possession of the petitioners themselves. The back portion of the ground floor was also shown to be demolished. It was also the stand that there was evidence to show that a part of the building on the first floor was burnt and the rest had fallen with the result that there was no habitable construction on the first floor. The trial Court on this aspect of the case came to the conclusion that it was not established that the building was unfit and unsafe for human habitation within the ambit of S. 13 (3) (iii) of the East Punjab Urban Rent Restriction Act, 1949, hereinafter called 'the Act' and consequently dismissed the ejectment application. On appeal the Appellate Authority affirmed the order of the Rent Controller. Aggrieved the landladies have preferred the present revision petition.

4. When the case came up before the learned single Judge, it was argued on behalf of the petitioners that on the established evidence on the record, coupled with the fact that there were also cracks on the walls of the premises demised to the tenants as well, the ejectment application should have been allowed by the Rent Controller. Particular reliance was placed by the learned counsel for the petitioners on Smt. Shakuntala Devi v. Daulat Ram, (1967) 69 Pun LR 251; Ranjit Kaur v. Piar Singh, (1968) 70 Pun LR 803 and Parkash Chand v. Jagdish Rai, 1975 Ren CJ (SN) 11 (Pun & Har), to contend that if the demised premises were part and parcel of a larger building which was in a dilapidated condition and therefore unsafe and unfit for human habitation, then the ejectment of the tenant could be ordered on that ground.

5. However, on behalf of the respondent-tenant, particular reliance was placed on C. R. No. 1711 of 1977, Amar Nath v. Nand Kishore, decided on the 18th of April, 1980. Resting on the observations made therein it was contended that the fact of some portion of the building in possession of the landlord being unfit and unsafe for human habitation would be extraneous and of no consequence for furnishing any ground for ejectment of the tenant from the demised premises.

6. Noticing an apparent conflict of precedent within this Court on the point, the learned single Judge has referred the question for authoritative decision and that is how the matter is before us.

7. At the very outset we would wish to make it clear that we propose to decide only the significant legal issue arising herein leaving the merits to be pronounced upon by a single Bench. The question herein arises on the admitted position that the demised premises are part and parcel of an integrated larger building. However, as the question has to be examined only in the light of the statutory provision it is apt to first read the definition of building as spelt out in Section 2 (a) and the relevant provisions of Section 13 (3) (a) (iii) of the Act:—

"S. 2. In this Act, unless there is anything repugnant in the subject or context,—

"Building" means any building or part of a building let for any purpose whether being actually used for that purpose or not, including any land, godowns, out-house, or furniture let therewith, but does not include a room in a hotel, hostel or boarding house". And

"S. 13 (3) (a): A landlord may apply to the Controller for an order directing the tenant to put the landlord in possession—

(iii) in the case of any building or rented land, if he requires it to carry out any building work at the instance of the Government or local authority or any Improvement Trust under some improvement or development scheme or if it has become unsafe or unfit for human habitation."

Now for clarity's sake the three facets of the issue which arise for consideration may be noticed as under:—

(i) Whether the tenant can be ejected when any part whatsoever of the larger building has become unsafe or unfit for human habitation?

(ii) Whether the tenant can be ejected only if a substantial part of the integrated larger building has become unsafe and unfit for human habitation? and

(iii) Whether the tenant can be ejected only if the whole and every part of the building including the particular one demised to him satisfies the test of being unsafe or unfit for human habitation?

8. Now it seems to be plain that so far as the last question No. (iii) is concerned the answer thereto seems to be simple enough. If the whole of the building including the demised premises has become unsafe and unfit for human habitation the

provisions of S. 13 (3) (a) (iii) are attracted proprio vigore and the tenants would be straightway liable to ejection. On this there seems to be hardly any dispute and the learned counsel were agreed that where the total structure including the portion thereof which is in occupation of the particular tenant satisfies the aforesaid twin condition then the liability for ejection would arise under the statute *stricto sensu*.

9. Therefore only the remaining two facets (i) and (ii) above seem to call for a closer analysis. As would appear hereinafter, within this jurisdiction the question is not *res integra* and consequently has to be viewed in the context of the existing precedent. However, before adverting thereto the statutory provision calls for some examination and interpretation. Herein what first deserves highlighting is the fact that the definition of the word 'building' in S. 2 of the Act is not in terms absolute but is subject to contextual limitations. The very opening part of the said section makes it explicit that the definition is to apply only if there is nothing repugnant in the subject or the context. Consequently the use of the word 'building' in Section 13 (3) (a) (iii) has to be viewed in its particular textual context and not with any inflexible absoluteness of the literal terms of cl. (a) of S. 2 of the Act. Therefore it would be possible to construe the word 'building' as used in S. 13 (3) (a) (iii) of the Act to include the integrated larger building as a whole rather than the part thereof demised to a particular tenant alone. Specifically this question came up before J. V. Gupta, J. in *Mulk Raj v. Hari Chand etc.*, 1981 Cur LJ (Civil) 500, who held as follows:—

"Thus, the definition of the building, as given in Section 2 (a) of the Act, has to be read with reference to the opening words of Section 2, reproduced above. Section 13 (3) (a) (iii) of the Act *inter alia* provides that in the case of any building or rented land if the landlord requires it to carry out any building work at the instance of the Government or the local authority or any improvement scheme, or if it has become unsafe or unfit for human habitation, the landlord is entitled to eject the tenant therefrom. Now in this clause, the word 'building' cannot be said to mean only a part of the building which is included in the definition of the term 'building', as given in Section 2 (a) of the Act, because it will be repugnant in the context of S. 13 (3)

(a) (iii) of the Act. If a landlord is required to carry out any building work at the instance of the Government or the local authority or any Improvement Trust, it cannot be said that the rented premises being a part of the building will not be included therein and the tenant can claim protection in view of the definition of the term 'building' as given under Section 2 (a) of the Act."

It is unnecessary to labour the point as I am in agreement with the aforesaid view which is unreservedly affirmed.

10. The other aspect which calls for somewhat pointed notice is that Section 13 (3) (a) (iii) is not confined only to cases of buildings which are unsafe or unfit for human habitation. An identical right of ejectment is given therein to the landlord where he has to carry out any building work at the instance of the Government or local authority or any Improvement Trust under some improvement or development scheme. In a way the aforesaid provision has in view the concept of urban renewal as its underlying purpose. It is plain that in case any improvement or development scheme requires a rebuilding or reconstruction or even substantial alteration of the existing structure then the landlord is forthwith entitled to eject his tenants thereon. It has to be sharply kept in mind that in these cases the building need not satisfy the test of being unsafe or unfit for human habitation. Even if it is wholly safe and fit for occupation the tenant loses his rights in face of the larger purpose of improvement or development schemes at the instance of the specified authorities.

11. Now the case of a building becoming unsafe or unfit for human habitation has been expressly placed on the aforesaid pedestal and bracketed with the same in one comprehensive provision. In such cases also if it becomes necessary to rebuild or reconstruct the structure then for reasons of larger social need the law gives the right to the landlord to forthwith eject his tenants. Viewed as a whole S. 13 (3) (a) (iii), therefore, visualises the reconstruction of the building either at the behest of the Government or other authority or in the event of its being rendered unsafe or unfit for human habitation. The provision here does not seem to look at the matter in a narrower legalistic term of the individual rights of the tenants and landlords but perhaps on the larger social purpose of not obstructing urban renewal and the remodelling and reconstruction of structures either for their betterment at the instance of public

authority or where they have out-lived their usefulness and become unsafe and unfit for human habitation.

12. It is with this background of principle and the statutory provisions that one may now proceed to examine the authorities on the point. There appears to be a catena of unbroken precedent which is a pointer to the fact that where a larger building has become substantially unsafe or unfit for human habitation then the landlord has the right to get the whole of it vacated for purposes of reconstruction and renewal. Pride of place in this context may straightway be given to the Division Bench judgment of this Court in *Dr. Piara Lal Kapur v. Smt. Kaushalya Devi*, (1970) 72 Pun LR 411, wherein it has been observed as under:—

"None of the cases cited by Mr. Roop Chand lays down the proposition of law for which he is canvassing. No case has been cited before us where it might have been laid down that the entire demised premises must be proved to have become unsafe or unfit for human habitation before the order for eviction can be passed under the relevant clause. A finding of fact has been recorded in the present case by the Appellate Authority to the effect that at least a portion of the premises in dispute had in fact become unfit and unsafe for human habitation. The mere fact that the unsafe and unfit portion has been demolished or removed would not, in our opinion take the case out of the mischief of sub-clause (iii) of clause (a) of sub-section (3) of Section 13 of the Act."

Following the aforesaid basic tenet of the Division Bench, the later Single Benches have in a way added and elaborated the ratio thereof. In *Sham Dass v. Sunder Singh*, (1978) 1 Rent LR 596, Harbans Lal J., held the following as axiomatic—

"* * The principle of law is not disputed that if a part of the building is unfit and unsafe for human habitation, the order of ejectment can be passed in respect of the whole building."

In *Bhagwanti v. Yasodha Devi*, (1980) 1 Rent LR 573, R. N. Mittal, J. was even more categorical in holding:—

"* * The question to be determined is that if a part of the building is unsafe and unfit for human habitation whether a landlord can seek ejectment of the tenant from the building leased out to him on this ground. It is well settled that a building includes a part of building. It has not been provided in the Act that if

a part of the building is unfit for human habitation, the landlord can seek ejectment only with respect to that part of the building. The intention of the Act is clear that if a part of the building has become unsafe and unfit for human habitation the landlord can seek ejectment of a tenant."

To the same tenor are the observations of A. D. Koshal, J., in *Parkash Chand v. Jagdish Rai*, 1975 Ren CJ (SN) 11 and *Mulkh Raj's case* (supra).

13. However, it was not the Division Bench judgment in *Piar Lal Kapur's case* (1970-72 Pun LR 411) (supra) which is the first mile-stone in the law on this point within this Court. Even earlier the trend towards the same was visible in the observations of I. D. Dua, J. (as his Lordship then was) in *Madan Lal Kapur v. Nand Singh*, 1966 Cur LJ 772 and *Shamsher Bahadur J., in Ranjit Kaur v. Piar Singh*, (1968) 70 Pun LF. 803.

However, a pointed discordant note in this context has been struck in *Amar Nath v. Nand Kishor*, C. R. No. 1711 of 1977 decided on 18th April, 1980. Undoubtedly therein a view has been taken that unless the portion demised to the tenant was itself unsafe and unfit for human habitation he could not be ejected therefrom even though a substantial part of the larger building has already crumbled or had become unsafe and unfit for human habitation. It was, therefore, held that the condition of the premises demised to the tenant alone could furnish a ground of ejectment. Having taken so strict a view the learned Judge has observed as follows:—

"* * I am fully conscious of the fact that the conclusion arrived at by me appears to be quite odd and would cause a lot of hardship to the landlord who has to leave out a small portion of the building as it is, while reconstructing whole of the remaining portion but it is not possible to take any other view on the provisions of the statute noticed above and it is for the legislature to look into this matter and bring about a suitable amendment in the law to remove this obvious hardship to the landlords."

14. With the greatest respect it appears to me that the ratio in the aforesaid *Amar Nath's case* is rather untenable. A perusal of the judgment discloses that the larger social purpose of the statute and the concept of urban renewal which underlies S. 13 (3) (a) (iii) of the Act was not even remotely agitated be-

fore the Bench and has, therefore, missed consideration altogether. A narrow constricted view of the definition of building under S. 2 (a) was taken whilst omitting the meaningful prelude thereto to the effect that the said definition was subservient to anything repugnant in the subject or context. Inevitably the question whether the provisions of S. 13 (3) (a) (iii) had the seeds of repugnancy to the literal definition of the word 'building' did not come up for consideration at all. In this context *Krishna Iyer J. in Carew and Co. Ltd. v. Union of India*, (1975) 2 SCC 791: (AIR 1975 SC 2260 at p. 2272) had pithily observed:—

"* * Surely, definitions in the Act are a sort of statutory dictionary to be departed from when the context strongly suggests it."

15. It would appear that because of the aforementioned factors the learned Judge in *Amar Nath's case* held that it was not possible to take any other view of the provisions of the statute. As would be manifest from the earlier discussion of the authorities there appears to be a plethora of precedent taking a contrary view. Consequently it is not easy to subscribe to the observation that the statute is incapable of two interpretations. In such a situation it is again apt to recall the observations in *Carew & Company's case* (AIR 1975 SC 2260 at p. 2270) (supra):

"* * To repeat for emphasis, when two interpretations are feasible, that which advances the remedy and suppresses the evil, as the Legislature envisioned, must find favour with the Court. Are there two interpretations possible? There are, as I have tried to show and I opt for that which gives the law its claws."

Lastly the learned Judge was himself alive to the anomalous results that would flow from his view and rightly observed that the conclusion arrived at by him appeared to be quite odd and would cause grave hardship to the landlords. He, however, chose to leave this matter to the legislature. With the greatest respect this interpretative approach has now given way to the more wholesome method of construction which keeps the scheme and the purpose of statute at a higher pedestal. Way back in *Seaford Court Estates Ltd. v. Asher*, (1949) 2 KB 481, Lord Denning had observed as follows:—

"* * A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have

been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine pre-science and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman." and again

"A judge should ask himself the question: If the makers of the Act had themselves come across this ruck in the texture of it, how would they have straightened it out? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases."

I am inclined to the view that this was a case merely of ironing out a crease and if the language used in the statute could be broadly construed as to salvage the remedial intentment then the Court must adopt the same. It is well-settled that an interpretation which leads to glaringly anomalous results must be avoided. It is not always that the busy legislature has either the time or the inclination to make minor corrections in the innumerable statutory provisions and, therefore, the burden of meaningfully interpreting even obscure statute must be borne by the Court willingly.

16. For the aforesaid reasons I would hold that Amar Nath's case (*supra*) does not lay down the law correctly on the point and is hereby overruled.

17. The extreme stand that where any or even an infinitesimal part of the larger building has become unsafe or unfit for human habitation that also would give the landlord a right to eject the tenant was not seriously pressed before us even by the learned counsel for the petitioner. Neither principle nor precedent could be cited in support of such a proposition. There is thus no option but to reject the same.

18. To conclude the answer to the question posed in para 2 above is rendered in the affirmative and it is held that if the substantial part of the integrated larger building has become unsafe and unfit for human habitation the tenant can be ejected from the demised premises forming part thereof, under Section 13 (3) (a) (iii) of the Act despite the fact that the particular portion in his occupation may not be so.

19. The answer to the legal question referred having been rendered in the terms above, the revision would now go back before a learned single Judge for a

decision on merits in accordance therewith.

G. C. MITAL, J.:— I agree.

Reference answered in affirmative.

AIR 1982 PUNJAB AND HARYANA 250 RAJENDRA NATH MITTAL, J.

Walaiti Ram and another, Petitioners v. Harbans Lal, Respondent.

Civil Revn. No. 2486 of 1980, D/- 11-1-1982.*

East Punjab Urban Rent Restriction Act (3 of 1949), Ss. 19 (1) and (3), 15 (1) (a) and (b) — State Govt. Notifications under S. 15 (1) (a) D/- 14-4-1947, 19-10-1957 and 20-12-1958 — Authorities empowered by Notifications to hear appeals against orders of Rent Controller passed under Ss. 4, 10, 12 and 13 only. — Authorities have no jurisdiction to decide appeal against order of Rent Controller passed under S. 19 (3). (Para 4)

R. S. Bhatia, for Petitioners; P. S. Sandhu, for Respondent.

ORDER:— This revision petition has been filed by Walaiti Ram and Madan Lal landlords, against the order of the Appellate Authority, Ludhiana, dated 22nd May, 1980 allowing the respondent-tenant to file a complaint under S. 19 (1) of the East Punjab Urban Rent Restriction Act, 1949 (hereinafter referred to as 'the Act').

2. Briefly the facts are that the tenant moved an application before the Rent Controller under S. 10 of the Act for restoration of the amenities of latrine and hand-pump, allegedly removed by the landlords from the premises under his tenancy. It was accepted by the Rent Controller and the landlords were directed to reconstruct the latrine and instal the hand-pump. On appeal the order of the Rent Controller was affirmed.

3. The tenant then filed an application under S. 19 (3) that he may be allowed to file the complaint under S. 19 (1) against the landlords for contravening the provisions of S. 10 (1) of the Act. The application was contested by the landlords. The Rent Controller after recording the evidence dismissed it. The tenant went up in appeal before the Appellate

*From order of S. Amarbir Singh Gill, Appellate Authority, Ludhiana, D/- 25-5-1980.

Authority, who reversed the order of the Rent Controller and allowed the application. The landlords have come up in revision against the order of the Appellate Authority to this Court.

4. The only contention of the learned counsel for the petitioners is that the Appellate Authorities in the Punjab State have not been authorised under S. 15 (1) (a) by the State Government to hear appeals against the orders of the Rent Controllers under S. 19 (1) (3) of the Act. He in that regard made reference to the notification of the Government dated 14th April, 1947 under Section 15 (1) (a). I have given due consideration to the argument of the learned counsel and find force in it. Section 15 (1) (b) authorises a party, aggrieved against an order of the Rent Controller, to file an appeal before the Appellate Authority. S. 15 (1) (a) empowers the State Government by notification to confer on any officer or authority the powers of the Appellate Authority. Sub-s. (1) of S. 15 reads as follows:—

"(1) (a) The State Government may, by a general or special order, by notification confer on such officers and authorities as they think fit, the powers of appellate authorities for the purposes of this Act, in such area or in such classes of cases as may be specified in the order.

(b) Any person aggrieved by an order passed by the Controller may within fifteen days from the date of such order or such longer period as the appellate authority may allow for reasons to be recorded in writing, prefer an appeal in writing to the appellate authority having jurisdiction. In computing the period of fifteen days the time taken to obtain a certified copy of the order appealed against shall be excluded."

In the present case the State Government has issued a notification dated 14th April, 1947, under cl. (a) of sub-sec. (1), empowering all the District & Sessions Judges in the Punjab State in respect of the urban areas in their respective jurisdiction to hear appeals against the orders under Ss. 4, 10, 12 and 13 of the Act only and not under S. 19. Later two notifications were issued on 19th Oct., 1957 and 28th Dec. 1958 by the Punjab Government, under the aforesaid clause, empowering all the Additional District & Sessions Judges of Gurgaon, Ludhiana and Bhatinda also to act as Appellate Authorities under S. 15 (1) (a). From a conjoint reading of S. 15 (1) (a) and the above notifications, it is evident that the Appellate Authorities are empowered to

hear appeals against the orders passed under Ss. 4, 10, 12 and 13 only and not any other section. As already observed above, in the present case the order was passed by the learned Rent Controller under S. 19 (3). Thus the Appellate Authority had no jurisdiction to entertain an appeal against the said order. Consequently, the order of the Appellate Authority is without jurisdiction.

5. For the aforesaid reasons, I accept the revision petition and set aside the order of the Appellate Authority. In the circumstances of the case I, however, make no order as to costs.

Revision allowed.

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G. C. MITAL, J.

S. Tarlok Singh, Appellant v. Naib Subedar Sewa Singh, Respondent.

R.S.A. No. 440 of 1971, D/- 29-9-1981.*

East Punjab Urban Rent Restriction Act (3 of 1949), S. 3 — Exemption under — Applicability — Evacuee property — Allottee inducting tenant before granting of conveyance deed in his favour — By fiction of law, property would be deemed to be owned by allottee — Notification exempting Government property would not apply — Tenant could be evicted only under Rent Act and not by Civil Court. (Civil P. C. (1908), S. 9; Evidence Act (1872), S. 116).

Where an allottee of evacuee property inducted a tenant before granting of conveyance deed in his favour, the relationship of landlord and tenant came into being between the parties and by virtue of S. 116 of the Evidence Act the tenant was estopped from disputing the title of the landlord-allottee, therefore, so far as the parties were concerned it had to be assumed, by fiction of law, that the property belonged to the allottee, as such the Notification exempting Government property from the operation of Rent Act was not applicable and therefore, the tenant could be evicted only under the Rent Act and not by Civil Court. (Case law discussed). (Paras 5, 9)

Cases Referred: Chronological Paras

AIR 1977 SC 1201	8
AIR 1963 Punj 532: 65 Pun LR 852	
AIR 1960 Punj 172	6

*From decree of Jaswant Singh, Addl. Dist. J., Jullundur, D/- 17-3-1971.

KY/AZ/F532/81/VCD/SSG-H

Amar Dutt, for Appellant; Jang Bahadur Chowdhary, for Respondent.

JUDGMENT:— A question of significant importance which arises for consideration in this case is whether a tenant inducted by an allottee of evacuee/rehabilitation property before conveyance deed is granted in favour of the allottee can be evicted by a civil court without a ground of ejectment or can be evicted only under the East Punjab Urban Rent Restriction Act, 1949, on one of the grounds specified therein.

2. Evacuee property No. 453/54 situated in the town of Jullundur was allotted to Ram Lal by the Custodian/Rehabilitation Department. He came in possession of the same. On the death of Ram Lal, Smt. Parwati alias Bharawan Bai came into possession of the said property as his heir under a Will. Smt. Parwati inducted Tarlok Singh as a tenant and delivered vacant possession of the premises to him. Thereafter vide document Ex. P1, dated 17th Sept. 1966, Smt. Parwati transferred her rights to Sewa Singh for a consideration of Rs. 6,000 and received the full consideration. Since Tarlok Singh tenant did not pay rent, Sewa Singh filed the present suit for ejectment of Tarlok Singh and also for recovery of arrears of rent amounting to Rs. 270. The suit was filed in Civil Court instead of before the Rent Controller under the East Punjab Urban Rent Restriction Act, 1949 (hereinafter called the Rent Act) on the plea that the property in dispute was still Government property as proprietary rights had not so far been conferred and, therefore, the notification exempting the applicability of the Rent Act applied to the property in dispute. Tarlok Singh tenant pleaded that the Civil Court had no jurisdiction to try the suit, he admitted that Smt. Parwati Devi had inducted him as a tenant and, therefore, she was a necessary party; that Smt. Parwati Devi could not legally sell the property in dispute as proprietary rights had not been conferred on her and, therefore, there was no relationship of landlord and tenant between the parties. On the issues framed, evidence was led and the trial court by a judgment and decree dated 18th April 1970, held that the Civil Court did have the jurisdiction to entertain the suit since the property in dispute still belonged to the Government and the Government properties were exempt from the operation of the Rent Act. Smt. Parwati Devi had appeared as a witness and she proved that she had sold her rights

to Sewa Singh plaintiff and, therefore, it was held that there was relationship of landlord and tenant between the parties. In the result, the suit for ejectment as also for recovery of Rs. 270 as arrears of rent was decreed. The tenant felt aggrieved and filed an appeal which came up for hearing before Additional District Judge Jullundur. The lower appellate Court upheld the findings of the trial Court and dismissed the appeal. The defendant has now come up in this second appeal.

3. The found facts on which this appeal has to be decided are these. Admittedly, the property in dispute belonged to the Custodian/Rehabilitation Department and was allotted to Ram Lal and on his death Smt. Parwati Devi came in possession as his heir under the Will. She gave vacant possession of the property in dispute to Tarlok Singh under a contract of tenancy and while Tarlok Singh was still in occupation of the same as a tenant, she transferred her rights in favour of Sewa Singh on receipt of full consideration although the sale certificate or conveyance deed had not been issued by the Rehabilitation Department either in the name of Ram Lal or in her own name, with the result that the Rehabilitation Department continued to be the owner of the property and Ram Lal, thereafter Parwati Devi and then Sewa Singh, continued to possess the rights of an allottee without ownership rights. On these facts, the first question to be decided would be whether there is relationship of landlord and tenant between the parties. On the facts enumerated above, there is no escape from the conclusion that there is relationship of landlord and tenant between the parties. Once Smt. Parwati Devi gave vacant possession of the property in dispute to the appellant as a tenant, the relationship of landlord and tenant came into being between them and a similar relationship came into being between the parties after Smt. Parwati Devi sold her rights to Sewa Singh, plaintiff-respondent. Hence, the finding recorded by the courts below in this regard is upheld.

4. The next and the most crucial point that has been hotly contested between the parties is whether the Civil Court will have the jurisdiction to pass a decree for ejectment of a tenant or it is the Rent Controller alone, who is competent to order ejectment on one of the grounds specified in the Rent Act. The learned counsel for the parties have not been able to cite any direct decision one

way or the other wherein the tenancy may have been created by the allottee and this question may have cropped up. Some cases have been cited on behalf of the landlord which are on different facts and, therefore, would be considered in the later part of this judgment and the question involved on the facts of the present case, therefore, has to be decided on first principles.

5. Once the Custodian/Rehabilitation Department gave possession of the property in dispute to Ram Lal allottee and after his death Smt. Parvati Devi came in possession thereof and delivered vacant possession to Tarlok Singh tenant, not only the relationship of landlord and tenant came into being between the parties but by virtue of S. 116 of the Evidence Act, the tenant was estopped from disputing the title of the landlord. S. 116 of the Evidence Act is as follows:—

"No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given." Therefore, so far as Tarlok Singh tenant is concerned, Smt. Parvati Devi and thereafter Sewa Singh would be not only the landlord but also the owner of the property in dispute and Tarlok Singh would be estopped from setting up title in somebody else, i.e., the Custodian/Rehabilitation Department. Therefore, so far as the present parties are concerned it will have to be assumed by fiction of law that the property now belongs to Sewa Singh and if that is so, Sewa Singh can eject his tenant only under the Rent Act because his property has not been exempted from the operation thereof. The matter may be tested with some examples. Suppose the property in dispute had not been allotted to Ram Lal and Sewa Singh plaintiff-respondent had illegally occupied the same while it belonged to the Custodian/Rehabilitation Department and, in that case it would be Government property. After Sewa Singh was in established possession for some time, if Tarlok Singh defendant-appellant was to take the same on rent from him, the relationship of landlord and tenant would come into being between

the parties and by virtue of Sec. 116 of the Evidence Act, the tenant would be estopped from denying the title of Sewa Singh as owner and Sewa Singh would also not be able to set up the claim that since the property belongs to the Government it would be exempt from the operation of the Rent Act. The rights of the parties would be governed as landlord and tenant on the assumption that the landlord is owner of the property. If the aforesaid rank trespasser of Government will have to resort to ejectment of the tenant under the Rent Act, similarly an allottee who himself inducted a tenant would also be able to eject the tenant only under the Rent Act. Taking a converse example, suppose a private person's property is taken over wrongly by the Government and after the Government is in established possession thereof it inducts a tenant, in that situation the relationship of landlord and tenant would come into being between the parties and the property will be deemed to be owned by the Government and if the Government will have to take proceedings for ejectment of the tenant, then it will have a right to file suit in a Civil court because exemption from the applicability of the Rent Act is applicable to the Government properties. In that case, the tenant will not be entitled to say that the property does not belong to the Government and belongs to a private individual and, therefore, the property is not exempt from the operation of Rent Act. On this reasoning also, the rights of the parties have to be seen treating the landlord to be the owner and then to proceed to decide whether the landlord is the Government or a private individual. Wherever the landlord would be Government, the Rent Act would not apply and where the landlord would be a private individual, the Rent Act would apply.

6. This brings me to the consideration of cases cited at the Bar. The courts below followed *Sadhu Singh v. District Board, Gurdaspur*, AIR 1960 Punj 172 and considering the facts of the case that no conveyance deed had been executed in favour of Ram Lal or his heir or Sewa Singh and the property was still mentioned to be Government property as was proved from the statement of the Clerk of the Office of the Deputy Commissioner held that the property being Government property the Rent Act was not applicable as the Government properties had been exempt from the provi-

sions of that Act by Notification No. 4830-C-48/764, dated 5-1-1949. Sadhu Singh's case (supra) has got no applicability to the facts of the present case because the District Board had leased out the property and the suit for ejectment was filed by the District Board. The District Board is a wing of the State Government and the property owned by it belongs to the State Government and hence the Rent Act rightly did not apply in that case. The main point argued was that the notification and the provision providing for exempting certain buildings or class of buildings were ultra vires which argument was turned down on reasonable classification.

7. The next case cited is Roshan Lal Goswami v. Gobind Ram (1963) 65 Pun LR 852 : (AIR 1963 Punj 532). A reading of the facts of this case shows that the tenants were already in occupation of the property belonging to the Rehabilitation Department and while the tenants were in occupation, the same was put to sale by auction and the Rehabilitation Department asked the tenant to pay rent to the auction-purchaser but by the time the suit for ejectment was filed by the auction-purchaser, the sale certificate had not been issued in his favour, nor till the matter was being decided by the High Court. Since the tenancy was created by the Government through Rehabilitation Department, the tenant would continue to be the tenant of the Government even on being informed that henceforth he should pay rent to the auction-purchaser and would cease to be tenant of the Government only after the property would stand completely transferred to the auction-purchaser by grant of sale certificate and thereafter alone he would be tenant only of the auction-purchaser and would cease to be tenant of the Government. Until the sale certificate is issued to the auction-purchaser he would continue to be the tenant of the Government and, therefore, could be ejected only through Civil Court and not under the Rent Act. If in the present case Tarlok Singh appellant had been inducted as a tenant by the Custodian/Rehabilitation Department and thereafter allotment had been made to Ram Lal, then, of course the aforesaid case would have been applicable. There is one more fact in the aforesaid case. After the sale certificate had been granted to the auction-purchaser, even then for a period of two years the tenant would have had special protection under S. 29 of the Dis-

placed Persons (Compensation and Rehabilitation) Act 1954, notwithstanding anything contained in any other law and he could be ejected during that period on the grounds mentioned in that section. After the expiry of two years of the grant of sale certificate, the Rent Restriction Act would have become applicable to the tenant. Hence that case is clearly distinguishable from the facts of the present case.

8. Reliance was then placed on Sunder Dass v. Ram Parkash, AIR 1977 SC 1201. A reading of this judgment again shows that the tenancy was created by the Rehabilitation Department because after the property was put to auction, the tenant was asked by the Rehabilitation Department to pay rent to the auction-purchaser. In that case also the sale certificate had not been issued in favour of the auction-purchaser and before the issue of the same he successfully obtained a decree for ejectment against the tenant from the Civil Court at Delhi. When the auction-purchaser wanted to execute that decree, an amendment was made in S. 3 of the Delhi Rent Control Act, 1958, applying that Act with retrospective effect to all buildings belonging to the Rehabilitation Department which had been put to auction but in respect of which sale certificates had not been issued. In view of the amendment made it was ruled by the Supreme Court that since the amendment was retrospective, the jurisdiction of the Civil Court to pass a decree for ejectment of the tenant was taken away and, therefore, the ejectment decree was a nullity and could not be executed. Ultimately, the matter was decided in favour of the tenant that he could not be evicted except under the provisions of the Rent Act. Hence that case is on different facts but the ultimate conclusion in that case is the same which is being taken in this case, namely, that the tenant has to be evicted by a private landlord only under the Rent Act. Hence this case is also of no help to the landlord.

9. For the reasons recorded above it is held that between the parties to this suit while there is relationship of landlord and tenant, the property in dispute would be deemed to be owned by the plaintiff-respondent so far as Tarlok Singh tenant is concerned and in view thereof, the tenant can be ejected only under the East Punjab Urban Rent Restriction Act, 1949, and not by a civil suit. Accordingly, the Civil Court will have no jurisdiction to entertain the suit.

for ejectment and the finding to the contrary recorded by the courts below is set aside.

10. However, the suit for recovery of arrears of rent was competent and the decree passed by the courts below in that regard deserves to be maintained.

11. For the above reasons, this appeal is allowed partly to the extent that the decree for ejectment of the appellant passed by the courts below is set aside and the suit for ejectment is dismissed relegating the plaintiff-respondent to seek ejectment of the tenant-appellant under the East Punjab Urban Rent Restriction Act, 1949. However, the decree for the recovery of Rs. 270/- towards arrears of rent passed by the courts below is maintained. Since difficult question of law was involved, the parties are left to bear their own costs of this appeal.

Appeal partly allowed:

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KULWANT SINGH TIWANA
AND M. M. PUNCHHI, JJ.

Baba Badri Dass, Petitioner v. Sh. Dharma and others, Respondents.

Civil Writ Petn. No. 1196 of 1980, D/- 26-8-1981.

(A) Punjab Tenancy Act (16 of 1887), S. 8 r./w. Ss. 5, 6, 7 — Term 'perpetual tenant' — Is distinct and different from the term 'trustee'. (Words and Phrases — Words 'trustee' and 'perpetual tenant' — Distinction).

In legal annals a trustee is the legal owner of the property, the actual owner thereof having lost title thereto by the creation of a trust. The equitable ownership in the trust property vests in the beneficiaries. The trust is thus an incidence of dual ownership in which the creator of the trust no longer figures. A perpetual tenant, on the other hand, partakes the character of an occupancy tenant and in this relationship his landowner is not divested of the title to the property demised. AIR 1922 Lah 126, Refd. (Para 10)

(B) Punjab Security of Land Tenures Act (10 of 1953), S. 2 (1) — 'Landowner' — Dohlidar is a land-owner for purposes of the Act and he is not a perpetual tenant — Dohli tenure is not covered by concept of tenancy at all — It is an instance of malik kabza. (Punjab Settlement Manual (1899), Para 142 — Punjab

Land Revenue Act (17 of 1887) S. 3 (2)). AIR 1922 Lah 126 and AIR 1937 Lah 805 Dissented from. 1976 Pun LJ 586, 1972 Rev LR 563 and 1973 Rev LR 280, Overruled.

Though a dohlidar is not an owner of the land as the term is well understood yet he is otherwise a landowner for the purposes of the Act. He is not a perpetual tenant. The dohli tenure is not of a perpetual tenancy and is not covered by the concept of tenancy at all. There are many reasons in support of this conclusion. The succession to occupancy tenancy was governed by S. 59 of the Punjab Tenancy Act, 1887 whereas succession to the dohli tenure is either natural or traditional. The occupancy tenure is capable of sale carrying with it a peremptory obligation to offer it in the first instance to the landowner. There is no such obligation in the dohli tenure treating it for the moment, though not holding, that it is transferable. The occupancy tenancy rights are capable of being sold in execution of a decree against the occupancy tenant, but the rights of a dohlidar are not subject to such permissible process of Court under the law as understood. Alienations made by occupancy tenants are voidable at the instance of the landowner. For these reasons, which are only some of them, it must be held that the dohli tenure is not of a perpetual tenancy and is not covered by the concept of tenancy at all. A dohli tenure is an instance of malik kabza and a dohlidar is a landowner for the purposes of the Act. 1969 Pun LJ 27 and 1898 Punj Record 82, Rel. on.; 1976 Rev LR 641, Refd.; 1962 Pun LJ 75 (SC), Disting; AIR 1922 Lah 126 and AIR 1937 Lah 805, Dissented from; 1976 Punj LJ 586, 1972 Rev LR 563 and 1973 Rev LR 280, Overruled. (Paras 13, 14, 16, 17)

Cases Referred : Chronological Paras

AIR 1976 Punj 271 : 1976 Pun LJ 199 5
1976 Pun LJ 586 : 1976 Rev LR 645

4, 11, 14, 16
1976 Rev LR 641 : 1976 Pun LJ 75 9, 14
1973 Rev LR 280 : 1973 Punj LJ 117

9, 16

1972 Rev LR 563 : 1972 Pun LJ 614 9

1969 Pun LJ 27 4, 11, 17

1962 Pun LJ 75 : (1963) 1 SCJ 328 18

AIR 1937 Lah 805 7, 8, 11, 16

AIR 1922 Lah 126 : (1921) ILR 2 Lah 313

6, 7, 8, 9, 10, 11, 14, 16

1898 Punjab Record 82 13

1887 Punjab Record 246 13

Jawala Dass, for Petitioner; Ram Rang, for Respondents.

M. M. PUNCHHI, J.:— This writ petition under Arts. 226/227 of the Constitution of India requires determination of an interesting question of law, making it imperative on us to dig deep in antiquity to discover what are the attributes of a dohli tenure and who is a dohlidar.

2. The facts giving rise to this petition are simple and straight:—

3. Petitioner Baba Badri Dass, Chela of Baba Narotam Dass Bairagi, concededly is a dohlidar of agricultural land measuring 134 kanals 14 marlas, appropriately described in the petition, situate in village Bahu Akbarpur, Tehsil and District Rohtak. According to him, he succeeded to the property being the chela of Baba Narotam Dass, the erstwhile dohlidar. Vide registered deed dt. 16th May, 1973, (copy Annexure P. 1) he leased out the aforesaid parcel of land to respondents No. 1 and 2 for a period of ten years at the annual rent of Rupees 2,000/-. The rent was required to be paid on 15th May of each year. Since the rent was not paid regularly, he filed a petition for ejectment of the lessee/tenants u/s. 9 (1) on Form-L of the Punjab Security of Land Tenures Act, 1953, (for short the Act) before the Assistant Collector 1st Grade, Rohtak. The tenants resisted the claim of the petitioner inter alia on the ground that the petitioner was not a 'land-owner' as defined in the Act and, therefore, the petition for ejectment was incompetent. After recording evidence and hearing the respective contentions of the parties, the Assistant Collector 1st Grade, Rohtak, allowed the petition and ordered the ejectment of respondents Nos. 1 and 2. They unsuccessfully appealed before the Collector, Rohtak. The Commissioner of Ambala Division declined to interfere in the revision petition filed by them. They, thus, moved the Financial Commissioner, Haryana. Shri V. P. Johar, Financial Commissioner, Haryana, vide his order dt. 25th Oct. 1979 (copy Annexure P. 2), allowed the petition and dismissed the ejectment application. This order is now impugned in the writ petition. The Motion Bench admitted the petition to a Division Bench and this is how the matter has been placed before us.

4. As is plain from a reading of the impugned order of the Financial Commissioner, he was confronted with two single Bench decisions of this Court: one in favour of the petitioner and the other in favour of the tenant-respon-

dents. In Mahant Sirya Nath v. Financial Commr., Haryana, 1969 Pun LJ 27, H. R. Sodhi, J. had taken the view that a Dohlidar would be a 'landowner' as the expression was used in the Act and thus the holdings in his hand would be subjected to the process of surplus area determination. This decision supported the contention of the petitioner that he was a landowner within the meaning of the Act and had a right to maintain the ejectment petition. On the other hand, in Baba Nand Ram v. Gram Panchayat of Village Malkos, 1976 Pun LJ 586. A. D. Koshal, J. (who now adorns the Supreme Court) came to hold that the status of a Dohlidar does not differ from that of a tenant, albeit that a tenant is a Dohlidar in perpetuity. This decision went in favour of tenants-respondents. The Financial Commissioner opted for the view of A. D. Koshal, J. and held the petitioner to be a tenant over the land and thus accepting the petition, reversed the orders of the lower officers in the hierarchy. Plainly, we are required to refurnish and reconcile the two views and in doing so, we have to travel back decades in the realm of history.

5. On the annexation of Punjab to British India the land tenures and rights of landowners came to be governed by two important pieces of legislation. The first was the Punjab Tenancy Act (XXVIII of 1868) which later came to be substituted by the Punjab Tenancy Act, 1887 (XVI of 1887), which held the field till after the independence of the country and still holds the field in a truncated way. The other one was the Punjab Land Revenue Act (XXXIII of 1871) which later came to be substituted by the Punjab Land Revenue Act, 1887 (XVII of 1887), which holds the field till date. These twin legislations i.e. Acts XVI and XVII of 1887, have supplemented each other in a variety of ways. Behind each legislation prevails the experience gathered by the British Settlement Officers who had become acquainted with the complex traditions and behaviours of the various communities in the State of Punjab. Their experiences, the necessities of proceeding in particular directions in effecting settlements, in regulating land revenue etc. came to be compiled in the Punjab Settlement Manual by Sir James M. Douis, K.C.S.I., I.C.S., the first edition of which was published on 6th Oct. 1899. There have been subsequent editions as well improving the previous one. We find the expression 'Dohli' or 'Dohlidar' significantly missing

from both the Punjab Tenancy Act and the Punjab Land Revenue Act but alluded to only in the Manual in the following manner:—

Glossary of Vernacular Words

DHOLI — Death-bed gift of a small plot of land to a Brahman.

BOOK II — The Records of Rights
Chapter VIII — Of tenures and the rights of landowners.

Para 142. Malik Kabza.

"Owners are sometimes found in village communities who do not belong to the brotherhood and are not sharers in the joint rights, profits and responsibilities of its members. Their proprietary title is a complete or undivided one, but it is confined to certain fields and does not include any share in the village waste. The name by which this tenure is officially known in the Punjab is malkiyat makbuza, and the holder of it is called malik kabza. These terms indicate that the interest of the proprietor is limited to the land actually in his own possession. This land he can let, mortgage, or sell as he pleases, and he is responsible for the payment of its revenue. A familiar instance of this form of landholding is the right acquired by a Brahman, who receives a dohli or death-bed gift of a small plot of land from a landowner. The tenure is also created whenever a landowner sells a part of his holding without the appurtenant share of the village common land. The malik kabza tenure is common in the districts of Gujarat, Rawalpindi, Jhelum, Attock and Hazara, where it was introduced at the first regular settlement under circumstances which will be described in a later paragraph. In some cases the statute of malik kabza is combined with that of an inferior proprietor....."

"175. Forms of ownership recognised.—Our officers had in fact to seek for a fair compromise of conflicting claims. In Gujarat, which was the first of the districts to be settled, and where the Sikh mill had ground exceeding (sic) small the old owners, known as warisan do not seem to have pressed their claims very hotly. But in Jhelum and Rawalpindi, which then included tahsils now in Attock, the former lords of the soils vehemently contested the proprietary right with the cultivating communities. The original villages of the leading clans often covered very large areas, and cul-

tivators had been located in outlying dhoks, or hamlets, whose occupants now claimed to be treated as entirely independent communities. Tenants in the parent villages alleged that they also possessed full rights as owners on the ground that the old landholders had received from them no sort of recognition of proprietorship. A similar state of things existed in Hazara, where the settlement did not begin till 1868. Four classes of owners emerged—

- (a) talukdars or 'ala malikan,'
- (b) Malikan or warisan,
- (c) adna malikan, and
- (d) malikan kabza.

The nature of the tenure of ownership of the last class has been described in para 142. It was introduced into the settlement of the North-West districts of the Punjab under the orders of Mr. Thornton, the Commissioner of Rawalpindi. It has been remarked that he invented the name, but not the thing. At any rate the solution of the ownership problem which he proposed was not unfair, and where it was adopted, the form of landholding produced was not unlike that which had grown up spontaneously in some of the South-Western districts. Of course, new tenures of malikan kabza are created whenever land is sold without its appurtenant share in the common waste." Mr. Douie's views in the Settlement Manual are treated with great respect but these cannot take the place of statutory provisions. See Sardara Singh v. Sardara Singh, 1976 Pun LJ 199 : (AIR 1976 Punj 271). Still he had feared while prefacing his first edition in 1899 in this manner:—

".....But it must be remembered that the generation familiar with the early revenue history of the Punjab is rapidly passing away, and that experience shows that it is hard to say of any administrative controversy in India that it is really dead, or of any policy that it has been finally abandoned. Some questions which seemed at one time to have been settled are sure to be revived, and it is well that those who may have to take part in the discussion should know, at least in broad outline, what in the past has been urged and decided in regard to them."

From the Settlement Manual it becomes clear that the dohli tenure was a holding the right of which had been acquired by a Brahman, who received it as such as a death-bed gift from a landowner, and

that as a dohlidar, he was in the status of a malik kabza. It is also clearly recognised vide para 175 *ibid* that these tenures had spontaneously grown in the South-Western districts of Punjab, but had to be given a name when they were being enforced or made applicable in the Northern districts vide para 142 *ibid*. Being termed as malik kabza, the dohlidar was held under para 142 *ibid* to be responsible for the payment of land revenue and otherwise entitled to let, mortgage or sell it as he pleased.

6. Judicial precedents, however, oblivious perhaps of the material available in the Punjab Settlement Manual, appear to have taken a course of their own. In *Sewa Ram v. Udegir* AIR 1922 Lah 126, a Division Bench consisting of Shadi Lal, C. J. and Harrison, J. spelled out the term dohli tenure in these terms:—

"The dohli tenure is a peculiar kind of tenure to be found in the South-Eastern districts of Punjab. It is a rent free grant of a small plot of land by the village community for the benefit of a temple, mosque or shrine, or to a person for a religious purpose. In the revenue records the proprietary body are recorded as the owners of the property, and the grantee is recorded as a tenant in the column of cultivation. So long as the purpose, for which the grant is made, is carried out, it cannot be resumed, but should the holder fail to carry out the duties of his office, the proprietors can eject him and put in some one else under a like tenure.

It is beyond dispute that tenure of this kind cannot be alienated by sale or mortgage, and there can be little doubt that any alienation of that character, if made by the dohlidar would be absolutely void. This being the case, we are not prepared to accept the contention that the present dohlidar who is the son of the alienor, is precluded by any rule of law from impeaching the alienation made by his father. As the transaction was altogether void, we consider that even the alienor could have successfully pleaded in answer to the plaintiff's suit that the latter could not enforce it in a Court of law. There is, therefore, no reason why the defendant should not be able to impeach the alienation more especially when we remember that the office of a dohlidar is similar to that of a trustee, and that it is open to one trustee, to impeach the validity of an alienation made by his predecessor."

7. In *Khema Nand v. Kundan*, AIR 1937 Lah 805, Monroe, J., taking aid of the dictum laid by Sir Shadi Lal, C. J.,

in the afore-referred to case, observed as follows:—

"The nature of dohli tenure is somewhat obscure: some account of it is to be found in the judgment in (1921) ILR 2 Lah 313 : (AIR 1922 Lah 126) (*Sewa Ram v. Udegir*). There it was stated that in this form of tenure, there is a rent free grant of land by a village community for the benefit of a temple, mosque or shrine or to a person for a religious purpose: in the revenue records, the proprietary body are recorded as the owners of the property and the grantee is recorded as a tenant in the column of cultivation.

It would appear, therefore, that on a grant in dholi, the proprietors continue to be proprietors of the land and the dholidar in right of the temple and his successors become tenants in perpetuity."

8. The obscurity of the tenure was noticed by Monroe, J. Yet the question whether a dohlidar was a trustee, as held in *Sewa Ram's* case (AIR 1922 Lah 126) (*supra*), or a tenant in perpetuity, as held in *Khema Nand's* case (AIR 1937 Lah 805) (*supra*), despite the obvious conflicts, has remained unresolved and both views have been kept followed in decisions of this Court.

9. In *Trikha v. Dwarka Parshad*, 1972 Rev LR 563, a single Bench of this Court relying on *Sewa Ram's* case (AIR 1922 Lah 126) (*supra*) held that any alienation by a dohlidar would be void ab initio. It was held to be non est. The latter paragraph of the judgment in *Sewa Ram's* case, as extracted above, was quoted in the judgment to draw sustenance for the view taken. The view taken in *Trikha's* case was relied upon in *Dharma v. Smt. Harbi*, 1976 Rev LR 641, to hold that an alienation of a dohli was void ab initio. The Bench further went on to say that dohli was not a permanent tenure, and the moment the dohlidar fails to render the requisite services for which the dohli was created, the dohli rights are extinguished and the property reverts to the original proprietors. In *Bharat Dass v. Gram Sabha Village Jahajgarh*, 1973 Rev LR 280, the tenure in that case was spelled out to be a dohli. The former paragraph, as extracted above from *Sewa Ram's* case, was quoted in the judgment at two places to draw sustenance for the view taken.

10. In none of these cases, the provisions of the Punjab Tenancy Act, 1887 or the Punjab Land Revenue Act, 1887 were noticed to come to those conclusions,

Sewa Ram's case (AIR 1922 Lah 126) (supra) gave at the same time two sets of reasonings, in our view mutually exclusive, namely that a dohliidar is a trustee and his alienation of the dohli property/rights are void ab initio and the other that the dohliidar is a perpetual tenant. Now this kind of reasoning, with due respect, does not appeal to us. It is well understood in legal annals that a trustee is the legal owner of the property, the actual owner thereof having lost title thereto by the creation of a trust. The equitable ownership in the trust property vests in the beneficiaries. The trust is thus an incidence of dual ownership in which the creator of the trust no longer figures. A perpetual tenant, on the other hand, partakes the character of an occupancy tenant and in this relationship his landowner is not divested of the title to the property demised. See in this connection S. 8 of the Punjab Tenancy Act, 1887 read in the light of Ss. 5, 6 and 7 thereof. These two warring concepts which trace their birth to Sewa Ram's case surfaced in the two cases referred to by the Financial Commissioner in his impugned order with which we will presently deal with in detail.

11. In Mahant Sirya Nath's case (1969 Pun LJ 27) (supra), H. R. Sodhi, J. for the first time took note of the definition of the word "landowner" as given in the Punjab Security of Land Tenures Act read with the provisions of the Punjab Land Revenue Act. These are in the following terms :

"'Landowner' means a person defined as such in the Punjab Land Revenue Act, 1887 (Act XVII of 1887), and shall include an 'allottee' and 'lessee' as defined in cls. (b) and (c), respectively of S. 2 of the East Punjab Displaced Persons (Land Resettlement) Act, 1949 (Act XXXVI of 1949) hereinafter referred to as the 'Resettlement Act'."

The definition of the word 'landowner' will not be complete if what is provided in the Punjab Land Revenue Act, 1887, is not noticed simultaneously.

"'Landowner' does not include a tenant or an assignee of land revenue, but does include a person to whom a holding has been transferred, or an estate or holding has been let in farm, under this Act for the recovery of an arrear of land revenue or of a sum recoverable as such an arrear and every other person not hereinbefore in this clause mentioned who is in possession of an estate or any

share or portion thereof, or in the enjoyment of any part of the profits of an estate."

The view taken by H. R. Sodhi, J. was that the definition of the word 'landowner' was not exhaustive and it would have its ordinary meaning except that certain classes of persons have been excluded from that definition. Sewa Ram's case (AIR 1922 Lah 126) (supra) was taken aid of to the limited extent by mentioning therein the purport of the first two sentences of the former paragraph of Sewa Ram's case extracted above. It was held by H. R. Sodhi, J. that the definition of the word 'landowner' covered the case of the then petitioner, who, for whatever be his status, was in the possession of the estate and in enjoyment of the profits thereof, though he might be utilising all or some of those profits for charitable or public purposes. The view also seems to have been taken on a concession more or less, as it was observed that Mr. Sarin (the learned counsel for the then petitioner) had not been able to seriously challenge this aspect of the matter and thus it was held that the then petitioner was a landowner within the meaning of the Act so as to attract the provisions of the Act relating to the surplus area. This decision is on its own facts, unchallenged as these were by counsel and cannot be said to bear a statement of law. In Baba Nand Ram's case (1976 Pun LJ 586) (supra), A. D. Koshal, J. on the other hand too took aid of the definition of the word 'tenant' as forthcoming in the following terms:—

"4. (5) 'tenant' means a person who holds land under another person, and is, or but for a special contract would be liable to pay rent for that land to that other person, but it does not include—

(a) an inferior landowner, or

(b) a mortgagee of the rights of a landowner, or

(c) a person to whom a holding has been transferred, or an estate or holding has been let in farm, under the Punjab Land Revenue Act, 1887 (XVII of 1887), for the recovery of an arrear of land revenue or of a sum recoverable as such an arrear, or

(d) a person who takes from the Government a lease of unoccupied land for the purpose of subletting it."

The definition will not be complete without adding the meaning from the Punjab Security of Land Tenures Act:—

"'Tenant' has the meaning assigned to it in the Punjab Tenancy Act, 1887 (Act

XVI of 1887), and includes a sub-tenant, and self-cultivating lessee, but shall not include a present holder as defined in S. 2 of the Resettlement Act."

A. D. Koshal, J. quoted in this decision the former paragraph as extracted above from Sewa Ram's case (AIR 1922 Lah 126) as also the latter paragraph as extracted from the decision of Monroe, J. in Khema Nand's case (AIR 1937 Lah 805) (supra). Yet the decision proceeded more on concession rather than determination of the attributes of the tenure of a dohlidar. There Mr. Harbhagwan Singh (the learned counsel for the then petitioner) took it that a dohli tenure was no different than from what had been stated in the aforementioned two cases. Therefore, the learned Judge had no hesitation in holding that the status of a dohlidar did not differ from that of a tenant, albeit that a tenant is a dohlidar in perpetuity. A fortiori it was held that the holder of a dohli tenure had no liability to pay rent, but then it was so because of the nature of the grant which is rent free and according to which the tenant, instead of paying the rent, has to perform certain obligations of a religious nature. According to the learned Judge, a dohlidar entered upon the land under a grant which is in the nature of a special contract and according to which he has to pay no rent but is to perform certain other obligations. In these circumstances, it was held in that case that a dohlidar being a tenant could sue for recovery of possession u/s. 50 of the Punjab Tenancy Act for which the period of limitation was one year. It is plain that the case proceeded with the aid of concession. This decision may be good on its own facts but cannot be said to bear and with finality any statement of law. And this latter view of A. D. Koshal, J. has been made the basis of the impugned order of the Financial Commissioner.

12. We must at this stage notice the borrowed meanings of the words 'rent' and 'landlord' from the Punjab Tenancy Act, 1887 for the purposes of the Act:—

"4. (3) 'rent' means whatever is payable to a landlord in money, kind or service by a tenant on account of the use or occupation of land held by him."

"4. (6) 'landlord' means a person under whom a tenant holds land, and to whom the tenant is, or but for a special contract would be liable to pay rent for that land."

13. It is significant to notice that the words 'landowner' and 'tenant' are con-

tradistinct but the words 'landlord' and 'tenant' are correlated, for the purposes of the Act one has to be a tenant of the landlord-landowner, and a landowner, unless he becomes a landlord to a tenant, can remain a landowner in isolation. It is also significant that 'tenant' means a person who holds land under another person, and is, or but for a special contract would be, liable to pay rent for that land to that other person (emphasis supplied). So, 'that other person' is the landlord who is presently entitled to rent and to whom the tenant is liable to pay, but for a special contract suspending or not enforcing the liability. And 'rent' means whatever is payable to a landlord (emphasis supplied) in money, kind or service by a tenant on account of land held by him. Thus, in order to understand the attributes of landlord, landowner and tenant, the essential characteristic—as it appears to us—is that the existing liability to pay rent, if it is, or could be there, is only to the landlord-landowner and to none other, and it is for this reason that the tenant holds land under that person. If he is not liable to pay rent, or cannot otherwise be made so liable to pay it to the landowner, he does not hold the land under him and thus would not be his tenant. To put it differently, holding land under another person carries with it an existing obligation to pay not only rent, but to him and him alone, on account of the use or occupation of the land, held under him. But if the obligation to pay rent, whether in money, kind or service, is directed towards some others and not towards the landowner, then the occupier's possession would not be that of a tenant, but would be of another kind which may evade strict defining. Thus it appears to us that if the occupier of land is in strict terms not a tenant, then he being otherwise possessed of the land, would be a 'landowner' for the purposes of the Act, and it is immaterial if his rights otherwise do not amount to that of an 'owner of land'. Distinction between these two terms has admirably been drawn in a Full Bench decision in Buta v. Mst. Jiواني reported in 1898 Punjab Record 82 and till date the distinction has remained in vogue and unchallenged. An extract from the judgment would be worthwhile to reproduce:—

"The word used in S. 111 is 'owner' not 'landowner', and in our opinion the two terms are not synonymous. 'Landowner' has a very wide signification and includes many persons whose interests in land

are of a limited or ephemeral character, e.g., a farmer or transferee for revenue purposes or one, not expressly mentioned in the clause, who is in possession of an estate or any part thereof or in the enjoyment of any part of the profits of an estate. Had it been used in S. 111 there would have been some ground for the contention that the widow's right to partition is indefeasible, for at all events her interest is much larger than that of the persons mentioned above.

The word 'owner' has not been defined in the Act, and according to the accepted canons of interpretation we must, unless the context negatives such a construction, take it to have been used in its ordinary sense. Now the connotations of the term are somewhat indefinite and, it is commonly applied to persons whose rights in property are unlimited as well as those whose rights are more or less restricted. In its widest signification, to use the language of Austin, ownership means a 'right over a determinate thing indefinite in point of time, unrestricted in point of disposition and unlimited in point of duration'. The component rights of ownership fall under three heads, possession, enjoyment and disposition (per Sir M. Plowden, C. J. in No. 107, 1887, Punjab Record, page 246).'

14. In *Baba Nand Ram's case* (1976 Pun LJ 586) (supra) the special contract conceived of by A. D. Koshel, J. in which the dohlidar undertakes not to pay any rent to the landowner but binds himself to perform certain other obligations to others, as it appears to us, is not 'a special contract' but for which he would be liable to pay rent for that land to 'that other person'. It appears to us that the service rendered by a dohlidar to institutions or persons other than the creator of the dohli, strictly speaking does not fall either within the concept of rent or within that of a tenant. The liability to pay rent to the creator of the dohli, or the latter's right to claim rent in the event of the terms of dohli not being faithfully observed, is altogether missing in the nature of the creation of the tenure. It is equally inconceivable how a validly created trust in the event of the trustee or his successors-in-interest failing or refusing to perform their duties could warrant the abolition of the trust causing extinguishment of dohli rights or that the property reverts to the original proprietors. The observations of the Bench in *Dharma's case* (1976 Rev LR 641) (supra) are in the nature of obiter dicta and do

not seem to have arisen on the facts of that case. We, therefore, hold that though a dohlidar is not an owner of the land as the term is well understood yet he is otherwise a landowner for the purposes of the Act. The other questions whether he is a trustee or that his alienations are void ab initio do not arise in the present case, though we have our doubts about the correctness of the view in that regard taken by the Lahore High Court in *Sewa Ram's case* (AIR 1922 Lah 126) (supra).

15. A passing reference need be made that out of the four classes of owners mentioned to have emerged in para 175 of *Douie's Settlement Manual*, the *ala malikan* have ceased to exist and the *adna malikan* have come to be full proprietors. That instance of dual ownership was abolished by the Punjab Abolition of *Ala Malikiyat and Talukdari Act*, 1950. This obliterates classes of owners mentioned at serial numbers (a) and (c) and merged in class mentioned at serial number (b). Just two kinds of owners are prevalent now—(i) who are owners of land or their heirs and (ii) landowners on the basis of possession.

16. The concept of perpetual tenancy as conceived of in S. 8 of the Punjab Tenancy Act in the light of Ss. 5, 6 and 7 has also become non-existent on account of the Punjab Occupancy Tenants (Vesting of Proprietary Rights) Act, 1952. Occupancy or perpetual tenants have been made owners of the land. This Act came about to carry out agrarian reforms and to remove the intermediaries. And if the dohlidar is a perpetual tenant as conceived of in *Sewa Ram's* (AIR 1922 Lah 126) and *Khema Nand's cases* (AIR 1937 Lah 805) (supra) of the Lahore High Court followed in the cases of *Bharat Dass* (1973 Rev LR 280) and *Baba Nand Ram* (1976 Pun LJ 586) by this Court, then there is no reason why such like tenure should be allowed to exist in the face of the aforementioned statute. The reason is obvious. The succession to occupancy tenancy was governed by S. 59 of the Punjab Tenancy Act, whereas succession to the dohli tenure is either natural or traditional. The occupancy tenure is capable of sale carrying with it a peremptory obligation to offer it in the first instance to the landowner. There is no such obligation in the dohli tenure treating it for the moment, though not holding, that it is transferable. The occupancy tenancy rights are capable of being sold in execution of a decree against the occupancy tenant but the rights of a dohlidar are not subject to

such permissible process of Court under the law as understood. Alienations made by occupancy tenants are voidable at the instance of the landowner. For these reasons, which are only some of them, we differ from the view that the dohli tenure is of a perpetual tenancy or is ever covered by the concept of tenancy at all. The view to the contrary taken by above referred to two decisions of the Lahore High Court does not appear to us to be correct. We do not expressly follow the decisions of the Lahore High Court in Sewa Ram's case (AIR 1922 Lah 126) and Khema Nand's case (AIR 1937 Lah 805) and overrule the single Bench decisions afore-quoted taking the view based thereon on this aspect.

17. Now, when the dohliadar is not a perpetual tenant as held by us, typification of the dohli tenure in Douie's Settlement Manual as an instance of malik kabza and hence that of a landowner for the purposes of the Land Revenue Act and derivatively for the purposes of the Act, appears to us crystal clear. He is a landowner because he is in possession of the land. We take the view as taken by H. R. Sodhi, J. in Mahant Sirya Nath's case (1969 Pun LJ 27) (supra) and hold that a dohli tenure is an instance of malik kabza and a dohliadar, a landowner for the purposes of the Act.

18. To be fair to the learned counsel for the respondent, a decision of the Supreme Court in Tekan v. Ganeshi, 1962 Pun LJ 75, may be noted. That is a case of a lessee. He sought ejectment of a tenant whom he had inducted. Here the lessee was holding land under his landowner and himself being a tenant was held disentitled to eject his inducted tenant under the Act. That decision has no applicability to the facts of the present case which are distinctly dissimilar.

19. Reverting to the facts of the present case, the registered lease deed, Annexure P-1, clearly mentioned that the petitioner had created the lease describing himself to be as the owner and possessor of the land as dohliadar. The respondents could not deny such title of their landowner. They had fought him on the level of reducing his status to that of a tenant wanting immunisation from ejectment. They have failed. In para 3 of the petition, the landowner had asserted in categorical terms that the tenants have not paid to him the rent for two consecutive years. In reply thereto, the tenants-respondents have not even denied it. Rather asserting that the petition was not

maintainable, they have taken the plea that they are not liable to pay any amount to the petitioner since his title as a dohliadar, for some reasons asserted, is not finally settled. Why the status of the petitioner landowner as dohliadar is unsettled has not been projected before us. There is no assertion by the tenants that they have paid the rent, or if they had not paid such rent, what was the sufficient cause for non-payment. Thus it appears to us that the tenants-respondents had no other point to urge before the Financial Commissioner except the one which they chose to project before the Financial Commissioner and which he opted to decide. Though it was urged by the learned counsel for the respondents that we must send back the case to the Financial Commissioner for re-decision on other questions which may be raisable in the revision petition, yet we are disinclined to accept that prayer as it appears to us that none has been highlighted in the return and none is so raisable. And at the same time recalling the well known Latin phrase 'interest reipublicae ut sit finis litium', we have thus chosen to put an end to this long standing dispute.

20. For the foregoing reasons, this petition is allowed. The impugned order of the Financial Commissioner, Annexure P-2, is hereby quashed. There would, however, be no order as to costs.

Petition allowed.

AIR 1982 PUNJAB AND HARYANA 262 FULL BENCH

S. S. SANDHAWALIA, C. J. AND
PREM CHAND JAIN AND
I. S. TIWANA, JJ.

State of Haryana and others, Appellants v. Chandgi, Respondent.

Letters Patent Appeal No. 21 of 1978 in Civil Writ Petn. No. 2532 of 1977, D/-17-8-1981.*

Haryana Ceiling on Land Holdings Act (26 of 1972), S. 8 (1) — Surplus area — Determination of — Sale of land prior to 30-7-1958 — Such sale could not be ignored — Surplus area has to be determined taking into consideration such sale.

Besides the transfers which are protected by S. 8 (1) other transfers of land

*Decided by Full Bench on order of Reference made by Prem Chand Jain and J. M. Tandon, JJ., on 4-12-1980.

CZ/CZ/B67/82/VNP/MVJ

in excess of permissible area under the Punjab law or the Pepsu law would be protected if the transfers were made prior to 30th July, 1958. (Para 9)

The landowner on 10-12-1957 had sold away certain units of land through registered sale deed. Subsequently his son filed a suit to pre-empt the sale. A decree for possession by pre-emption was passed in his favour on 14-1-1959. The Collector while determining the surplus area of the landowner, took into consideration the area obtained by his son through the pre-emption decree and excluded it from the lands held by landowner.

Held, that the determination of the surplus area was valid as the sale made by the landowner could not legally be ignored and the surplus area was to be determined taking into consideration such sale. AIR 1977 Punj & Har 221 (FB), Rel. on. (Para 9)

Cases Referred : Chronological Paras
AIR 1977 Punj & Har 221 : 1977 Pun LJ 230 (FB) 5, 6, 8, 9
1970 Pun LJ 159 : 1970 Rev LR 347 2, 3
1970 Pun LJ 487 : 1970 Rev LR 362 3

B. L. Bishnoi, Addl. Advocate General, for Appellants; R. S. Mittal with N. K. Khosla, for Respondent.

PREM CHAND JAIN, J.:— The facts of this case may briefly be stated thus:

Chandgi, respondent, owned 44 standard acres and 15-1/4 units of land in the revenue estate of village Jatola, tehsil and district Sonapat, on 15th Apr., 1953. Out of this land, 4 bighas and 4 biswas of land was under a dohldar tenant and 6 bighas and 7 biswas of land was under old tenants on 15th Apr., 1953. There is no dispute that the area with the dohldar tenant and the old tenants had to be excluded while determining the surplus area of Chandgi. On 10th Dec. 1957, Chandgi sold away 19 standard acres and 6-1/2 units of land to one Tekka of village Mandora through a registered sale deed. Attar Singh son of Chandgi filed a suit to pre-empt the sale made in favour of Tekka. A decree for possession by pre-emption was passed in favour of Attar Singh on 14th Jan. 1959.

2. The surplus area case of Chandgi was taken up by the Collector and on 26th Nov. 1959, 14 standard acres and 15-1/4 units of land was declared surplus, in his hands. While declaring this area as surplus, the land acquired by Attar Singh by pre-emption was ignored. The appeal, the revision and writ peti-

tion in this Court filed by Chandgi did not succeed. Thereafter, Attar Singh son of Chandgi, respondent, filed a writ petition in this Court, which was allowed on 3rd April, 1975, on the ground that he being a transferee was entitled to a notice before the surplus area of Chandgi respondent could be determined. The matter went back to the Collector, who vide his order dated 27th Nov. 1975, excluded the area obtained by Attar Singh through the pre-emption decree; with the result that no surplus area was left in the hands of Chandgi respondent. The State Government challenged the aforesaid order by filing a revision petition before the Financial Commissioner, which was allowed on 16th Aug. 1977 resulting in the setting aside of the order of the Collector, dated 27th Nov. 1975. Feeling aggrieved from the order of the Financial Commissioner, Chandgi filed Civil Writ Petition No. 2532 of 1977 in this Court. Though the learned single Judge was prima facie of the view that Attar Singh could not take benefit of the pre-emption decree, yet in view of the Division Bench judgment of this Court in Harpal Singh v. State of Punjab, 1970 Pun LJ 159, it was held that the land acquired by Attar Singh through the pre-emption decree could not be taken into consideration while declaring the surplus area of Chandgi respondent. Consequently, the writ petition was allowed and the order of the Financial Commissioner was set aside.

3. Feeling aggrieved from the judgment and order of the learned single Judge, present appeal under Cl. X of the Letters Patent was filed by the State of Haryana and others. When the appeal came up for final hearing, the only contention raised before the Bench by the learned Additional Advocate General was that the judgment in Harpal Singh's case (1970 Pun LJ 159) (supra) was not applicable to the facts of the case in hand, as in that judgment the interpretation of the provisions of the Pepsu Tenancy and Agricultural Lands Act, 1955 (hereinafter referred to as the 'Pepsu Act') was involved, while in the present case we are concerned with the provisions of the Punjab Security of Land Tenures Act, 1953 (hereinafter referred to as the 'Punjab Act'), which are quite different from the provisions of the Pepsu Act. The learned counsel further submitted that the Division Bench judgment of this Court in Chattar Singh v. Financial Commissioner, Revenue, Haryana, 1970 Pun LJ 487, though given in a case in which

the provisions of the Punjab Act were involved, does not lay down correct law, as the same is based on the judgment of Harpal Singh's case (supra), and has not taken into consideration the distinction which exists between the provisions of the two Acts.

4. Finding some merit in the contention of the learned Additional Advocate General, the case was referred to a larger Bench for decision. This is how we are seized of the matter.

5. When the matter came up for final hearing before us, Shri R. S. Mittal, learned counsel appearing for the respondent, submitted that it was not necessary to decide the question which was raised before the Division Bench and which necessitated the reference to this Bench, as in view of the provisions of S. 8 of the Haryana Ceiling of Land Holdings Act, 1972 (hereinafter referred to as the Act) and the decision of Full Bench of this Court in Smt. Jaswant Kaur v. State of Haryana, 1977 Pun LJ 230 : (AIR 1977 Punj & Har 221), the transfer made by Chandgi on 10th Dec. 1957 was a valid transfer.

6. After hearing the learned counsel for the parties and giving my thoughtful consideration to the entire matter. I find that the point now raised before us by Mr. R. S. Mittal, learned counsel for the respondent, is fully covered in his favour by the judgment of the Full Bench in Smt. Jaswant Kaur's case (AIR 1977 Punj & Har 221) (supra) and that it would be wasteful to dilate unnecessarily on the question that was referred to by the Bench for decision.

7. Relevant portion of S. 8 of the Act on which reliance has been placed, reads as under :—

"Certain transfer or dispositions not to affect surplus area.—

(1) Save in the case of land acquired by the Union Government or State Government under any law for the time being in force or by a tenant under the Pepsu law or the Punjab law or by an heir by inheritance, no transfer or disposition of land in excess of :—

(a) the permissible area under the Pepsu law or the Punjab law after the 30th day of July, 1951 and

(b) the permissible area under this act, except a bona fide transfer or disposition, after the appointed day, shall affect the right of the State Government under the aforesaid Acts to the surplus area to which it would be entitled but for such transfer or disposition;

Provided that any person who has received an advantage under such transfer or disposition of land shall be bound to restore it, or to pay compensation for it to the person from whom he received it (2) & (3)"

8. In Smt. Jaswant Kaur's case (AIR 1977 Punj & Har 221) (FB) (supra), one of the submissions raised before the Bench was to the following effect (at p. 228):—

"The submission of the learned counsel was that there was glaring inconsistency between S. 12 (3) and the two earlier provisions of S. 4 (1) and S. 8. It was said that while S. 4 (1) provided for the determination of the permissible area of the tenant also, S. 12 (3) prescribed that the tenant's permissible area under the Punjab Law which had not so far vested in the Government shall be deemed to have vested in the State Government with effect from the appointed day. The argument was that if the land vested in the Government what was the point of determining a tenant's permissible area under the Act? It was again said that while S. 8 saved certain transfers from the operation of the Act, S. 12 (3) made no such exception in favour of those transfers. For example, it was said that land which was declared surplus under the Punjab Security of Land Tenures Act but which was unutilized and later acquired by the Central Government would vest under S. 12 (3) in the State Government notwithstanding the acquisition by the Central Government. Similarly land purchased by a tenant under the provisions of S. 18 of the Punjab Security of Land Tenures Act would vest in the State Government under S. 12 (3) notwithstanding the purchase by the tenant. So also, in the case of transfers by inheritance. Even transfers made before 30th July, 1958 (the date mentioned in S. 8 (1) (a)) it was argued, would not be saved if they were made after the declaration of surplus area or tenant's permissible area under the Punjab Security of Land Tenures Act."

The aforesaid submission on behalf of the petitioner was dealt with by the Bench, thus (at pp. 228, 229):

"The provisions of Ss. 4 and 8, particularly S. 8, appear on first impression to be inconsistent with the provisions of S. 12 (3) but, as well said earlier, it is our first duty to seek to avoid conflict by endeavouring to harmonise and reconcile every part so that each shall be effective. A closer and critical examination of the provisions shows that they are not in-

reconcilable and all of them fit well into the general scheme of the Act. Sec. 8 has not been repealed expressly, by Section 12 (3) of the Act, nor can it be said, in the view that we are taking, that it was repealed by necessary implication. Section 12 (3) was introduced by way of amendment by Act XVII of 1976. By Section 1 (2) of the Amending Act, it is deemed to have come into force on 23-12-1972. A harmonious way of construing Ss. 8 and 12 (3) would be to give full effect to S. 8 (1) up to 23-12-1972, that is to say, to exclude from the operation of Section 12 (3) the transfers made up to 23-12-1972 which are protected by S. 8 (1) of the Act, namely (1) acquisition of land by the State or Central Government, (2) acquisition by a tenant under the Pepsu Law or the Punjab Law, or (3) acquisition by an heir by inheritance. Other transfers of land in excess of permissible area under the Punjab law or the Pepsu law would be protected if the transfers were made prior to 30-7-1958. We see no reason why Ss. 8 and 12 (3) should not be construed in this harmonious manner so as to give effect to both the provisions. We find from the instructions issued from time to time that the Government has also construed the provisions in a similar manner. In Memo No. 5726-AR(LA)-76/28819, dated 15-9-1976, addressed by the Financial Commissioner and the Secretary to Government, Haryana, Revenue Department, to the Commissioners of the Ambala and Hissar Divisions etc. it is said:—

"The surplus area already purchased by the eligible tenants/persons under S. 18 of the Punjab law and S. 22 of the Pepsu law should be considered to have been lawfully utilized and should not, therefore, be vested in the State Government under S. 12 (3) of the Haryana Ceiling on Land Holdings Act, 1972. Only such unutilized surplus area which was not purchased by the eligible tenants/persons under the Punjab law or Pepsu law should be deemed to have been vested in the State Government from the appointed day under S. 12 (3) of the Haryana Ceiling on Land Holdings Act, 1972, and may be mutated in favour of the State Government immediately and necessary action to allot such area to the eligible persons may be taken in accordance with the provisions of the Utilization of Surplus and Other Areas Scheme, 1976."

Again in Memo No. 6632-AR(II)-76/33389, dated 29-10-76 it is said,

"It has come to the notice of the Government that there is some lack of under-

standing in correctly interpreting the provisions of S. 8 and S. 12 (3) of the Haryana Ceiling on Land Holdings Act, 1972. In this regard it is clarified that S. 8 of the Haryana Ceiling on Land Holdings Act, 1972, inter alia prohibits transfers and dispositions of land in excess of the permissible area under the old Acts made after the 30th July, 1958. Therefore, transfers or dispositions of surplus area under the Punjab law or the Pepsu law made before the 30th July, 1958 stand regularised by law or in other words they would affect the surplus pool. As a result of this, the surplus area which had been transferred or disposed of by the landowners before 30-7-1958, shall not vest in the State Government under S. 12 (3) of the Haryana Ceiling on Land Holdings Act, 1972, and therefore, such area cannot be utilized in accordance with the Utilization of Surplus and Other Areas Scheme, 1976."

Shri Naubat Singh, the learned Assistant Advocate General, also agreed that we should harmonise S. 8 and S. 12 (3) in the manner that we have done but he suggested that the date up to which transfers of the three categories specified by us earlier as (1), (2) and (3) should be recognised, should be the appointed day (24-1-1971) and not the date on which S. 12 (3) came into force. We do not agree. S. 1 (2) of Act XVII of 1976 expressly provides that the Act shall come into force on 23-12-1972. We must give some meaning and effect to it. In our view, the effect of S. 12 (3) coming into force from 23-12-1972 on S. 8 is that transfers of the three categories specified by us made up to 23-12-1972 would be excluded from the operation of S. 12 (3) that transfers of land in excess of the permissible area under the Punjab or Pepsu law would be protected if made before 30-7-1958 and that all other land not excepted by S. 8 would vest in the State Government with effect from the appointed day.

We may mention here that though under S. 8, transfers out of surplus area declared under the Punjab law are recognised up to 30-7-1958 only, the Government by means of executive instructions have recognised, subject to certain conditions being fulfilled transfers up to 15-4-1966. Memo No. 5726-AR(LA)-76/28819 dated 15-9-1976 may be referred to in this connection."

9. A bare perusal of the aforesaid observations of the Bench clearly go to show that besides the transfers which are protected by S. 8 (1) of the Act, other

transfers of land in excess of permissible area under the Punjab law or the Pepsu law, would be protected if the transfers were made prior to 30th July, 1958. In view of the law laid down by the Bench in Smt. Jaswant Kaur's case (AIR 1977 Punj. & Har 221) (FB) (supra), it would be futile for the learned Additional Advocate General to argue that the sale made by Chandgi in favour of Tekka on 10th Dec. 1957, has to be ignored. Mr. R. S. Mittal, learned counsel for the respondent, is right in contending that the Collector by his order dated 27th Nov. 1975, has done nothing else than giving effect to the provisions of S. 8 (1) of the Act. Thus, in view of the law laid down in Smt. Jaswant Kaur's case, I hold that the sale made in favour of Tekka by Chandgi could not legally be ignored and that the surplus area of Chandgi had to be determined taking into consideration the said sale. In this view, of the matter, the judgment of the learned single Judge resulting in allowing the petition of Chandgi respondent and in setting aside the order of the Financial Commissioner, dated 16th August, 1977, is perfectly legal and no exception can be taken to the same.

10. Consequently, this appeal fails and is dismissed, but in the circumstances of the case, I make no order as to costs.

S. S. SANDHAWALIA, C. J.:— I agree.

I. S. TIWANA, J.:— I also agree.

Appeal dismissed.

AIR 1982 PUNJAB AND HARYANA 266

I. S. TIWANA, J.

Siri Krishan Jindal, Petitioner v. Registrar (Deputy Commissioner), District Patiala and others, Respondents.

Civil Writ Petn. No. 1517 of 1980, D/- 11-9-1981.

Stamp Act (2 of 1899), Sch. I, Art. 23 and S. 27 — Under Sch. I, Art. 23 stamp duty is chargeable on sale consideration mentioned in sale deed — Registrar cannot determine market value of property for charging stamp duty.

Under Sch. I, Art. 23 stamp duty is chargeable on sale consideration mentioned in the sale deed. The Registrar has no power to determine the market value of the property sold in order to assess the chargeability of stamp duty on the same. True, in view of the provisions of S. 27 the parties to a document are under an obligation to mention all facts

and circumstances affecting chargeability of stamp duty and if they fail to do so they are liable to be prosecuted under S. 64. AIR 1972 SC 899, Rel. on. (Para 2) Cases Referred : Chronological Paras AIR 1972 SC 899: (1972) 1 SCWR 739 2 Ujagar Singh, for Petitioner; H. S. Bajwa, for Respondents.

ORDER:— The petitioner along with one Ajay Jindal sought to purchase 9 kanals 10 marlas of land detailed in para 2 of the petition from Om Parkash for a sum of Rs. 40,000/- and for this purpose a regular sale deed was executed between the parties on stamp paper worth Rs. 4,004/-. It is not in dispute that as per the value mentioned in the sale deed this was the correct stamp duty payable in terms of Art. 23 of Sch. I of the Stamp Act, 1899. When this document was presented before the Sub-Registrar for registration, the same was duly endorsed by the latter in terms of Ss. 58 and 59 of the Registration Act, 1908. As soon as the procedure for registration of the document was completed the Sub-Registrar impounded it for the reason that the sale consideration had been under valued and forwarded the same to the Registrar, i.e., Deputy Commissioner, Patiala, for such necessary action as he may deem proper.

The Registrar ordered an enquiry through S.D.O. (C) Nabha to determine the market value of the land sold to the petitioner. As a result of the enquiry, he reported that the value of the same came to Rs. 25,849.60/- per acre. As per this report the value mentioned in the sale deed obviously was not understated. Somehow, the Registrar did not feel satisfied with the report of the S. D. O. (C) and asked him to look into the matter again keeping in view the location and potentiality of the land sold. On reconsideration of the matter the S. D. O. (C) reported back that the value of the land sold was Rs. 41,432/- per acre. On the basis of this report the Registrar ordered the making up of the deficiency in the stamp duty to the extent of Rupees 950/- and further imposed a penalty to the same extent i.e. Rs. 950/-. It is this action of the Registrar which is now impugned through this petition.

2. Learned counsel for the petitioner points out that the action and the procedure resorted to by the Registrar discloses a colossal ignorance of the relevant provisions of law and the same is wholly unsustainable. According to the learned counsel, the Registrar under no circumstances can determine the market

value of the property sold and then to conclude that the price mentioned in a particular sale deed has been understated and then to charge stamp duty on the same. The solitary stand of the Registrar is that the whole action was taken by him under S. 40 of the Stamp Act. What is now being sought to be highlighted by the counsel appearing for him is that under cl. (b) of sub-sec. (1) of S. 40 of the Act whenever the Registrar is of the opinion that an instrument is chargeable with duty and is not duly stamped he shall require the payment of the proper duty or the amount required to make up the same, together with a penalty. A bare reading of this clause indicates that the Collector has to formulate an opinion with regard to the chargeability of the stamp duty and its extent on the basis of the terms settled between the parties and the relevant provision of the statute or as provided for in Sch. 1 to the Act.

As already mentioned in the opening part of the order, the Article governing the case in hand is Art. 23 of the Schedule. If the amount of the sale transaction as mentioned in the sale deed is taken to be the amount settled between the parties then stamp duty already paid by the petitioner is not in any way in derogation to this Article. What the Registrar has sought to do is that the sale consideration mentioned in the sale deed does not represent the market value and that is how the transaction has been undervalued. Learned counsel has not been able to refer to any provision of law under which the Registrar can rely on the market value of any property sold for determining the chargeability of the stamp duty on the same. Undoubtedly, the parties to a transaction are under an obligation in view of the provisions of S. 27 of the Act to mention all facts and circumstances affecting chargeability of stamp duty and if they fail to do so they are liable to be prosecuted or proceeded against under S. 64 of the Act. In fact, to my mind, the case is completely covered by a decision of the Supreme Court in *Himalaya House Co. Ltd., Bombay v. Chief Controlling Revenue Authority*, (1972) 1 SCWR 739 : (AIR 1972 SC 899), wherein their Lordships after a reference to the provisions of S. 27, Art. 23 of the Schedule and a long list of precedents have observed as follows (at p. 904 of AIR) :

"It is true that in view of this provision, the parties to a document are required to set forth in the document fully

and truly the consideration (if any) and all other facts and circumstances affecting the chargeability of that document with the duty or the amount of the duty with which it is chargeable. But a failure to comply with the requirements of that section is merely punishable under S. 64 of the Stamp Act. No provision in the Stamp Act empowers the Revenue to make an independent enquiry of the value of the property conveyed for determining the duty chargeable. Article 23 is the article that governs the charges of the stamp duty on "conveyance."

Thus it is patent that the Registrar was acting wholly without jurisdiction while trying to find out the market value of the land sold in order to assess the chargeability of the stamp on the same.

3. In the light of the discussion above, the order and action of the Registrar asking for stamp duty worth Rs. 950/- and also imposing a penalty to that extent are quashed. As a result of this, the respondents are directed to complete the formalities under S. 61 of the Registration Act and to return the document to the petitioner. Thus this petition is allowed in the manner indicated above with costs. Counsel's fee is determined at Rupees 300/-.

Petition allowed.

AIR 1982 PUNJAB AND HARYANA 267 FULL BENCH

S. S. SANDHAWALIA, C. J., S. C. MITAL
AND S. P. GOYAL, JJ.

Oriental Fire & General Insurance Co. Ltd., Bombay, Appellant v. Bachan Singh and others, Respondents.

F.A.A.O. No. 473 of 1980, D/- 5-1-1982.*

Motor Vehicles Act (4 of 1939), S. 96 — Truck accident — Claim by dependents of deceased — Owner exonerated from liability — Insurer cannot be held liable for damages. (Torts — Accident — Liability of insurer). AIR 1967 Pat 342; AIR 1975 Gauhati 3 (Pt. D), AIR 1968 Mad 436 and AIR 1974 Andh Pra 310, Dissented; AIR 1978 Punj & Har 113, Overruled.

The insurer of the vehicle, which is involved in an accident, cannot be held liable for damages for wrongful act of the driver where the owner or the insured himself stands exonerated of any such

*Decided by Full Bench on order of reference made by S. P. Goyal, J. on 22-9-1981.

CZ/CZ/B276/82/MVJ

liability because of lack of evidence. AIR 1978 Punj & Har 113, Overruled; (1964) 66 Pun LR 804, Approved; AIR 1967 Pat 342; AIR 1975 Gauhati 3 (Pt. D); AIR 1968 Mad 436 and AIR 1974 Andh Pra 310, Dissented. (Case law discussed).

(Para 21)

It is well settled that in a contract of insurance, the privity of contract is strictly between the insurer and the insured only, and further it is one of the utmost confidence. As a necessary consequence of the legal position, and even otherwise, it seems to be well settled that in a claim for damages for a tortious act against the tortfeasor, the insurer of the latter is neither a necessary party nor in any way liable to the claimant under the general law. Therefore, in a claim for tort, the common law visualises a decree or an award against the tortfeasor alone in the first instance. It is only thereafter that the insured tortfeasor could possibly claim to be indemnified by his insurer under the contract of insurance, it is thus elementary that dehors any special statutory provisions, a judgment or an award could be executed only against the tortfeasor and not against his insurer because no direct liability of the insurer arises qua the claimant. Equally if the insured himself was not saddled with any liability or loss, he could not make any claim against his insurer. Such a claim can only arise where the insured himself is fastened with liability or a judgment or an award is rendered against him. To put it in other words, the insurer's liability is secondary and conditional to that of the insured. Once that is so, it seems plain on principle that unless liability is first fastened on the insured, none can possibly fall on the insurer who has only undertaken to indemnify the loss or damage suffered by the insured. It can, therefore, be said as a dictum (subject of course to qualification) that, no judgment against the insured—no judgment against the insurer. (Para 8)

A plain reading of S. 96 (1) would indicate that herein the precondition of the liability of the insurer arises when a judgment is obtained against the insured person who has taken up the policy of insurance. It is then and then alone that the insurer is obliged to pay the claimant the amount due under such a judgment as if the insurer was the judgment-debtor. Therefore, in the absence of a judgment obtained against the insured no liability whatsoever would arise against the insurer, according to language of subsec. (1). When read with Ss. 94 and 95 it

would appear that the patent intent of the legislature was to compel insurance against third party risk in cases of motor vehicle and in order to avoid the multiplicity of proceedings it was made possible to execute the judgment against the insurer directly as if he were the judgment-debtor for the satisfaction of the claim against the insured. The statute does not intend plainly to do more than this. Even here further safeguards were provided to the insurer by making it mandatory that he should be made a party to the proceeding instituted by the claimant against the insured and then to defend the action on specified, though limited grounds. S. 96 of the Act consequently makes it plain that it was never intended by the Legislature nor does it flow from its language that the insurer would become liable dehors the insured and even when the insured has been wholly exonerated of any liability. (Para 9)

It could not be contended that the insertion of Ss. 110 to 110-F by Act 100 of 1956 was intended to make a radical change in the substantive law for tortious liability in general and that of the insured and the insurer in particular. A plain reading of these provisions collectively would indicate that in true essence they are primarily procedural in nature. The whole purpose was to substitute the rather tardy procedure of the ordinary civil courts with the expeditious and summary procedure before a Motor Accidents Claims Tribunal with regard to the urgent claims of compensation by the victims of motor vehicle accidents. (Para 11)

It was also wrong to contend that Section 96 (2) had no applicability to proceedings before a Claims Tribunal and was attracted only in regard to a trial in Civil Court. It would follow from a plain look at Ss. 110 to 110-F of the Act that a Motor Accidents Claims Tribunal when constituted, would substitute the Civil Courts and, therefore, the provisions of S. 96 of the Act would be ipso facto attracted to the situation. (Para 17)

Cases Referred: Chronological Paras

AIR 1980 All 410:	1981 Acc CJ 340	14
AIR 1978 Punj & Har 113	1, 2, 3, 16;	19;
		20, 21
AIR 1977 SC 1248:	1977 Acc CJ 118	13
1977 Acc CJ 469:	(1977) 2 Kant LJ 112	14
AIR 1975 Gauhati 3:	1974 Acc CJ 381	18
AIR 1974 Andh Pra 310		16, 17
1972 Acc CJ 433:	(1972) 2 Mys LJ 74	14
1971 Acc CJ 156:	74 Cal WN 879	17

AIR 1971 Madh Pra 5 : 1970 Acc CJ 86
(FB) 13
1969 Acc CJ 60 : (1968) 2 Andh WR 506

AIR 1968 Mad 436 14, 17

AIR 1967 Patna 342 18

(1964) 66 Pun LR 804 : 34 Com Cas 936

1, 3, 15, 19, 21

AIR 1963 Punj 214 : 64 Pun LR 917 15, 19

AIR 1962 Punj 540 : 64 Pun LR 448 11

AIR 1959 J & K 90 14

AIR 1958 Andh Pra 309 14

V. P. Gandhi with L. M. Suri, R. M. Suri and S. S. Dhaliwal, for Appellant; U. S. Sahni and Sudarshan Goel, for Respondents Nos. 6 & 7.

S. S. SANDHAWALIA, C. J.:— Whether the insurer can still be held liable under S. 96 of the M. V. Act, 1939, when the insured has himself been exonerated of such liability is the pristinely legal question which falls for determination before this Full Bench. Equally at issue in this context is the direct discordance of views in the two Division Bench judgments of this Court in *Alwar Motor Association (P.) Ltd., Alwar v. Hazari Lal*, (1964) 66 Pun LR 804 and *New India Assurance Co. Ltd., New Delhi v. Norati Devi*, AIR 1978 Punj & Har 113.

2. The facts, though brief disclose a long delay which sometimes occurs even in the urgent compensation cases of claims by victims of motor vehicle accidents. Way back on the 4th of Dec. 1970, Gurmel Singh deceased the son of Bachan Singh respondent was fatally run over by truck No. HRK 6664. An application for compensation on behalf of the dependents of the deceased was preferred against Prabh Dayal, the driver of the truck, Dai Ram the alleged owner thereof, and the Oriental Fire & General Insurance Company Ltd., who were the insurers of the offending vehicle. The case of the claimants rested on the ground that the truck was being rashly and negligently driven by Prabh Dayal driver. In resisting the claim application the respondents took the plea that Dai Ram was not the owner of the truck though it was admitted that it stood insured with the Oriental Fire and General Insurance Co. Ltd. and was driven by Prabh Dayal at that time. The Tribunal on issue No. 3 held that Dai Ram was not the owner of the truck and in fact M/s. Bal Kishan Ram Dhari of Samalkha were its real owners who were not impleaded as such. It was, however, found that the death of Gurmel Singh deceased was on account of rash and negligent driving by Prabh

Dayal and compensation therefor was assessed at Rs. 16,600. The claim petition, however, was dismissed in view of the aforesaid finding on issue No. 3. However, on appeal the dismissal of the claim application was set aside and the matter was remanded to the Tribunal to decide the same afresh in the light of the observations of the appellate Court. For the purposes of this reference it is unnecessary to advert to the chequered history of the second trial before the Tribunal and it suffices to mention that during the course thereof Prabh Dayal driver died and the counsel for the claimants made a statement to the effect that he had left no estate and consequently his name be struck off from the array of respondents which was accordingly done. The Tribunal then found that M/s. Bal Kishan Ram Dhari were the owners of the truck and not Dai Ram respondent. The firm stand taken on behalf of the owners before the tribunal was that the evidence recorded at the original trial when they were not parties to the proceedings could not be looked at for fastening them with liability. Consequently it was contended that there was no evidence against them that the death of the deceased was caused by rash and negligent driving of the truck by Prabh Dayal, after they were impleaded as parties. This stand found favour with the Tribunal and as a necessary corollary thereof M/s. Bal Kishan Ram Dhari the owners were exonerated from all liability. Nevertheless the Tribunal found that the appellant insurer M/s. Oriental Fire and General Insurance Co. Ltd. would continue to be liable in view of the observations in *Norati Devi's case* (AIR 1978 Punj & Har 113) (supra).

3. This appeal first came up before my learned brother S. P. Goyal, J. Learned counsel for the parties placed reliance on the conflicting views in *Hazari Lal's* (1964) 66 Pun LR 804 and *Norati Devi's* cases. Noticing that there was a direct conflict betwixt the two judgments, the matter has been referred to the Full Bench.

4. At the very outset it deserves highlighting that there is a long line of unbroken precedent (to which reference would inevitably follow hereinafter) in favour of the view that the liability of the insurer is conditional on a judgment or award against the insured. Nevertheless the matter calls for some examination on principle as also in the peculiar context of the provisions of the M. V. Act, 1939 (hereinafter referred as 'the Act').

5. At the very threshold, the true nature of the contract of insurance deserves highlighting. That the very corner stone thereof is the principle of indemnity is now so well settled that it would be wasteful to elaborate this aspect. It suffices to recall the following from the authoritative treatise of Porter's Law of Insurance:—

"Indemnity—Indemnity is the controlling principle in insurance law, and by reference to that principle most difficulties arising on insurance contracts must be settled. Except in insurance on life and against accident, the insurer contracts to indemnify the assured for what he actually loses by the happening of the events upon which the insurer's liability is to arise; and in no circumstances is the assured in theory entitled to make a profit (out?) of his loss."

6. Equally authoritative is the following enunciation of law in Leake on Contracts:—

"Insurance is a contract of indemnity only; consequently, an insurer of property, upon payment of the amount due under the contract, is subrogated to the assured, that is, is considered in equity as standing order in the place, and may pursue his remedies against a person primarily liable for the loss."

Now the statutory definition of a contract of indemnity is in the following terms in S. 124 of the Contract Act:—

"A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a 'contract of indemnity.'"

7. It seems unnecessary to elaborate the matter because by the language of the statute itself in a contract of insurance (barring some exceptions), the insurer promises to indemnify the insured for any loss or liability caused to him by his own conduct or the conduct of any other person. Under the general law, no right would accrue to any third party under such a contract. It is the more so because it is well settled that a contract of insurance is one of *uberrima fides*. It involves the utmost good faith betwixt the insurer and the insured including within it the obligation of the insured to disclose all material facts to the insurer. This is pithily stated as follows in Colinvaux's well-known work on the 'Law of Insurance'.

"..... This is expressed by saying that it is a contract of the utmost good faith

uberrima fides. Moreover, this utmost good faith is required not only from the assured but also from the insurer, and the insurer is therefore under a similar duty of disclosure. The doctrine applies equally to all kinds of insurance, including life insurance."

It would follow from the above, and indeed it seems to be well settled, that in a contract of insurance, the privity of contract is strictly between the insurer and the insured only, and further it is one of the utmost confidence.

8. As a necessary consequence of the aforesaid legal position, and even otherwise, it seems to be well settled that in a claim for damages for a tortious act against the tort-feasor, the insurer of the latter is neither a necessary party nor in any way liable to the claimant under the general law. This is plainly so because of the absence of any privity of contract between the claimant on the one hand and the insurer of the tort-feasor on the other. It bears repetition that this privity of contract exists only betwixt the insurer and the insured who mutually bind themselves and no rights or liabilities accrue thereunder to any third party. Therefore, in a claim for tort, the common law visualizes a decree or an award against the tortfeasor alone in the first instance. It is only thereafter that the insured tortfeasor could possibly claim to be indemnified by his insurer under the contract of insurance. It is thus elementary that dehors any special statutory provisions, a judgment or an award could be executed only against the tortfeasor and not against his insurer because no direct liability of the insurer arises qua the claimant. Equally if the insured himself was not saddled with any liability or loss, he could not make any claim against his insurer. Such a claim can only arise where the insured himself is fastened with liability or a judgment or an award is rendered against him. To put it in other words, the insurer's liability is secondary and conditional to that of the insured. Once that is so, it seems plain on principle that unless liability is first fastened on the insured, none can possibly fall on the insurer who has only undertaken to indemnify the loss or damage suffered by the insured. It can, therefore, be said as a dictum (subject of course to qualification) that, no judgment against the insured—no judgment against the insurer.

9. Though under the general law, a judgment against the tortfeasor could not be executed directly against his in-

suror, yet undoubtedly it can be so done by express provisions to the contrary in a statute. Indeed, before as it was conceded that but for S. 96 of M. V. Act, 1939, the Award against the insured could not be executed directly against the insurer-company by the claimant. Since in this particular context the issue must also turn on the language of the statutory provision, it becomes necessary to read the relevant parts of S. 96, at this stage:—

"Duty of insurers to satisfy judgments against persons insured in respect of third party risks.—

(1) If, after a certificate of insurance has been issued under sub-sec. (4) of Section 95 in favour of the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (1) of Section 95 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or canceled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment-debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(2) No sum shall be payable by an insurer under sub-sec. (1) in respect of any judgment unless before or after the commencement of the proceedings in which the judgment is given the insurer had notice through the Court of the bringing of the proceedings or in respect of any judgment so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceeding is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:—

(a) that the policy was cancelled by mutual consent or by virtue of any provisions contained therein before the accident giving rise to the liability, and that either the certificate of insurance was surrendered to the insurer or that the person to whom the certificate was issued has made an affidavit stating that the certificate has been lost or destroyed, or that either before or not later than

fourteen days after the happening of the accident the insurer has commenced proceedings for cancellation of the certificate after compliance with the provisions of Sec. 105; or (b) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely, —

(i) a condition excluding the use of the vehicle —

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached, where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification, or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion, or

(c) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular."

Now what indeed was the intent of the legislature in enacting the aforesaid Section 96 and the true import thereof is the crucial question. Did it intend thereby to make the insurer liable independently of the insured? I do not think so. The language of S. 96 plainly is no warrant for this rather radical proposition. Indeed it seems to be a clear pointer to the contrary. A plain reading of sub-sec. (1) of S. 96 would indicate that here- in the pre-condition of the liability of the insurer arises when a judgment is obtained against the insured person who has taken up the policy of insurance. It is then and then alone that the insurer is obliged to pay the claimant the amount due under such a judgment as if the insurer was the judgment-debtor. Therefore, in the absence of a judgment obtained against the insured no liability whatsoever would arise against the insurer, according to language of sub-section (1). When read with Ss. 94 and 95 it would appear that the patent intent of

the legislature was to compel insurance against third party risk in cases of motor vehicles and in order to avoid the multiplicity of proceedings (that is, the necessity of the claimant first obtaining a judgment against the insured and later suing his insurer to be indemnified therefor) it was made possible to execute the judgment against the insurer directly as if he were the judgment-debtor for the satisfaction of the claim against the insured. The statute does not intend plainly to do more than this. Even here further safeguards were provided to the insurer by making it mandatory that he should be made a party to the proceeding instituted by the claimant against the insured and then to defend the action on specified though limited grounds. S. 96 of the Act consequently makes it plain that it was never intended by the legislature nor does it flow from its language that the insurer would become liable de hors the insured and even when the insured has been wholly exonerated of any liability.

10. Both principle and the language of this statute being loaded against him and further faced with a stone-wall of precedent, Mr. Sahni, the learned counsel for the respondents attempted to make a flanking movement by contending that Ss. 110 to 110-F of the Act which were introduced in the statute later in 1956, had brought about a radical change in the substantive law applicable to the insured and the insurers in this context. Particularly with regard to precedent it was sought to be submitted that the judgments relied upon on behalf of the petitioners (to which detailed reference would follow) had not expressly taken into consideration the effect of Ss. 110 to 110-F of the Act. Particular reliance was sought to be placed on sub-sec (2-A) of S. 110C of the Act which was even added later with effect from Mar. 2, 1970. On this specific provision, it was sought to be contended in the alternative that where the insurer-Company has availed a right of contesting the claim on all the grounds that were available to the insured, the insurer could be saddled with liability de hors any judgment or Award against the insured.

11. The question that frontally arises in the context of the aforesaid submission is whether the insertion of Ss. 110 to 110-F of the Act by Act No. 100 of 1956 (and the later amendments made therein), was intended to make any radical change in the substantive law for tor-

tious liability in general and that of the insured and the insurer in particular. I do not think so. A plain reading of these provisions collectively would indicate that in true essence they are primarily procedural in nature. The whole purpose was to substitute the rather tardy procedure of the ordinary civil courts with the expeditious and summary procedure before a Motor Accident Claims Tribunal with regard to the urgent claims of compensation by the victims of motor vehicles accidents. Though this seems to be patent from the very language of Ss. 110 to 110-F, it is unnecessary to elaborate this matter because within this jurisdiction, the issue is settled by authority. In *Shri Ram Partap v. General Manager, Punjab Roadways, Ambala*, (1962) 64 Pun LR 448 : (AIR 1962 Punj 540), an identical argument was repelled by Dua, J. in the following terms (at p. 542 of AIR):—

"Dealing with the second point first, it is true that Sec. 110-B of the M. V. Act does not in terms lay down that it is only when negligence on the part of the driver of the vehicle concerned is established that compensation can be awarded, but then it should be borne in mind that this bunch of (Ss. 110 to 110-F) merely deal with the subject of the substitution of Motor Accidents Claims Tribunal in place of civil courts for the purpose of adjudicating on claims for compensation in respect of accidents involving the death or bodily injury to persons arising out of the use of motor vehicles. They do not deal with the question as to who is to be held liable and in what circumstances, if any injury results from an accident. In order, therefore, to discover the criterion or test for fixing liability, we have, in the absence of any statutory provision fixing liability irrespective of negligence, to turn to the law of torts according to which indisputably negligence in causing the accident in question is generally speaking essential to hold the negligent person liable. Nothing has been stated at the bar to persuade me to hold that the bunch of sections mentioned above in any way override the law of Torts. The cardinal principle of liability in tort, when death or bodily injury has been caused to a person, is negligence or failure to take the requisite amount of care required by law. It has not been argued and, indeed, not even a suggestion has been thrown, that the claim in question before me is based on any scheme of insurance, contractual or statutory. I have, therefore,

no hesitation in repelling this contention."

12. Again it appears to me that the reliance on Ss. 110-B and 110-C by Mr. Sahni is hardly well conceived. A plain look on S. 110-B of the Act would indicate that it is purely procedural providing for the modus of making the Award by the Tribunal and in cases where compensation is directed to be payable, it is prescribed that the Tribunal should specify the amounts to be paid by the insurer, the owner or the driver of the vehicle or by all or any of them as the case may be. It does not even remotely pretend to lay down the substantive law for determining such a liability. Further a reference to sub-sec. (2-A) of S. 110-C of the Act would, on the other hand, indicate that far from in any way burdening the insurer with any liability, it is only intended for their protection and safeguarding their interest. It deserves recalling that sub-sec. (2) of Sec. 96 of the Act had severely limited the defences open to the insurer in an action against the insured to those in clauses (a), (b) & (c) thereof only. Sub-sec. (2-A) of S. 110-C of the Act which was inserted much later by Act No. 56 of 1969 (with effect from 2-3-1970), indeed provides thereby that where there was collusion between the claimant and the insured or where there was a failure on the part of the insured to contest the claim, the Tribunal, for reasons to be recorded, would give the insurer the right to contest the claim on all or any of the grounds that were available to the insured. It is thus manifest that this provision far from in any way extending the liability of the insurer is plainly for their protection and safeguarding of their interests in cases of collusion between the claimant and the insured or the failure of the insured to contest the same.

13. The decks are now clear for advertising to the mass of precedent tilted primarily in favour of the appellant. In *Minu B. Mehta v. Balkrishna Ramchandra Nayan* 1977 Acc CJ 118 : (AIR 1977 SC 1248) their Lordships of the Supreme Court whilst advertng to the scope of S. 96 of the Act, have observed as follows (at p. 1256 of AIR):—

"Section 96 of the Act also makes the position clear. It provides that when a judgment in respect of such a liability as is required to be covered by a policy is obtained against any person insured by the policy, then the insurer shall pay

to the person entitled the benefit of the decree as if he were a judgment-debtor. The liability is thus limited to the liability as is covered by the policy."

Again a Full Bench of the Madhya Pradesh High Court in *Mangilal v. Parasram*, 1970 Acc CJ 86 : (AIR 1971 Madh Pra 5), after fully considering the provisions of Ss. 110 to 110-F of the Act has directly concluded as follows, on this point (at p. 9 of AIR):—

".....However, the ingredients of the liability of the insurer are nowhere provided in this special statute. Necessarily, therefore, that aspect of the matter will be governed by the general substantive law, which remains untouched by this special law. We have already shown that it is on the contract of indemnity that the insurer is liable to pay compensation only if the insured is liable to pay damages to the claimant. If the insured is not liable, then the insurer is also not liable. In other words, the liability of the insurer depends upon the liability of the insured....."

14. An identical question arose before a Division Bench of the Karnataka High Court in *New India Assurance Co. Ltd. v. Parvathamma*, 1977 Acc CJ 469 and was again answered in categorical terms as follows:—

".....The question for decision is as to whether the insurance company was liable even though there was no liability imposed on the insured. The answer, in our opinion, must be in the negative."

xx xx xx

And again,

".....But in all cases there must be liability of the insured so as to bind the insurer and make him liable to answer the claim....."

In *Barrala Ramaswamy v. Bhamidipati Satyanarayana*, AIR 1958 Andh Pra 309, it was observed as follows in this context (at p. 310):—

"So, it is clear from the language of S. 96 (1) that the suit must be filed as against the insured, and a judgment obtained against him. It is only after the judgment is obtained against the insured that the sum is recoverable from the insurer, i.e., the Insurance Company. Section 96 (2) provides for the issue of notice to the Insurance Company and the defences that might be raised by the Insurance Company if made a party. From the terms of S. 96 (2), it is implicit that no suit as against the Insurance Company can be maintained by the third party tak-



ing advantage of the Insurance policy, S. 97 supports this conclusion."

In *Abdul Ghafoor v. New India Assurance Co. Ltd.*, 1981 Acc CJ 340 : (AIR 1980 All 410), the Division Bench of the Allahabad High Court, after an analysis of the statutory provisions has again concluded as follows (at p. 411 of AIR):—

"The above provision places an obligation on the insurer to pay the amount which may have been awarded against the owner of the vehicle subject to certain conditions and qualifications. The first condition is that there should be a judgment or decree against a person insured. The second condition is that the judgment must be in respect of liability covered by the policy under cl. (b) of sub-sec. (1) of S. 95. The third condition is that the liability, in fact, must be covered by the terms of the policy. If any of these three conditions is not satisfied, the insurer will not be responsible to pay compensation for the bodily injury or death which may have been caused to a third party. These provisions clearly show that in absence of a decree against the owner (person insured), an insurer has no liability to satisfy the claim of a third party as under the policy the insurer is liable to satisfy the liability which may have been accrued against the person insured....."

Though not on all fours, analogous observations have been made to this effect in *Hindustan Ideal Ins. Co. Ltd. v. Pokanti Ankiah*, 1969 Acc CJ 60 (Andh Pra); *Hindustan Ideal Ins. Co. Ltd. v. Pappu Poojary*, 1972 Acc CJ 433; and *New Asiatic Insurance Co. Ltd. v. Kulwant Devi*, AIR 1959 J & K 90.

15. In line with the aforesaid mass of precedent within this Court also, the view has been consistently the same. In *Nand Singh Viridi v. Punjab Roadways, Amritsar*, (1962) 64 Pun LR 917 : (AIR 1963 Punj 214), Pandit, J. expressed the following opinion in unequivocal terms as follows (at p. 215 of AIR):—

".....The insurer only incurs the liability of the assured and that also to the extent for which the vehicle is insured. Therefore, the third party has first of all to establish the liability of the assured and it is only then that it can recover the amount of compensation awarded against the assured from the insurer. If he is unable to prove his claim against the assured, then he cannot get any compensation from the insurer. The provisions of the M. V. Act

have not, in any way, changed the general law under which compensation is claimed by one person from another....."

The aforesaid view was unhesitatingly affirmed by the Division Bench in *Alwar Motor Association (Private) Ltd., Alwar v. Hazari Lal*, (1964) 66 Pun LR 804, after quoting a part of the aforesaid passage with approval.

16. With the massive weight of precedent ranged against him, Mr. Sahni, the learned counsel for the respondent, was forced to concede that there was no direct authority (apart from the observations in *New India Assurance Co. Ltd., New Delhi* (AIR 1978 Punj & Har 113) (supra)), holding that an insurer would be liable de hors the insured and even where the insured had been exonerated of all the liability. Learned counsel, however, by way of analogy squarely placed reliance on *K. Gopalakrishnan v. Sankara Narayana*, AIR 1968 Mad 436, to contend that S. 96 (2) of the Act had no applicability to proceedings before a Claims Tribunal and was attracted only in regard to a trial in civil court. The aforesaid view has been later followed in *Madras Motor & General Insurance Co. v. Katanreddi Subbareddy*, AIR 1974 Andh Pra 310.

17. It would follow from a plain look at Ss. 110 to 110-F of the Act that a Motor Accidents Claims Tribunal when constituted, would substitute the civil courts and, therefore, the provisions of S. 96 of the Act would be ipso facto attracted to the situation. It is unnecessary to elaborate the matter because the issue came up pointedly before a Division Bench of the Calcutta High Court in *Hukam Chand Insurance Co. Ltd. v. V. Subhashini Roy*, 1971 Acc CJ 156, and expressly dissenting from the view in *K. Gopalakrishnan's case* (AIR 1968 Mad 436) (supra), and, *Madras Motor and General Insurance Co. case* (AIR 1974 Andh Pra 310) (supra), it observed as follows:—

"From study into the above sections it would thus appear that the only change that has been introduced in matters of adjudication of claims for compensation by the amended provision is that the courts are replaced by the Claims Tribunal whenever set up for the purpose in any area by notification made by the State Government for adjudication of claims for compensation following a summary procedure with right of appeal to High Court. It, therefore, follows that

although S. 96 (2) has not been suitably amended, whenever a Claims Tribunal is set up for any area the word 'court' occurring in S. 96 (2) must be interpreted to mean Claims Tribunal. Any other interpretation would lead to anomalous and absurd result....."

I am in respectful agreement with the aforesaid observations and for the detailed reasons recorded in the judgment, I would record my dissent with the observations in K. Gopalakrishnan's case (supra); and, Madras Motor & General Insurance Co.'s case (supra), also.

18. In fairness to Mr. Sahni, it must be noticed that he also placed reliance on the Vanguard Insurance Co. Ltd. v. Foolchand Mandal, AIR 1967 Patna 342; and, Assam Corporation v. Binu Rani Ao, 1974 Acc CJ 381 : (AIR 1975 Gauhati 3). Undoubtedly, the observations made therein would lend some assistance to his stand. However, in view of the detailed discussion, both on principle, the language of the statute and the massive weight of precedent to the contrary, I am unable to subscribe to the same and with the greatest respect feel compelled to record a dissent therefrom as well.

19. In the end, one must necessarily advert to New India Assurance Co. Ltd., New Delhi's case (AIR 1978 Punj & Har 113) (supra), which indeed has necessitated this reference to the Larger Bench. A perusal of the judgment would disclose that the matter was not adequately canvassed before the Division Bench and this is manifest from the fact that it was disposed of in limine. The learned Judges expressed only a tentative opinion and observed as follows (at p. 114):—

".....As at present advised, we cannot subscribe to the broad proposition that an Insurance Company can never be held liable so long as the insurer is not impleaded as a party to the proceedings, or having been impleaded his name is ordered to be struck off from the array of respondents on the basis that he enjoys diplomatic immunity from being sued in a Court."

Counsel were plainly remiss in not bringing to the notice of the court, the Division Bench case in Alwar Motor Association (Pvt.) Ltd., Alwar's case ((1964) 66 Pun LR 804) and the previous single Bench decision in Nand Singh Viridi v. Punjab Roadways, Amritsar, (1962) 64 Pun LR 917 : (AIR 1963 Punj 214), on which it was rested. Equally, the long line of precedent, which has been noticed in this context by me, were not even re-

motely referred to. The larger principles involved and the specific provisions of the statute which were attracted, were not brought to the notice of the Bench.

20. It would also seem that the equity of the case was tilted heavily in favour of the respondent-claimant because the insured therein was a member of the diplomatic corps and therefore, was immune from civil process. Undoubtedly, such cases would raise grave hardship against the claimants who are the victims of accidents occurring owing to the negligence of persons entitled to diplomatic immunity. This, however, is a matter which deserves the urgent consideration of the legislature, but cannot be made a ground for deviating from the law as settled on both principle, and by unbroken precedent. With the greatest respect, therefore, it must be held that New India Assurance Co. Ltd.'s case (AIR 1978 Punj & Har 113) (supra) is not correctly decided and is hereby overruled.

21. To conclude, the answer to the meaningful question formulated at the very outset is rendered in the negative and it is held that the insurer cannot be held liable under S. 96 of the Act, where the insured himself stands exonerated of any such liability. The Division Bench judgment in Alwar Motor Association (Pvt) Ltd., Alwar's case (1964) 66 Pun LR 804 (supra), is hereby affirmed and that in New India Assurance Company Ltd's case (AIR 1978 Punj & Har 113) (supra) is overruled.

22. The issues referred to the Full Bench have been answered as above, the case would now go back to the learned single Judge for decision on merits, in the light thereof.

S. C. MITAL, J.:— I agree.

S. P. GOYAL, J.:— I also agree.

Answered accordingly.

AIR 1982 PUNJAB AND HARYANA 275

J. M. TANDON, J.

K. L. Bawa (deceased by L. R.), Petitioner v. M/s. Basant Textiles, Abu Lane, Meerut, Respondent.

Civil Revn. No. 408 of 1981, D/- 15-1-1982.*

Civil P. C. (5 of 1908), Ss. 2 (10), 60 (1) (ccc) and 115 — Judgment-debtor's

*From order of S. R. Bansal, H. C. S. Sub J., 1st Class, Chandigarh, D/- 29-9-1980.

CZ/DZ/A933/82/HR/RSK

house attached in execution proceedings — Objection filed by judgment-debtor claiming protection under S. 60 (1) (ccc) dismissed — Revision under S. 115 — Death of judgment-debtor pending revision — Held revision was rendered infructuous since protection under S. 60 (1) (ccc) was available only to judgment-debtor in person and could not pass on to his legal representative. (Para 7)

R. S. Bhatia, for Petitioner; Hemant Kumar, for Respondent.

ORDER:— Messrs Basant Textiles, Abu Lane, Meerut (respondent) obtained a decree for the recovery of Rs. 23,363.05 against K. L. Bawa (petitioner) now deceased and represented by his widow Jagdish Rani from the Court of Ist Civil Judge, Meerut, on Mar. 12, 1977. The decree was transferred to the District Judge, Chandigarh, for execution purposes. In the execution proceedings, house No. 70, Sector 18-A, Chandigarh, belonging to the judgment-debtor was attached. The judgment-debtor filed objections against attachment u/s. 47, Civil Procedure Code, claiming the protection of cl. (ccc) under proviso to sub-sec. (1) of S. 60, Civil P. C. The objection petition was dismissed by the executing Court vide order dt. Sept. 29, 1980, against which the present revision is directed.

2. The judgment-debtor died on Oct. 14, 1981. His widow Jagdish Rani has been allowed to be impleaded as his legal representative in C. M. No. 63-CII of 1982.

3. The learned counsel for the respondent has argued that as a result of the death of the judgment-debtor on Oct. 14, 1981, the revision petition stands rendered infructuous. The contention of the learned counsel must prevail.

4. Cl. (ccc) to proviso to sub-sec. (1) of S. 60, C. P. C., reads:—

"Provided that the following particulars shall not be liable to such attachment or sale, namely:—

(a), (b), (c) and (cc).....
(ccc) one main residential house and other buildings attached to it (with the material and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to a judgment-debtor other than an agriculturist and occupied by him; provided that the protection afforded by this clause shall not extend to any property specifically charged with the debt sought to be recovered."

5. The protection regarding one main residential house is only available to

judgment-debtor under cl. (ccc) reproduced above.

6. S. 2 (10), Civil P. C., defines judgment-debtor and it reads:—

"'Judgment-debtor' means any person against whom a decree has been passed or an order capable of execution has been made."

7. K. L. Bawa deceased was the judgment-debtor against whom the money decree was passed. The protection from attachment of one main residential house under cl. (ccc) was available to him in person. His widow Jagdish Rani being not a judgment-debtor cannot avail of the protection under cl. (ccc). The protection under cl. (ccc) which was available to K. L. Bawa, judgment-debtor (now deceased), therefore, came to an end with his death on Oct. 14, 1981. The protection under cl. (ccc) being available to the deceased in person would not pass on to his widow as his legal representative. Under these circumstances, there is no escape from the conclusion that the death of the judgment-debtor on Oct. 14, 1981, has rendered the present revision infructuous.

8. In the result, the revision fails and is dismissed with no order as to costs.

Revision dismissed.

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I. S. TIWANA, J.

Satish Kapur and another, Petitioners v. State of Haryana and another, Respondents.

Civil Writ Petn. No. 371 of 1981, D/- 22-1-1982.

(A) Land Acquisition Act (1 of 1894), S. 4 (1) — Notification under — Unexplained delay between publication of notification in Gazette and publication of its substance in the locality concerned — Proceedings emanating from it are void. AIR 1976 Punj & Har 279 (FB) and 1977 Rev LR 337 (Punj & Har), Foll.

(Para 3)

(B) Land Acquisition Act (1 of 1894), Ss. 4, 23 — Land acquisition — Power of, has to be exercised reasonable, meaning that award must be passed expeditiously — Issuing notification under S. 4 for freezing price and passing award at convenient time is against scheme of Act.

The statutory power conferred on the State by the Act, viz., the power to acquire the land compulsorily has to be exercised reasonable and fairly which

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necessarily means that the award must be passed with reasonable expedition. It is the scheme and intentment of the Act that the award should be passed as early as possible in the circumstances of the case. As such to issue notification under Sec. 4 only for the purpose of pegging down or freezing the price of the land proposed to be acquired and then wait for a convenient and opportune time to pass an award is a course of conduct which is alien to the scheme and intentment of the Act. If the Land Acquisition Authorities are allowed to issue a notification under S. 4 (1) and then to wait and ultimately pay compensation as and when they please on the basis of the market price of the land as on the date of the notification under S. 4 by invoking provisions of S. 23 (1) the said compensation can hardly represent a reasonable and fair compensation. This attitude of the acquiring authorities cannot possibly be countenanced. (Para 8)

(C) Constitution of India, Art. 226 — Writ petition — Laches — Petition by landlord seeking relief against delay in completion of land acquisition proceedings by Authorities — Authorities cannot turn round and defend petition on ground of laches. (Para 9)

Cases Referred : Chronological Paras

1982 Rev LR 78 (Punj & Har)	4, 7
(1981) Civil Writ No. 1028 of 1981, DJ-24-8-1981 (Punj & Har) Ram Krishan Shroff v. State of Haryana	4, 8
AIR 1980 SC 64	5, 8
ILR (1980) 2 Punj & Har 403 : 1980 Pun LJ 414	4, 7
1977 Rev LR 337 : 1977 Fun LJ 398	3
AIR 1976 Punj & Har 275 : 78 Pun LR 545 (FB)	3
AIR 1975 SC 2190	9
AIR 1968 SC 1223	8

H. L. Sarin, Sr. Advocate with M. L. Sarin, for Petitioners; Harbhagwan Singh, Advocate General, Haryana with Bhopinderjit Singh, Addl. Advocate General, Haryana, for Respondents.

ORDER:— Two notifications issued by the State Government under Ss. 4 and 6 of the Land Acquisition Act (for short the Act) on Nov. 4, 1977 and Oct. 24, 1980, respectively, for the acquisition of 174.46 acres of land including the land of the petitioners in these Writ Petitions Nos. 371, 309 and 372 of 1981, situated within the revenue estate of Atmadpur, Tahsil Ballabgarh. District Faridabad, are impugned primarily on the grounds that (i) there has been no compliance of the provisions of sub-sec. (1) of S. 4 of

the Act in as much as substance of notification has not been published in the locality concerned simultaneously with its publication in the Gazette and (ii) there was no bona fide need for acquiring the property in question and the notifications had been issued for a collateral purpose of pegging down the prices to the date of the notification and thus amounted to abuse of power.

2. On behalf of the respondents, it has been explained in their return that the substance of the notification issued under S. 4 of the Act was published on Nov. 9, 1977 and this fact is evidenced by the Rapat Roznamcha No. 104 dated Nov. 9, 1979, recorded with the Halqa Patwari; acquisition proceedings are in progress and the petitioners would be paid due compensation in accordance with law before taking over the possession from them.

3. After hearing the learned counsel for the parties I find merit in the above noted two contentions raised by the petitioners. Even if the stand of the respondents to the effect that the substance of the notification was published in the locality concerned is accepted as correct — though it is seriously being disputed by the learned counsel for the petitioners with the allegation that the entry in the Roznamcha of the Patwari is only a paper transaction — still I find no explanation whatsoever for the delay that has occurred between the dates of the publication of the notification in the Gazette and the alleged publication of its substance in the locality concerned. In the absence of any such explanation, the proceedings emanating from the impugned notification are obviously rendered void. This has been so ruled by a Full Bench of this Court in Rattan Singh v. State of Punjab, (1976) 78 Pun LR 545 : (AIR 1976 Punj & Har 279). Yet in another Division Bench judgment of this Court in Murari Lal Bhargava v. State of Haryana, 1977 Rev LR 337, the delay of six days between the two dates, i.e., the date of publication in the gazette and in the locality concerned, in the absence of any explanation on the part of the acquiring authorities for the same, was found to be enough to quash the impugned notifications.

4. In support of his second contention, the learned counsel relies on the following indisputable facts. The impugned notification under S. 6 was issued just ten days before the expiry of the statutory period of three years from the is-

suance of the notification under S. 4 of the Act. Earlier to the issuance of the notification under Sec. 4 of the Act on Nov. 4, 1977, a similar notification had been issued on Oct. 1, 1973 but that notification automatically lapsed as it was not followed by a notification under S. 6, within the prescribed period of three years. No further action except the publication of the two notifications has been taken by the authorities concerned to complete the acquisition proceedings either till the filing of these petitions or even till today. So much so, even a notice under S. 9 of the Act has not been issued to the landowner-claimants, what to talk of the assessment of compensation payable to them. It is on the basis of these premises that the learned counsel maintains that the sole purpose of issuing these two impugned notifications was to peg down the prices to the date of notification under S. 4 of the Act for future acquisition of this land. This abuse of power of compulsory acquisition, according to the learned counsel, cannot possibly be allowed. The delay or non-action on the part of the respondent authorities in completing the acquisition proceedings is obviously indicative of the fact that there was no need to acquire the land on the date it was so notified, that is, Nov. 4, 1977. In support of this contention, the learned counsel for the petitioners squarely relies on the following judgments of this Court:—

1. *Man Singh v. State of Punjab*, ILR (1980) 2 Punj and Har 403.

2. Civil Writ No. 4230 of 1981 (*Naval Singh v. State of Haryana*) decided on Jan. 11, 1982.*

3. Civil Writ No. 1028 of 1981 (*Ram Krishan Shroff v. State of Haryana*) decided on Aug. 24, 1981.

5. On behalf of the respondents, however, it is contended in the light of the observations of their Lordships of the Supreme Court in *Gujarat State Transport Corporation v. Valji Mulji Soneji*, AIR 1980 SC 64 that the delay of about three years that has occurred, in the issuance of the notification under Sec. 6 after the publication of the notification under S. 4 of the Act, cannot be taken notice of for the reason that the statute itself confers powers and prescribes time within which this power could be exercised and since the statutory power has been exercised within the prescribed period, the Court cannot examine the question of delay and record a finding

that there was unreasonable delay in the exercise of the power by the respondent authorities.

6. Realising the force of the observations of the Supreme Court in the above-noted judgment, the learned counsel for the petitioners explains that (i) the same are only based on the facts of that case and their Lordships do not lay down as a general rule that the State authorities are entitled to deliberately delay the issuance of the notification under S. 6 of the Act for three years after the publication of the notification under S. 4 of the Act and (ii) the phraseology of the first proviso to sub-sec. (i) of S. 6 of the Act which makes it imperative for the acquiring authorities to publish the declaration under S. 6 within a period of three years from the publication of the notification under S. 4 of the Act, is in the negative form; thereby injuncting the acquiring authorities not to delay the publication for more than three years. This, according to the learned counsel, lays down the outer time limit for the publication of the notification under S. 6 of the Act and it does not mean that the authorities are entitled to delay this publication for that much period without any justification or any basis. The learned counsel maintains that even if an executive authority has the jurisdiction to acquire the land of a landowner, still the power has to be exercised in a manner which does not render it arbitrary. According to him, the respondent authorities are under an obligation to complete the acquisition proceedings within a reasonable time and without any unjustifiable delay so that the landowner gets a reasonable compensation for his land. He points out that the principle of awarding compensation is based on the right of the owner to be indemnified by the community for whose benefit he is being deprived of the property against his will. Compensation would essentially mean a just equivalent of what the owner has been deprived of. In other words, the owner who is deprived of his property should be enabled by the compensation awarded to him to place himself in substantially the same position in which he was before the acquisition. He further asserts that this principle has to be kept in mind by the respondent authorities and this is more so in the present day conditions when the prices of lands around urban areas are witnessing a phenomenal rise and maintain an ever-increasing trend.

7. In support of his first contention, the learned counsel relies on the obser-

*Reported in 1982 Rev LR 78.

ventions of the Division Bench of this Court in Naval Singh's case (supra). In somewhat similar circumstances, when an argument was raised by the State counsel to the effect that no period of limitation has been prescribed for determining the compensation and giving of an award the learned Judges observed after noticing the above noted judgment of the Supreme Court as follows:—

"However, the facts in that case were entirely different. In that case, the notification under S. 4 of the Act was issued on Oct. 10, 1952, and the following action was taken by the State Government expeditiously within less than a year by issuing a notification under S. 6 on Aug. 14, 1953. The landowners filed a suit challenging the notifications. They lost in different Courts but continued pursuing their remedies and the matter was ultimately decided in the Supreme Court in 1963, whereafter action was taken for determining the compensation. So, it was the landowner who had delayed the proceedings and the State was not at fault. The ratio of this case will not be applicable to the facts of the present case." The learned Judges of the Division Bench quashed the impugned notification under Ss. 4 and 6 of the Act on the basis of the earlier judgment in Man Singh's case (ILR (1980) 2 Purj & Har 403) (supra).

8. After giving thoughtful consideration to the entire matter I feel that in view of the observations of their Lordships of the Supreme Court in para 16 of the judgment, though hardly any scope has been left — at least before me — to examine the above noted first submission of the learned counsel in any great depth, yet I find that the given facts and circumstances preceding and following the two notifications in the case in hand, do justify the learned counsel's submission to the effect that the omissions and commissions of the respondent authorities have resulted in arbitrariness and deprivation of a reasonable compensation for the acquired land. As has already been pointed out, there is absolutely no explanation for the non-taking of any steps subsequent to the issuance of the impugned notification under S. 6 of the Act. Neither any notice under S. 9 of the Act asking the petitioners to file their claim for compensation payable to them for the land sought to be acquired has been issued nor has any step been taken towards the completion of the acquisition. It is obvious that the impugned

notification under S. 4 of the Act was issued four years ago and in the light of the provisions of S. 23 (1) of the Act, compensation payable to the petitioners is the 'market value' of the land on that date. This too has to be paid only after the passing of the award. It is equally true that the possession is to be taken from the petitioners after the passing of the award and till then they are entitled to reap the benefits from the land, yet it cannot possibly be denied that the issuance of this notification did have the effect of freezing the market price of the land. It resulted in two ways; firstly, the market value of the land to be acquired was to be determined on the date of the notification under S. 4 (1) of the Act and secondly, any outlay or improvements on or disposal of the land acquired commenced, made or effected without the sanction of the Collector, after the date of the publication of the notification under S. 4 (1) was to be ignored in determining the compensation (see Section 24 seventhly). Not only this the earlier publication of a similar notification under S. 4 of the Act on Oct. 1, 1973, also had a similar effect. Thus it is patent that what is going to be paid to the petitioners ultimately — when it is going to be paid is not as yet certain — would virtually be the price of the land as it existed on October 1, 1973. It cannot be gainsaid that the scheme and intendment of the Act is that the award should be passed as early as possible in the circumstances of the case. It can hardly be denied that over the last several years there has been a substantial rise in the prices of agricultural land, urban vacant sites and immovable properties. In the case of major towns and cities the increase has been phenomenal. If the land acquisition authorities are allowed to issue a notification under S. 4 (1) of the Act and then to wait and ultimately pay compensation as and when they please on the basis of the market price of the land as on the date of the notification under S. 4 of the Act, the said compensation can hardly represent a reasonable and fair compensation. This attitude of the acquiring authorities cannot possibly be countenanced. Procedure under the Act is very simple in nature. Questions of title or disputed claim can neither be considered nor adjudicated upon by the authorities concerned. The Land Acquisition Collector has only to assess the market price of the acquired land and his award ultimately is only in the nature of an offer made by the State. All that the

Land Acquisition Officer is required to do under the Act after the publication of the notification under S. 6 of the Act is to prepare a statement of valuation and determine what is the reasonable price payable for the land and then to pass an award on that basis. This should not ordinarily take much of time. It is of course a different matter if the land-owners themselves obstruct the proceedings and cause delay by resorting to various remedies in Courts as was the case before the Supreme Court in Valji Mulji Soneji's case (AIR 1980 SC 64) (supra). In such a case they cannot be heard to complain. But where the land-owners have not contributed to the delay in any manner, the Land Acquisition Officer cannot sleep over the matter and take his own time in passing the award. The statutory power conferred on the State by the Act, viz. the power to acquire the land compulsorily should be exercised reasonably and fairly which necessarily means that the award must be passed with reasonable expedition. As has already been pointed out in the cases in hand there is absolutely no explanation on behalf of the respondent authorities for the delay that has taken place in the completion of the acquisition proceedings or the passing of the award. In the absence of any such justifiable reason for the delay that has taken place, the action of the respondent authorities is undoubtedly rendered unreasonable and arbitrary exercise of power. The impugned notifications could not be issued for the purpose of pegging down or freezing the price as the case is found to be and then wait for a convenient and opportune time to pass an award—such a line of thinking and course of conduct is alien to the scheme and intentment of the Land Acquisition Act. This is well supported by the following observations of the Supreme Court in Ambalal Purshottam v. Ahmedabad Municipal Corporation, AIR 1968 SC 1223 (at p. 1227):—

“We are not hereby to be understood as suggesting that after issue of the notification under Ss. 4 and 6 the appropriate Government would be justified in allowing the matters to drift and to take in hand the proceedings for assessment of compensation whenever they think it proper to do. It is intended by the scheme of the Act that the notification under S. 6 of the Land Acquisition Act must be followed by a proceeding from determination of compensation without any reasonable delay.....”

Keeping the above noted principle in view in Ram Kishan Shroff's case (supra), Dhillon, J. even quashed the award given by the Collector under S. 11 of the Act along with the impugned notifications under Ss. 4 and 6,

9. As a last resort, the learned counsel for the respondents urges that the petitioners be non-suited on the ground of laches. He maintains that considerable delay has occurred in the filing of this petition since the publication of the impugned notifications. In support of this contention of his he relies on certain observations of the Supreme Court in State of Mysore v. V. K. Kangan, AIR 1975 SC 2190. In view of the facts and circumstances of this case I do not find any merit in this submission. Firstly, it is to be noticed that the delay in approaching the Court is not by itself fatal since there is no law of limitation obliging a person to approach a Court within a particular time. Laches is one of the considerations which deserves to be given weight in exercise of the jurisdiction under Art. 226 of the Constitution of India and this consideration has primarily to be applied at the motion stage, that is, when the petition is admitted to a hearing. Moreover in the type of cases in hand where the acquisition proceedings have been kept pending for a number of years and there being no end in view, the relief is sought to be granted on the ground of inordinate delay on the part of the Land Acquisition Officer in finalising the proceedings. In such a case I am unable to see as to how the respondents can turn round and accuse the petitioners of laches. Furthermore I find that the petitioners were well justified in awaiting the fall or lapsing of the impugned notification under S. 4 of the Act in view of the fact that the respondent authorities had allowed their earlier notification dated Oct. 1, 1973 to exhaust itself with the expiry of three years, from the date of its publication.

10. For the reasons recorded above, I allow these petitions and quash the impugned notifications so far as these relate to the petitioners' land. The petitioners would also be entitled to costs of these petitions which are assessed at the rate of Rs. 300/- per petition.

Petition allowed.

AIR 1982 PUNJAB AND HARYANA 281

G. C. MITAL, J.

Bachna Ram, Petitioner v. Nar Singh Dass and others, Respondents.

Civil Revn. No. 2665 of 1981, D/- 8-1-1982.*

East Punjab Urban Rent Restriction Act (3 of 1949), S. 13 — Civil P. C. (1908), O. 22, R. 10 — Suit for ejectment — Sale of property during pendency of suit — Impleadment of vendee as plaintiff — Grounds for eviction not affected by change in ownership — Impleadment can be granted. AIR 1979 Bom 269, Dissented from.

Eviction was sought on three grounds namely, (1) building was unsafe and unfit for human habitation, (2) change of user and (3) tenant materially impairing value and utility of building. The suit property was sold during the pendency of the suit. The vendees sought permission under O. 22, R. 10 to be impleaded in the suit as plaintiffs. It was granted.

Held, that the grounds were such that the change of ownership would not affect them in any way, therefore the order granting impleadment of the vendees as plaintiffs in the pending suit was legal. AIR 1973 SC 2110, Relied on; AIR 1979 Bom 269, Dissented from. (Paras 2, 4)

According to the provisions of the Act, if breaches are committed by the tenant after the coming into force of the Act the ground for eviction becomes available to a landlord which can be pleaded by the landlord who wants the premises to be vacated and this would include the successors as well. (Para 4)

Cases Referred: Chronological Paras
AIR 1979 SC 269: (1979) 2 Ren CR 434 3
AIR 1973 SC 2110: 1973 Ren CR 364 2
Ashok Bhan, for Petitioner; Vijay Thanji, for Respondents.

ORDER:— The sole point which arises for consideration in this case is whether the successor-in-interest of the landlord can be allowed to continue ejectment application when the following four grounds were pleaded for ejectment of the tenant:

1. Non-payment of rent on the first date of hearing.
2. Building being unsafe and unfit for human habitation.
3. Change of user; and
4. The tenant materially impairing the value and utility of the building.

*Against order of S. S. Gupta, P.C.S., Rent Controller, Ludhiana, D/- 19-10-1981.

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Nar Singh Dass and Gian Chand were the landlords and the premises in dispute had been let out by them to Bachna Ram. Both the landlords filed an application for ejectment on the aforesaid four grounds. While the application was pending before the Rent Controller, they sold the rights in the property in dispute to Smt. Shanti Devi, Smt. Sarla Devi and Sunil Kumar, vide two registered sale deeds dated 10th of July, 1981 and 29th of July, 1981. After purchase the vendees filed an application under O. 22, R. 10 of the Civil P. C. for being impleaded as petitioner-landlords in the pending ejectment petition. The application was opposed by the tenant on the ground that the purchasers could not be allowed to be impleaded as petitioners. The Rent Controller allowed the application and impleaded vendees. This is tenant's revision against the aforesaid order.

2. After hearing the learned counsel for the parties, I am of the view that the purchasers have rightly been brought on record to continue the ejectment petition at least on the following three grounds:—

1. Building being unsafe and unfit for human habitation;
2. Change of user of the demised premises; and
3. Tenant having materially impaired the value and utility of the building.

This view of mine has indirect support from Supreme Court decision in Smt. Phool Rani v. Naubat Rai Ahluwalia, 1973 Ren CR 364: (AIR 1973 SC 2110). There the landlord died while his appeal was pending before the Appellate Authority and his legal representatives applied for being brought on the record. The only ground which was taken in the ejectment application was that the landlord required the premises for his personal necessity. In the facts of that case, it was held that the legal representatives could not be allowed to be brought on the record because the lis in that case centered around the personal necessity of the landlord who has filed the ejectment petition because it was for him to plead and prove the following three things:—

1. Whether the plaintiff required the premises for his occupation and for the occupation of his wife, sons, daughters-in-law and grandchildren.
2. Whether the aforesaid requirement is bona fide; and
3. Whether the plaintiff has no other reasonably suitable residential accommodation.

The moment the landlord died and the enquiry which was to be made came to

an end a fresh enquiry had to be made on all the three points after they were pleaded by the legal representatives because it is quite possible that the legal representatives may be having other residential accommodation in the same urban area whereas their predecessor-in-interest may not be having, and may not be having personal necessity. According to the Supreme Court, this could be done only in a fresh petition and not by substitution of the legal representatives. If the matter had to be decided on larger principle of law that an ejectment application once filed by a landlord has to come to an end on his death and cannot be continued by his legal representatives or will come to an end by sale and cannot be continued by the successor, then it was wholly unnecessary to consider whether it would be a fit case for the legal representatives/transferees to continue the proceedings. That is why the Supreme Court took pains to consider this matter and found in case of personal necessity that it cannot be continued. Adopting the reasoning, if the building was unsafe and unfit for human habitation for the previous landlord owning the property, it cannot be said that it became a good building the moment it was sold by him and ceased to be unsafe and unfit. Similar would be the answer to the other two grounds of eviction.

3. Mr. Ashok Bhan, learned counsel for the tenant has cited decision of Bombay High Court in *Shantinath S. Ghon-gade v. Rajmal Uttamchand Gugale*, (1979) 2 Ren CR 434 : (AIR 1979 Bom 269), where the ejectment petition on the ground of impairment of the value and utility of the building as also on the ground of change of user, was not allowed to be continued by the vendee, wherein it is held as follows (Paras 14 & 15 of AIR):—

"Any landlord who wants to recover possession and wants to take advantage of the provisions of Section 13, is bound to show that certain acts were committed by a tenant and, as already pointed out, that tenant referred to in Section 13 (1) (a) and (b) is the tenant of the landlord who wants to recover possession. If at the time when the alleged acts were committed the defendant was not the tenant of the plaintiff-landlord, in my view, he, as a transferee of such property, will not be entitled to found his claim for possession on any breaches alleged to have been committed prior to the time when the title vested in the plaintiff.

In this view of the matter, there is a clear infirmity in the suit filed by the plaintiff inasmuch as admittedly, both the breaches alleged to have been committed by the defendant were committed long before the plaintiff became the owner of the property. Consequently, he was not entitled to invoke the provisions of Section 13 (1) (a) or (b) of the Rent Act against the defendant on the basis of acts alleged to have been committed prior to 20th January, 1971. The fact that those breaches continued up to the date of the suit would, in my view, not be material because the breaches had already occurred and there was no question of the breaches being continued."

4. I do not subscribe to the aforesaid view. It is nowhere contained in the East Punjab Urban Rent Restriction Act, 1949 (hereinafter called the Act) with which I am concerned that the breaches must be committed at a time when the applicant who came to the Court was the landlord. On the contrary what is contained in the Act is that if breaches are committed after the coming into force of the Act, the ground of eviction becomes available to a landlord which can be pleaded by the landlord who wants the premises to be vacated and this would include the successors as well. Moreover, the Supreme Court decision was not noticed and if that had been noticed, the result may have been different.

5. Whether the ground of non-payment of rent would be available to the vendees or not, this matter is left upon and would be gone into afresh by the Rent Controller.

6. For the reasons recorded above, I do not find any merit in the revision petition and dismiss the same with no order as to costs.

Petition dismissed.

AIR 1982 PUNJAB AND HARYANA 282
RAJENDRA NATH MITTAL, J.

Amar Singh, Appellant v. Tej Ram and another, Respondents.

Regular Second Appeal No. 437 of 1971, D/- 18-11-1981.*

(A) Evidence Act (1 of 1872), S. 64 — Mode of proof — Deed of adoption produced before trial court but no objection taken regarding mode of proof — Party

*Against judgment and decree of K. C. Grover, Addl. Dist. J., Karnal, D/- 27-2-1971.

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disputing fact of adoption is precluded from raising objection for first time in appeal. AIR 1943 PC 83, AIR 1958 Punj 116 and AIR 1972 SC 668, Rel. on.

(Para 6)

(B) Hindu Adoptions and Maintenance Act (78 of 1956), Ss. 10, 16 — Presumption u/s. 16 — Validity of adoption challenged on ground that adoptee was over 15 years and married and plaintiff had not proved u/s. 10 that custom permitted such adoption — Plaintiff producing registered deed of adoption — Court shall presume that adoption was valid and it is for defendant challenging validity to rebut presumption. (1963) 70 Pun LR 535, Rel. on.

(Para 8)

(C) Hindu Adoptions and Maintenance Act (78 of 1956), S. 10 — Custom — Proof of — Validity of adoption challenged on ground that adoptee was over 15 years and married and plaintiff had not proved that custom permitted such adoption — Plea not taken in written statement — Held, plaintiff was, therefore, not required to plead and prove existence of such custom. AIR 1953 SC 235 and AIR 1973 Punj 387, Disting.

(Para 10)

(D) Hindu Adoptions and Maintenance Act (78 of 1956), S. 10 — Custom — Proof of — Person above 15 years and married adopted by Jats from Punjab who were governed by customary law under which such adoption could take place — Held custom was not required to be proved for purpose of establishing validity of adoption. (Evidence Act (1872), S. 57).

If the Courts have recognised the custom in a particular matter for a long time, that is considered to be the law and it is not necessary to prove it. The Courts can take judicial notice of such a custom. It is well-recognised that the Jats in the State of Haryana, which was earlier a part of the erstwhile State of Punjab, are governed by customary law. In para 36 of Rattigan's Digest of Customary Law in the Punjab, it is clearly stated that there are no restrictions as regards the age or the degree of relationship of the person to be adopted. It is also well-settled that a married man having children can be adopted under custom. AIR 1959 SC 1041 and (1922) ILR 49 Cal 120 (PC), Rel. on.

(Para 13)

Cases Referred: Chronological Paras

AIR 1973 Punj 387: 1972 Pun LJ 623	10
AIR 1972 SC 608	6
(1968) 70 Pun LR 535: ILR (1968) 2 Punj 231	8
AIR 1966 Punj 258	14
AIR 1959 SC 1041	13

AIR 1958 Punj 116: (1957) 59 Pun LR 650

AIR 1953 SC 235

AIR 1951 Punj 239

AIR 1951 Punj 242

AIR 1943 PC 83: 1943 All LJ 292

AIR 1922 PC 2: ILR 49 Cal 120

AIR 1918 PC 81: 45 Ind App 148: (1918)

16 All LJ 833

B. S. Jawandha, for Appellant; Suresh Amba, for Respondents.

JUDGMENT:— This second appeal has been filed by Amar Singh defendant against the judgment and decree of the Additional District Judge, Karnal, affirming those of the trial Court by which the suit of the plaintiff for possession by pre-emption had been decreed.

2. Briefly, the facts are that Harkesh respondent No. 2 sold land measuring 78 Kanals 18 Marlas situated in village Mandi to Amar Singh defendant for a consideration of Rs. 26,000 vide sale deed dt. 26th May, 1966. Tej Ram plaintiff filed a suit for possession by pre-emption on the ground that he was father's brother's son of Harkesh vendor. He took some other pleas which are not relevant for determination of the appeal.

3. The suit was contested by the defendant-vendee who controverted the allegations of the plaintiff and inter alia pleaded that Harkesh was not the adopted son of Smt. Hanso as no adoption took place. It was next averred that he was the son of Phalel son of Baru with whom the plaintiff was not connected. He, therefore, pleaded that the plaintiff had no superior right of pre-emption.

4. On the pleadings of the parties, the learned Subordinate Judge framed seven issues. In appeal, however, the following two issues are relevant:—

1. Whether the plaintiff has a superior right of pre-emption?

2. Whether the vendor Harkesh is not the adopted son of Smt. Hanso and can the defendant No. 1 challenge the same? He held that Harkesh was the adopted son of Smt. Hanso and the plaintiff was his father's brother's son. Consequently, he passed a decree for possession in favour of the plaintiff on payment of Rs. 27,832.50. Amar Singh defendant No. 1 filed an appeal before the Additional District Judge, Karnal, who affirmed the judgment and decree of the trial Court and dismissed the same. He has come up in second appeal to this Court.

5. The first contention of Mr. Jawanda is that the original registered deed of

adoption has not been produced and the plaintiff-respondent did not make out a case for leading secondary evidence. Therefore, the adoption deed cannot be taken into consideration for determining the issues.

6. I regret my inability to accept the contention. The objection regarding the mode of proof should have been taken at the time when the document was exhibited. In case the document is exhibited without any such objection, a party to the litigation cannot be allowed to raise an objection regarding it for the first time in appeal. In the aforesaid view, I am fortified by the observations in *Gopal Das v. Sri Thakurji*, AIR 1943 PC 83, *S. Anup Singh v. Sardarni Harbans Kaur*, (1957) 59 Pun LR 650: (AIR 1958 Punj 116) and *P. C. Purushothama Reddiar v. S. Perumal*, AIR 1972 SC 608. In *Gopal Das's* case (supra), it was held that where the objection to be taken is not that the document is in itself inadmissible but that the mode of proof put forward is irregular or insufficient, it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. A party cannot lie by until the case comes before a Court of appeal and then complain for the first time of the mode of proof. This case was followed by this Court in *Anup Singh's* case (supra) and similar observations were made. The above view was affirmed by the Supreme Court in *P. C. Purushothama Reddiar's* case (supra).

7. The next contention of Mr. Jawanda is that Harkesh was more than 15 years of age and was married at the time of adoption. Under S. 10 of the Hindu Adoptions and Maintenance Act, 1956 (hereinafter referred to as 'the Act') such a person could not be adopted unless custom applicable to the parties allows that. He urges that custom should be pleaded and proved which has not been done in the present case.

8. I have heard the learned counsel at considerable length and given thoughtful consideration to their arguments. In the present case, Harkesh was adopted by a registered adoption deed dt. 12th Nov., 1963, S. 16 of the Act reads as follows:—
"Wherever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved."

From a reading of the section it is evident that if there is a registered document of adoption signed by the person giving and the person taking the child in adoption, the Court is required to presume that the adoption had been made in compliance with the provisions of the Act. In that eventuality it is on the other side to disprove the adoption. In the aforesaid view, I get support from *Basdeo Bhardwaj v. Ram Sarup*, (1968) 70 Pun LR 535, wherein it is observed that where there is a registered document relating to adoption, the presumption shall be drawn in favour of adoption and it is then for the other side to disprove that adoption. The presumption has to be disproved by the other party by leading cogent evidence in rebuttal. It is further observed that where no such evidence is led, the legal presumption remains unaffected not having been disproved. In view of the document and the position of law, it is to be presumed that Harkesh was validly adopted and it is for the other side to rebut that presumption.

9. In the present case, in addition to the registered adoption deed, the adoption of Harkesh has been admitted by the appellant as well. In the agreement to sell dt. 2-4-1965 (Exhibit D-2) to which Harkesh respondent and the appellant are parties, the former described himself as adopted son of Smt. Hanso wd/o Net Raj. On the same day Rs. 7,300 were paid by the appellant to Harkesh and the latter executed a receipt (Exhibit D-3) in his favour. In the receipt again he described himself as adopted son of Smt. Hanso. Again in the sale deed (Exhibit D-3) he described himself as adopted son of Smt. Hanso. No doubt in the latter two documents the appellant did not put his signatures yet he accepted those documents as correct. He also appeared before the Registrar when the sale deed was presented to him and signed under the endorsement. He was present at the time when the said documents were executed. In the said circumstances, he is also estopped from saying that he does not admit Harkesh to be the adopted son of Smt. Hanso.

10. Now the question to be seen is as to whether the plaintiff-respondent had to plead and prove u/s. 10 of the Act that according to the custom a person who is above 15 and married can be adopted. The plaintiff-respondent in his plaint had stated that he had a superior right of pre-emption being the father's brother's son of Harkesh. The defendant in the written statement denied the aforesaid fact and

pleaded that he had been wrongly described as the adopted son of Smt. Hanso and in fact no adoption took place. The relevant para of the written statement reads as follows:—

"That Harkesh has been wrongly described as adopted son of Smt. Hanso. In fact no such adoption took place nor could any such ceremonies performed. Harkesh is the son of Phulail son of Baru and thus the plaintiff has got no right of pre-emption, the parties being Jats governed by customary law."

He did not plead that the plaintiff-respondent could not be adopted as he was more than 15 years of age and was a married person. The plaintiff-respondent in the replication asserted that he was not the son of Phulail but had been adopted by Smt. Hanso. As the plea regarding the adoption being invalid on the ground that he was above 15 years of age and was married, had not been taken in the written statement, there was no occasion for him to take a plea in the replication that there was custom under which a person who was above 15 and married could be adopted. In view of the aforesaid pleadings issue No. 2, as mentioned above, was framed and the onus of the issue was placed on defendant No. 1. Now he cannot turn round and say that it was for the plaintiff-respondent to plead and prove custom to the effect that the person who is above 15 and married can be adopted according to it. The learned counsel for the appellant has referred to *Trojan & Co. v. R.M.M.N. Nagappa Chettiar*, AIR 1953 SC 235 and *Shanti v. Surta*, 1972 Pun LJ 623: (AIR 1973 Punj 387). In the former case it was observed that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. In the latter case, it was held that it was an absolute necessity that the determination in a cause should be founded upon a case to be found in the pleadings or involved in or consistent with the case thereby made. There cannot be any dispute about the correctness of the observations but both the cases are distinguishable on facts. In those cases, there was no such section where certain presumption as provided in S. 16 of the Act could be drawn.

11. In view of the registered adoption deed and the provisions of S. 16 of the Act, it was the duty of the appellant to plead in the written statement that Harkesh respondent could not be adopted as he was a married person and was more

than 15 years of age. In the absence of the plea, it is to be presumed that his adoption was not challenged on these grounds. The appellant cannot be allowed to say that it was for the plaintiff-respondent to plead and prove the custom according to which a person who was above 15 years of age and married could be adopted.

12. The learned counsel for the plaintiff-respondent has sought to urge that in the absence of the pleading that a person who is above the age of 15 years and married could not be adopted, the evidence regarding the custom to the contrary could not be given. He has, however, argued that the general custom which has been recognised by the Courts becomes the law of the land and it is not necessary to prove it. According to him, in the Punjab, the general custom amongst the Jats is that a person who is above the age of 15 years and married can be adopted.

13. I find force in the contention of the learned counsel. It is well-settled that if the Courts have recognised the custom in a particular matter for a long time, that is considered to be the law and it is not necessary to prove it. The Courts can take judicial notice of such a custom. In the aforesaid view, I am fortified by the Supreme Court in *Ujagar Singh v. Mst. Jeo*, AIR 1959 SC 1041. The following observations may be read with advantage (at p. 1045):—

"It therefore appears to us that the ordinary rule is that all customs, general or otherwise, have to be proved. Under S. 57 of the Evidence Act, however, nothing need be proved of which courts can take judicial notice. Therefore it is said that if there is a custom of which the Courts can take judicial notice, it need not be proved. Now, the circumstances in which the courts can take judicial notice of a custom were stated by Lord Dunedin in *Raja Rama Rao v. Raja of Pittapur*, 45 Ind App 148 at pp. 154, 155: (AIR 1918 PC 81 at p. 83), in the following words, "When a custom or usage, whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom or usage to be introduced into the law without necessity of proof in each individual case". When a custom has been so recognised by the courts, it passes into the law of the land and the proof of it then becomes unnecessary u/s. 57 (1) of the Evidence Act. It appears to us that

in the courts in the Punjab the expression "general custom" has really been used in this sense, namely, that a custom has by repeated recognition by courts, become entitled to judicial notice as was said in *Bawa Singh v. Mt. Taro*, AIR 1951 Punj 239, and *Sukhwant Kaur v. Balwant Singh*, AIR 1951 Punj 242."

Admittedly, the parties are Jats. It is well-recognised that the Jats in the State of Haryana, which was earlier a part of the erstwhile State of Punjab, are governed by customary law. In para 36 of Rattigan's Digest of Customary Law in the Punjab, it is clearly stated that there are no restrictions as regards the age or the degree of relationship of the person to be adopted. It is also well-settled that a married man having children can be adopted under custom. Reference in this regard may be made to *Ramkishore v. Jainarayan*, (1922) ILR 49 Cal 120: (AIR 1922 PC 2), wherein it has been observed that under the Customary Law, a brother can be adopted, a daughter's son can be adopted; there is no limit as to the age of the person who may be adopted; a married man who has had children may be adopted; and a guardian may give a boy in adoption. No contrary view has been brought to my notice to the effect that amongst Jats such a person cannot be adopted. Therefore, I am of the opinion that the adoption of Harkesh respondent cannot be challenged on this ground.

14. Faced with that situation, Mr. Jawanda has further urged that in the present case the adoption, if there is any, is an appointment of an heir and as such Harkesh has not been transplanted into the family of the adopter. According to him, in that situation, the plaintiff-respondent does not get any right to pre-empt the sale effected by him. He fortifies his contention by referring to *Inder Singh v. Kartar Singh*, AIR 1966 Punj 258.

15. I am not impressed with this contention of the learned counsel either in the Courts below the case has been argued on the assumption that the provisions of the Act are applicable to the parties. The learned counsel also made a reference to them before me. S. 12 of the Act provides that an adopted child shall be deemed to be the child of his adoptive mother for all purposes with effect from the date of the adoption and from such date the ties of the child in the family of his birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family. From

the section, it is clear that the adopted person severs all relations with his natural family and he gets all his rights in the adoptive family. Therefore, it cannot be said that the relations of the adopted son who fall within the provisions of Section 15 of the Punjab Pre-emption Act on the adoptor's side cannot file a suit for pre-emption. I am supported in the above observations by *Inder Singh's* case (supra), referred to by the learned counsel for the appellant. In that case, pre-emption was sought u/s. 15 (1) (a), thirdly, of the Punjab Pre-emption Act, against the alienation of the vendor who had been adopted. It was held by the learned Judge that the right of pre-emption conferred by the said section on the father's brother or father's brother's son of the vendor is available even if the relationship is created by adoption or appointment of an heir. I do not think the learned counsel can derive any benefit from the said case.

16. For the aforesaid reasons, I do not find any merit in the appeal and dismiss the same with no order as to costs.

Appeal dismissed.

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S. S. SANDHAWALIA, C. J. AND
BHOPINDER SINGH DHILLON, J.

Mathura Dass, Petitioner v. Smt. Ram Piari, Respondent.

Civil Revn. No. 2740 of 1980, D/- 30-10-1981.*

East Punjab Rent Restriction Act (3 of 1949), S. 13 (3) (a) r/w S. 2 (c) — Application by landlord for ejectment — Application by one of the many co-landlords is maintainable. (1980) 2 Rent LR 752 (Mad), Dissented from.

The definition of 'landlord' in S. 2 (c) is wide ranging one including within its sweep a number of persons. Particularly noticeable is the fact that the 'landlord' under the Act is not necessarily confined to the owner or the owners of the premises. Persons who may lay no claim of title to the property would nevertheless come within the wide amplitude of the definition. Equally patent it is that the statute herein does not necessarily visualise a single landlord but also a plurality thereof. Once that is so one can turn to S. 13 (3) (a) which indicates that the Act visualises the filing of an application by a landlord. This is of particular significance

*From order of B. S. Nehra, Appellate Authority, Ferozepore, D/- 5-8-1980.

in the context that the definition of 'landlord' positively visualises a plurality thereof. The requirement of sub-sec. (3) above is not that 'the landlord' should move an application or "all the landlords" should do so. It suffices if 'a landlord' does so. It would thus appear that on the particular provision of the present Act an ejectment application by one of the many landlords would be maintainable, apart from any other considerations. AIR 1976 SC 2335, AIR 1977 SC 1599, (1980) 2 Ren CR 137 (Punj & Har) and (1981) 1 Mad LJ 240, Rel. on; (1980) 2 Rent LR 752 (Mad), Dissented from. (Para 6)

Cases Referred: Chronological Paras
(1981) 1 Mad LJ 240 : 93 Mad LW 820

	11, 13
(1980) 2 Rent LR 752 : (1980) 1 Mad LJ 274	10
(1980) 2 Ren CR 137 (Punj & Har)	9
(1979) 1 Rent LR 312 (Punj)	3, 9
AIR 1977 SC 1599	8, 10
AIR 1976 SC 2335	7, 8, 10
(1966) C. R. No. 326 of 1965, D/- 10-3-1966 (Punj), Agya Ram v. Amrik Singh	9
(1965) C. R. No. 630 of 1964, D/- 30-4-1965 (Punj), Shiv Dev v. Firm Maharaj Parshad Piara Lal.	9

R. L. Sarin, for Petitioner; Ravinder Chopra, for Respondent.

S. S. SANDHAWALIA, C. J.:— Can one of the co-landlords alone maintain an application for ejectment against his tenant under S. 13 of the East Punjab Rent Restriction Act, 1949, is the significant question which has been re-agitated in this reference to the Division Bench.

2. Mathura Dass petitioner who admittedly was one of the co-owners of the demised premises had preferred an ejectment application under S. 13 of the East Punjab Rent Restriction Act (hereinafter called the Act) before the Rent Controller at Fazilka. The primary ground on which it was sought to be pressed was the non-payment of rent by the tenant and that the premises were required for the personal occupation of the landlord. The ejectment application was resisted on behalf of the respondent-tenant and on the pleadings of the parties the following issues were framed:—

1. Whether the respondent is liable to ejectment on the grounds taken in the application?

2. Whether the application is bad on account of non-joinder of necessary parties?

3. Relief.

On issue No. 1 the Rent Controller came to the finding that the tenant was in

arrears of rent but held that the petitioner had failed to establish that he needed the demised premises for his bona fide use and occupation. Issue No. 2 was decided in favour of the petitioner with the observations that it was well-settled that one of the landlords of the demised premises can by himself make an application for ejectment without making the other landlords a party thereto. In view of the finding on the two issues, the ejectment application was allowed with costs.

3. On appeal the finding on issue No. 1 was virtually not challenged and only that on issue No. 2 was assailed. The learned Appellate Authority relying primarily on the recent judgment in *Bir Bhan v. Kuldip Parkash*, (1979) 1 Rent LR 312, held that only one of the co-owners could not maintain an ejectment application without impleading the other co-owners as well and consequently reversed the finding on issue No. 2 and dismissed the ejectment application.

4. The present revision first came up before my learned brother Dhillon J. sitting singly. Noticing some conflict of precedent on the question whether one of the many co-landlords alone could maintain the ejectment application he referred the matter for decision by a larger Bench.

5. As would appear hereinafter there is no paucity of precedent both direct and by way of analogy on the point. Nevertheless it is refreshing to examine the matter on principle and on the particular language of the statute because this aspect does not seem to have been adequately considered in some of the judgments relied upon by the parties.

6. What first meets the eye herein is the definition of the word 'landlord' under Section 2 (c) of the Act which is in the following terms:—

"2. In this Act, unless there is anything repugnant in the subject or context.—

(a) and (b)

(c) 'landlord' means any person for the time being entitled to receive rent in respect of any building or rented land, whether on his own account or on behalf of for the benefit of any other person, or as a trustee, guardian, receiver, executor or administrator for any other person, and includes a tenant who sublets any building or rented land in the manner hereinafter authorised, and, every person from time to time deriving title under a landlord:

(d) to (g)....."

It seems manifest from the above that the definition is a wide ranging one including within its sweep a number of persons. Particularly noticeable in the fact that the 'landlord' under the Act is not necessarily confined to the owner or the owners of the premises. Persons who may lay no claim of title to the property would nevertheless come within the wide amplitude of the definition. Equally patent it is that the statute herein been not necessarily visualise a single landlord but also plurality thereof. Once that is so one can now turn to S. 13 (3) (a) of the Act which is in the following terms:—

"13 (3) (a). A landlord may apply to the Controller for an order directing the tenant to put the landlord in possession—

(i) in the case of residential building if—

(a)

(b) he is not occupying another residential building in the urban area concerned; and

(c) he has not vacated such a building without sufficient cause after the commencement of this Act, in the said urban area;

(d)"

A plain reading of the above would also indicate that the Act visualises the filing of an application by a landlord. This is of particular significance in the context that the definition of 'landlord' positively visualises a plurality thereof. The requirement of sub-sec. (3) above is not that the 'landlord' should move an application or 'all the landlords' should do so. It suffices if 'a landlord' does so. It would thus appear that on the particular provision of the present Act an ejectment application by one of the many landlords would be maintainable, apart from any other considerations.

7. Two binding precedents of the final Court though under different Rent Acts are equally a pointer to the aforesaid view. In *Sri Ram Pasricha v. Jagannath*, AIR 1976 SC 2335, their Lordships were considering the analogous provisions of S. 13 of the West Bengal Premises Tenancy Act of 1956. Therein also an identical issue was raised that the application for ejectment having not been made by all the co-owners was, therefore, not competent. Repelling such a contention their Lordships concluded as follows (at p. 2339):—

"Jurisprudentially it is not correct to say that a co-owner of a property is not its owner. He owns every part of the composite property along with others and

it cannot be said that he is only a part-owner or a fractional owner of the property. The position will change only when partition takes place. It is, therefore, not possible to accept the submission that the plaintiff who is admittedly the landlord and co-owner of the premises is not the owner of the premises within the meaning of Section 13 (1) (f). It is not necessary to establish that the plaintiff is the only owner of the property for the purpose of S. 13 (1) (f) as long as he is a co-owner of the property being at the same time the acknowledged landlord of the defendants."

8. In *Smt. Kanta Goel v. B. P. Pat-hak*, AIR 1977 SC 1599, their Lordships were construing the relevant provisions of the Delhi Rent Control Act 1958, which are virtually in pari materia with the East Punjab Urban Rent Restriction Act, 1949. Therein also the identical objection that one of the many co-owners could not maintain the eviction application was pointedly raised. Rejecting this contention and holding that the ratio in *Sri Ram Pasricha's* case (supra) was equally applicable under the context of the Delhi Act also, it was held that the absence of the other co-owners on record does not disentitle only one of the landlords from suing for eviction.

9. Though the matter would be plainly concluded by the aforesaid judgments even within this Court also there is now no room for discordance. Undoubtedly there was previously some conflict of opinion betwixt single Bench judgments of this Court which has been set at rest by the Division Bench in *Ram Piari v. Dr. Kesho Ram*, (1980) 2 Ren CR 137. In the said case the contrary view in *Agya Ram v. Amrik Singh*, C. R. No. 326 of 1965 decided on Mar. 10, 1966; *Birbhan v. Kuldeep Parkash*, C. R. No. 1990 of 1978 decided on 25th Jan. 1979,* and *Shiv Devi v. Firm Maharaj Parshad Piara Lal*, C. R. No. 630 of 1964 decided on Apr. 30, 1965 was expressly overruled.

10. In fairness to Mr. Chopra the learned counsel for the respondent, we must notice his reliance on a single Bench judgment of the Madras High Court in *A. Alagiyanathan v. M. Swaminatha Pillai*, (1980) 2 Ren LR 752. This judgment undoubtedly lends some support to the stand taken on behalf of the respondent. However, with the greatest respect we are unable to agree with the line of reasoning therein. The judgment

*Reported in (1979) 1 Ren LR 312 (Punjab & Har).

of their Lordships in Sri Ram Pasricha's case (AIR 1976 SC 2335) (supra) though referred to was sought to be distinguished for what appears to us as inadequate reason. The later judgment of their Lordships in Smt. Kanta Goel's case (AIR 1977 SC 1599), however, seems to have missed notice altogether. With due deference, therefore, I would wish to record my dissent from the line of reasoning in A. Alagiyathan v. M. Swaminatha Pillai (supra). Even otherwise it calls for notice that the relevant provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, which fell for consideration there, are certainly not in pari materia with those in the Act. It bears repetition that I have also rested my view on the particular provisions of the present Act as well.

11. It would appear that a touch of discordance within the Madras High Court itself is disclosed by the subsequent judgment in Ehasan Bivi v. Nagalakshmi Ammal, (1981) 1 Mad LJ 240. Therein it has been held that an eviction application by one of the co-owners was maintainable and the written consent envisaged by S. 10 (8) of the Tamil Nadu Buildings (Lease and Rent Control) Act, was not required.

12. To conclude, both on principle and precedent the answer to the question posed at the outset is rendered in the affirmative and it is held that even one of the many co-landlords can singly maintain an application for ejectment against his tenant under the Act.

13. Applying the above rule to the facts of the present case would make it plain that the petitioner is entitled to succeed. Both the Rent Controller and the Appellate Authority have taken the consistent view that the respondent was in arrears of rent and he had not tendered the same for payment to the applicant on the first date of the hearing and was, consequently, liable to be evicted. The appellate court had reversed the trial court, only on the basis of the single Bench judgment in Birbhan's case ((1981) 1 Mad LJ 240) (supra), which, as has been noticed above, now stands already overruled. The finding of the appellate court on issue No. (2) has, therefore, to be reversed and as a necessary consequence the order of the appellate authority dismissing the application is set aside and that of the Rent Controller is hereby restored.

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14. In view of the earlier conflict of precedent in this Court, there will be no order as to costs.

Petition allowed.

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S. S. SANDHAWALIA, C. J.

AND G. C. MITAL, J.

Gurdev Singh and others, Appellants v. Kehar Singh and others, Respondents.

Letters Patent Appeal No. 152 of 1976, D/- 9-10-1981.*

Custom (Punjab) Riway-e-am — Adoption — Informal adoption of son by way of customary appointment of an heir — Adopted son does not lose his right to succeed in the family of his natural father except when other son or sons were alive — Succession would be governed by Hindu Succession Act 30 of 1956. (Hindu Law — Adoption); (Hindu Succession Act (30 of 1956), S. 8).

When adoption is informal, meaning thereby customary appointment of an heir merely to succeed to the adoptive father, then he does not succeed to the collaterals of the adoptive father and while no right is left to the adopted son to succeed to his natural father, in the presence of other son or sons, he does not lose his right to collateral succession in the family of his natural father. Such collateral succession would be governed by Hindu Succession Act when death of the collateral occurred after enforcement of the said Act. The adoption would be informal because the adopted son has been allowed to inherit even his natural father in the absence of any other son or sons. Once the adopted son is allowed to succeed to his natural father in the circumstances stated above, then the adoption would not be of a formal nature so as to completely transplant the adopted son in the family of the adoptive father. AIR 1949 East Punjab 197, Approved. (Paras 4, 6)

Cases Referred : Chronological Paras

AIR 1966 SC 1555	6
AIR 1951 Punj 117	6
AIR 1949 East Punjab 197	5

K. P. Singh Sandhu with P. S. Sandhu, for Appellants; Amar Dutt, for Respondents.

*Against judgment of Harbans Lal, J. in R. S. A. No. 141 of 1972, D/- 5-1-1976 (P & H).

CZ/CZ/B12/82/VNP/SNV

GOKAL CHAND MITAL, J.:— The sole point for consideration in this appeal is whether in Tahsil Phillaur of District Jullundur, a customary adoption is formal so as to transplant the adopted son in the adoptive family, completely severing his connections in the family in which he was born or it would be merely an appointment of an heir reserving right to the adopted son to succeed collaterally in the family in which he was born.

2. Dhian Singh was the original owner of the property in dispute situate in Tahsil Phillaur, District Jullundur. He had two sons Beant Singh and Kehar Singh. Kehar Singh was adopted by Dasondha Singh vide adoption deed Exhibit D-1 dt. 8th Apr. 1929. In the year 1950, Dhian Singh died and on his death his son Beant Singh succeeded to his entire estate to the exclusion of Kehar Singh who had been adopted by Dasondha Singh. In the year 1961, Beant Singh also died without leaving a mother, widow or any child. On his death, Kehar Singh claimed to be his next heir as his brother whereas the collaterals of Beant Singh claimed to be nearer heirs on the plea that Kehar Singh stood transplanted by formal adoption in the family of Dasondha Singh and, therefore, was not entitled to collateral succession to the estate left by Beant Singh. The collaterals filed the present suit for a declaration against Kehar Singh and pleaded that they were owners in possession of the same as next heirs of Beant Singh and that Kehar Singh had been formally adopted by Dasondha Singh and, therefore, he lost all rights of inheritance in the family in which he was born. Kehar Singh admitted the adoption but pleaded that it was a customary appointment of an heir and under custom by which the parties were governed he had not been transplanted into the family of his adoptive father and had the right to succeed to Beant Singh as his brother. The trial Court decreed the suit on returning a finding that the adoption was formal. The learned Additional District Judge reversed the finding of the trial Court and held that it was an informal adoption under custom by which he retained the right to collateral succession in the family in which he was born. The appeal was allowed and the suit was dismissed. The aforesaid decision was affirmed by a learned single Judge of this Court. This is plaintiff's letters patent appeal.

3. After hearing the counsel for the parties, we are of the view that the deci-

sion of the learned single Judge is well based. The learned counsel for the plaintiff-appellants has urged that the adoption deed Exhibit D-1 as also the statement of Kehar Singh defendant go to show that ceremonies were performed at the time of adoption and once it is proved that some ceremonies are performed, it becomes a formal adoption like the one under the Hindu Law and, therefore, Kehar Singh stood completely transplanted in the adoptive family with the result that he had no right to succeed in the family in which he was born. A reading of the adoption deed as also the statement of Kehar Singh would show that ceremonies like collection of the brotherhood, declaring the factum of adoption in their presence, distribution of sweets and the writing of the adoption deed were performed and besides these no other ceremony was performed. These are the usual ceremonies which are performed in a case of customary adoption and are in consonance with the Riwayat-e-Am of the Jullundur district, including Phillaur Tahsil. In this regard, the relevant questions and answers contained in the Riwayat-e-Am of Jullundur district deserve to be noticed:—

"Question 71 — Are any formalities necessary to constitute a valid adoption? If so, describe them. State expressly whether the omission of any customary ceremonies will vitiate the adoption.

Answer — The essence of adoption is that the fact of adoption be declared before the brotherhood or other residents of the village. The usual practice is that the baradari gathers together and the adopter declares in their presence of the fact of the adoption. Sweets are distributed. A deed of adoption is also drawn up. Unless these formalities are observed, the adoption is not considered valid....."

"Question 72 — Does an adopted son retain his right to inherit from his natural father? Can he inherit from his natural father if the natural father dies without other sons?

Answer — In the Jullundur Tahsil (except among Mahtons) and in the Phillaur and Nawanshahr Tahsils an adopted son cannot inherit his natural father, but he can do so if his natural father dies without leaving other sons."

A reading of the answer to question No. 71 would show that in customary adoption in the Jullundur district ceremonies like collection of brotherhood, declaration of the factum of adoption in their

presence, distribution of sweets and drawing of a deed of adoption are the usual formalities which are observed for considering an adoption to be valid and precisely these ceremonies were followed in this case. Hence, merely because of the performance of such ceremonies, no conclusion can be arrived at one way or the other.

4. Whether on the observance of the aforesaid ceremonies an adoption would be formal or merely appointment of an heir (informal), question No. 72 and the answer thereto have to be considered. Question No. 72 clearly suggests as to whether the adopted son would retain his right to inherit to his natural father and whether he would succeed his natural father if he dies without other sons. The answer is that in the Jullundur, Phillaur and Nawanshahr tahsils an adopted son cannot inherit his natural father but he can do so if his natural father dies without leaving any other son. The answer clearly shows that the adopted son will not ordinarily succeed his natural father if any other son or sons are alive but in case the natural father dies without leaving any other son, then the adopted son would succeed to the estate left by him. If the customary adoption had the effect of adoption like the Hindu Law, then the adopted son would have stood transplanted in the adoptive family and he would have succeeded to his adoptive father as also to the collaterals of his adoptive father as if he was a natural son and similarly he could not succeed either to his natural father or to other relations of his natural father. But, when adoption is informal, meaning thereby customary appointment of an heir merely to succeed to the adoptive father, then he does not succeed to the collaterals of the adoptive father and while no right is left to the adopted son to succeed to his natural father, in the presence of other son or sons, he does not lose his right to collateral succession in the family of his natural father. Hence, the answer clearly shows that in tahsil Phillaur of Jullundur district, besides other tahsils, the adoption would be informal because the adopted son has been allowed to inherit even his natural father in the absence of any other son or sons. Once the adopted son is allowed to succeed to his natural father in the circumstances stated above, then it clearly shows that the adoption is not of a formal nature so as to completely trans-

plant the adopted son in the family of the adoptive father. Therefore, it has to be held in the present case, on the basis of answer to question No. 72, that the adoption of Kehar Singh by Dasondha Singh was informal and Kehar Singh did not lose his right to succeed in the family of his natural father except when another son or sons were alive, which clearly goes to show that collateral succession in the family of his natural father is permissible under custom.

5. A case of Nawanshahr tahsil of Jullundur district came up for consideration before Achhru Ram, J., in Rattan Singh v. Nirmal Singh, AIR 1949 East Punjab 197, and while considering the scope of question No. 72 and the answer thereto in the Customary Law, he has held as follows:—

"My attention was drawn by the learned counsel for the respondent to the answer to question 72 in the Customary Law in which it is stated that an adopted son cannot inherit his natural father. That, however, cannot be taken to mean that he loses all connection with the natural family. It will be noticed that in answer to that question it is expressly stated that in the Phillaur and Nawanshahr Tahsils an adopted son does succeed to the property of his natural father if the latter dies without leaving other sons. The parties to the present litigation belong to Nawanshahr Tahsil and it is obvious that at least amongst them, in the absence of a real brother, the adopted son retains the right to succeed even to the property of his natural father. There in two Tahsils the right of an adopted son to succeed to the property of his natural father, in the absence of a real brother, has been recognized.

The Customary Law of the district does not recognize the right of an adopted son to succeed collaterally in the adoptive family."

The same view was taken as has been taken by us and we approve of that decision.

6. A case of Amritsar district with regard to customary adoption came up for consideration before the Supreme Court in Kehar Singh v. Dewan Singh, AIR 1966 SC. 1555. In that case it was held that a customary adoption in Amritsar district is formal and the adopted son is completely transplanted in the family of his adoptive father and the adopted son is entitled to succeed to the collateral relations of his adoptive father.

There question No. 90 of the Riwayat-e-Am and the answer thereto were as follows:—

"Question

Answer

90. Can an adopted son succeed collaterally in the family of his adoptive father?

All the tribes. Yes.

Once collateral succession is permissible in the adoptive family, that is the only incidence of formal adoption and that is why it was held that in Amritsar district the adoption is formal having the result of completely transplanting the adopted son in the family of adoptive father. The learned counsel for the appellants wanted to derive support from the aforesaid decision but the answer to the relevant questions in the Jullundur district and the Amritsar district are clearly opposed to each other and, therefore, that case would be of no help to the appellants. This would be clear from the following observations made in the Supreme Court case (at p. 1558 of AIR):—

"In AIR 1951 Punj 117 (Teja, Singh v. Kesar Singh), it was said that the ordinary rule in Amritsar district is that the adoption is complete. In other cases, it was said that ordinarily such an adoption is by way of a customary appointment of an heir. The true rule appears to be that it is a question of fact in each case whether the adoption by a Jat in the Amritsar district is formal or informal. The adoption is formal if the parties manifest a clear intention that there should be a complete change of the family of the adopted son, so that he ceases to be a member of his natural family and loses his right of collateral succession in that family and at the same time becomes a member of the adoptive father's family and acquires a right of collateral succession in the family. The loss of the right of collateral succession in the natural family is strong evidence to show that the adoption is formal and effects a complete change in the family. On the other hand, retention of the right of collateral succession in his natural family indicates that the adoption was informal by way of customary appointment of an heir."

Since right to collateral succession has been allowed by answer to question No. 72, it has to be held that under the Customary Law, that is, the Riwayat-e-Am of Jullundur district in the tahsil of Phillaur, the adoption is informal by way of customary appointment of an heir and as such Kehar Singh did not lose right

to collateral succession in the natural family. Accordingly, the finding of the learned single Judge is upheld.

7. Once it is held that Kehar Singh would retain his right to collateral succession in the natural family, it cannot be disputed that the succession would be governed by the Hindu Succession Act, 1956, as Beant Singh died in 1961 and Kehar Singh would be Beant Singh's brother and would be a nearer heir as compared to the plaintiffs who are collaterals of Beant Singh in third degree or beyond that. Therefore, it is Kehar Singh alone who would succeed to Beant Singh as his brother.

8. For the reasons recorded above, this appeal is dismissed with costs.

S. S. SANDHAWALIA, C. J.:— I agree.
Appeal dismissed.

AIR 1982 PUNJAB AND HARYANA 292 RAJENDRA NATH MITTAL, J.

Milkhi Ram, Appellant v. Kewal Singh and another, Respondents.

Regular Second Appeal No. 528 of 1970, D/- 5-10-1981.*

Punjab Custom — One D alienated his property in 1956 — Out of his 2 sons K and S, S consented to the alienation — D executed a will bequeathing the reversionary right to K and S in equal shares — D died in 1965. K filed a suit for a declaration of his reversionary rights in the property — It was compromised by mutual agreement that reversioners would be entitled to the reversionary right after the death of D on payment of Rs. 3,500/- to alienee — Held that S was not entitled to claim half share in the reversionary right in view of his having consented to the alienation by D, but that K was entitled to possession of half share under the will, from alienee on payment of Rs. 1,750/-. AIR 1969 SC 1144, Ref. to. (Para 6)

Cases Referred : Chronological Paras
AIR 1977 SC 1699 5
AIR 1969 SC 1144 5

H. L. Sarin, Sr. Advocate with R. L. Sarin and J. L. Malhotra, for Appellant; Baldev Kapur, for Respondents.

JUDGMENT:— Briefly, the facts are that Dhanna Singh was the owner of the property in dispute which he sold for an

*From decree of Addl. Dist. J., Jullundur, D/- 9-1-1970.

BZ/CZ/A550/82/KNA/SNV

amount of Rs. 4,700/- to Milkhi Ram vide sale deed dated 1st Feb. 1956. Kewal Singh one of the sons of the alienor instituted a usual declaratory suit. A compromise was effected between the plaintiff and Milkhi Ram alienee, according to which it was agreed that the reversioners would be entitled to possession of the land in dispute on payment of Rs. 3,500/- after the death of Dhanna Singh. He died on 1st Aug. 1965, leaving Kewal Singh and Sibbu, sons, two daughters and a widow. Kewal Singh and Sibbu filed a suit for possession of the land on payment of Rs. 3,500/- against Milkhi Ram alienee, claiming that they inherited the property through a will dated 24th May, 1965.

2. The suit was contested by the defendant inter alia on the ground that the daughters and the widow of the deceased were entitled to the share as no will had been executed by the deceased in favour of his two sons. He further pleaded that Sibbu was not entitled to any share as he had consented to the sale.

3. The learned trial Court held that after the death of Dhanna Singh, sons, daughters and widow of the deceased were entitled to inherit the property in equal shares but Sibbu had consented to the sale and the widow and daughters had not filed the suit for possession. Therefore, Kewal Singh was entitled to possession of 1/5th share on payment of Rs. 700/-. The plaintiffs went up in appeal before the Additional District Judge, Jullundur, who modified the decree of the trial Court and held that Kewal Singh was entitled to one-half of the property in view of the will of the deceased dated 24th May, 1965, on payment of Rs. 1,750/-. He however, affirmed the finding of the trial Court that Sibbu, in view of his consent regarding the sale, was not entitled to his share. Consequently, he partly accepted the appeal and passed a decree in favour of Kewal Singh for one-half of the property on payment of Rs. 1,750/-. The defendant has come up in second appeal to this Court.

4. It is contended by Mr. H. L. Sarin, learned counsel for the appellant, that after the death of Dhanna Singh, the property alienated by him reverted to his estate in view of the declaratory decree dated 2nd June, 1958. His five heirs were entitled to 1/5th share each and consequently a decree in favour of Kewal Singh could be passed regarding his share, that is, 1/5th share. He fur-

ther argues that when the will dated 24th May, 1965, was executed by the deceased, the property in dispute had been alienated and, therefore, it does not operate against that property.

5. I have given due consideration to the arguments of the learned counsel but regret my inability to accept the same. The facts of the case are not disputed. It is well settled that after the death of Dhanna Singh, the property alienated by him would revert to his estate. In this view, I am fortified by the observations of the Supreme Court in *Giani Ram v. Ramji Lal*, AIR 1969 SC 1144. In that case, a Hindu Jat of Hissar district alienated a share in ancestral land without legal necessity. His eldest son sued and obtained a declaratory decree that the sale was ineffective against his reversionary rights. The alienor died after the coming into force of the Hindu Succession Act leaving behind him his widow, three sons and two daughters. The Supreme Court held that under the customary law in force in the Punjab, a declaratory decree obtained by the reversionary heir in an action to set aside the alienation of ancestral property enured in favour of all persons who ultimately took the estate on the death of the alienor. The decree obtained by a competent reversioner did not make the alienation a nullity, it removed the obstacle to the right of the reversioner entitled to succeed when the succession opened and restored the property alienated to the estate of the alienor. It was further held that after the enactment of the Hindu Succession Act, the estate devolved upon the three sons, the widow and the two daughters and it could not be said that because in the year 1920 the wife and the daughters were incompetent to challenge the alienation of ancestral property, they could not inherit his estate when the succession opened after that Act came into force. The said view was followed by that Court in *Teg Singh v. Charan Singh*, AIR 1977 SC 1699.

6. In the present case, as the property of the deceased reverted to his estate, it will stand disposed of in accordance with the will executed by him. The legatees under the will were his two sons, and not the daughters and the widow. Consequently, the two sons became entitled to inherit the property of the deceased. Sibbu, it is not disputed, had consented to the alienation. Consequently, he is not entitled to file a suit for possession re-

garding his one-half share. Thus, the plaintiff-respondent is entitled to get only half share on payment of Rs. 1750/-. In my view, the approach of the lower Appellate Court is correct and there is no scope for interference with its judgment and decree.

7. For the aforesaid reasons, I do not find any merit in the appeal and dismiss the same. I, however, leave the parties to bear their own costs.

Appeal dismissed.

AIR 1982 PUNJAB AND HARYANA 294

S. S. SANDHAWALIA, C. J.

AND G. C. MITTAL, J.

Avtar Singh, Appellant v. Punjab State and others, Respondents.

Regular Second Appeal, No. 267 of 1981, D/- 19-8-1981.*

Land Acquisition Act (1 of 1894), Sections 4, 9 (3), 18 — Acquisition proceedings — Notice under S. 9 (3) not giving 15 days — But landowner claiming compensation, and then applying reference under S. 18 for enhanced compensation — Enhancement allowed — Appeal not preferred — Landowner is estopped from questioning validity of acquisition even assuming that S. 9 (3) is a mandatory provision. (Evidence Act (1872), Section 115). AIR 1967 Mad 118, AIR 1975 Punj 26 and 1980 Pun LJ 510, Foll; AIR 1971 Andh Pra 310, Ref. (Para 5)

Cases Referred : Chronological Paras
1980 Pun LJ 510 : 1980 Rev LR 381 3, 4
AIR 1975 Punj 26 : 1974 Pun LJ 115 3, 4
AIR 1975 Punj 135 : (1974) 76 Pun LR 735

AIR 1971 Andh Pra 310

AIR 1967 Mad 118

2
2
3, 4

P. S. Rana, for Appellant; Mohinderjit Singh Sethi, Addl. Advocate General, for Respondents.

GOKAL CHAND MITTAL, J.:— The land of Avtar Singh was acquired by the State of Punjab for the construction of houses for landless labourers. Thereafter, an award was made by the Land Acquisition Collector. Avtar Singh was dissatisfied with the compensation awarded by the Collector and he filed an application for reference under Sec. 18 of the Land Acquisition Act, 1894 (hereinafter called the Act) and ultimately, the dis-

trict Court enhanced the compensation. In the meantime, Avtar Singh filed a civil suit to challenge the acquisition as also the award of the Collector, on the ground that no notice was issued to him, under S. 4 of the Act and the notice issued under S. 9 (3) of the Act was short of 15 days and as such the award of the Collector was illegal and void. The suit was opposed by the State and it was specifically pleaded that the plaintiff filed a claim before the Land Acquisition Collector in pursuance to notice under S. 9 (3) of the Act, and compensation was allowed thereafter. It was also pleaded that the plaintiff had sought a reference under S. 18 of the Act and under these circumstances, the award of the Land Acquisition Collector could not be held to be null and void. The trial Court as also the first appellate Court found no merit in the suit and dismissed the same. The plaintiff came to this Court in second appeal.

2. At the motion hearing it was urged on the basis of two single Bench decisions in Velagapudi Kanaka Durga v. District Collector, AIR 1971 Andh Pra 310 and Mani Ram v. The State of Punjab, (1974) 76 Pun LR 735 : (AIR 1975 Punj 135), that the provisions of S. 9 (3) of the Act were mandatory and if fifteen days' notice is not served on a landowner, the award of the Land Acquisition Collector cannot be sustained. In view of the importance of the matter, the case was ordered to be decided by a large Bench and that is how it has been placed before us for final disposal.

3. Before us, a preliminary objection has been raised by the learned Additional Advocate General, Punjab, that assuming S. 9 (3) of the Act to be mandatory, as sought to be argued by the learned counsel for the appellant, yet no relief can be granted to the plaintiff in this suit because in spite of a short notice under S. 9 (3) of the Act, he filed his claim which was considered by the Land Acquisition Collector on merits before the award was given by him and thereafter the plaintiff filed an application for reference which too has been allowed by the district Court and the plaintiff is satisfied by the enhancement as he did not file any further appeal in this Court. On these facts, it is urged that the plaintiff would be estopped from challenging the award of the Land Acquisition Collector on the ground that 15 days' notice was not given to him for filing his claim. In support of the argu-

*Against judgment and decree of Dist. J., Gurdaspur, D/- 10-9-1980.

ment, reliance has been placed on Mohammad Habibullah Sahib v. Special Deputy Collector, AIR 1967 Mad 118; Brahm Sarup v. State of Haryana, 1974 Pun LJ 115 : (AIR 1975 Punj 26) and Bishna v. State of Punjab, 1980 Pun LJ 510.

4. After hearing the counsel for the parties on this preliminary matter, we find substance in the objection raised by the learned Additional Advocate General in Mohammad Habibullah Sahib's case (AIR 1967 Mad 118) (supra), a Division Bench of the Madras High Court observed as follows (at p. 121):—

".....where a petitioner had already made an application for reference claiming increased compensation, he could not be permitted to challenge the acquisition itself and at the same time claim increased compensation."

In Brahm Sarup's case (AIR 1975 Punj 26) (supra), R. N. Mittal, J., observed as follows (at p. 28):—

"The petitioners cannot be permitted to challenge the acquisition itself and at the same time claim increased compensation. On one hand, the petitioners accepted the compensation without representing that their land was being illegally acquired and made applications for enhancement of the same and, on the other, after passing of several months they filed the writ petition, they cannot be allowed the discretionary relief."

In Bishna's case (1980 Punj LJ 510) (supra), the facts were that notice under S. 4 of the Act was not published in the locality simultaneously with the publication of the notification and the publication was made twenty days thereafter. On the basis of the Supreme Court decisions, the provisions of S. 4 were found to be mandatory, yet we did not allow the petitioner to challenge the notification published under S. 4 after undue delay because he filed objections under S. 5A of the Act within the prescribed period of thirty days, which were duly heard on merits. The relevant portion of the aforesaid decision is as follows:—

".....since the appellant had filed objections within the period of thirty days from the date of publication of the notification in the official Gazette, which were duly considered, we hold that he is not entitled to impugn the notification merely on the ground that same was published in the locality after undue delay."

5. On the facts of the present case, we find that the aforesaid decisions clearly support the preliminary objection raised by the Additional Advocate General. As observed in the opening part of the judgment, that plaintiff not only filed a claim in response to notice under S. 9 (3) of the Act, but being dissatisfied with the award of the Land Acquisition Collector filed a reference application under S. 18 of the Act, which reference was allowed by the district Court and the compensation was enhanced with which the plaintiff was fully satisfied as he did not file any further appeal. On these facts and circumstances, the award of the Land Acquisition Collector cannot be set aside, assuming that S. 9 (3) of the Act was mandatory.

6. For the view we have taken above, it has become wholly unnecessary to go into the matter whether S. 9 (3) of the Act is mandatory or not.

7. For the reasons recorded above, we do not find any merit in this appeal and dismiss the same but without any order as to costs.

SANDHAWALIA, C. J.:— I agree.

Appeal dismissed.

AIR 1982 PUNJAB AND HARYANA 295

J. V. GUPTA, J.

Mohinder Singh Jubbal, Petitioner v. M/s. Grindlays Bank Ltd. and others, Respondents.

Civil Revn. No. 2756 of 1981 and Civil Misc. Appln. No. 4332-CII of 1981, D/- 18-12-1981.*

Civil P. C. (5 of 1908), O. 2, R. 2 (3), S. 10 — Institution of previous recovery of loan on basis of goods pledged — Subsequent suit on basis of mortgage created by defendants for payment of loan — Cause of action in both suits is distinct — Subsequent suit would not be barred by provision of O. 2, R. 2 (3).

Where the previous suit was instituted for the recovery of loan on the basis of the goods pledged with the plaintiff Bank and the subsequent suit was filed on the basis of the mortgage created by the defendants for the payment of the loan advanced by the bank, the causes of action in two suits being different, the second suit would not be barred.

*From order of Sh. R. N. Batra, Senior Sub. J., Faridabad, D/- 12-8-1981.

CZ/CZ/A940/82/PGS/SNY

red under O. 2, R. 2. Consequently, S. 10 was not attracted. AIR 1922 PC 412, Rel. on. (Para 6)

A person must be entitled to more than one relief in respect of the same cause of action. If on the same cause of action, the same relief could not be had in the suit instituted earlier, then it could not be disputed that the bar under O. 2, R. 2 (3) is not attracted. The cause of action means every fact which will be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment. If the evidence to support the two claims is different, then the causes of action are also different. The causes of action in the two suits may be considered to be the same if in substance they are identical. The cause of action has no relation whatsoever to the defence that may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers to the media upon which the plaintiff asks the court to arrive at a conclusion in his favour. (Para 6)

Cases Referred : Chronological Paras

AIR 1977 Punj 1 :	(1976) 78 Pun LR	3
828		3
AIR 1976 Punj 117 :	(1976) 78 Pun LR	3
313		3
AIR 1975 Cal 411		3, 11
(1975) 77 Pun LR 250		3
AIR 1973 Punj 454 :	(1973) 75 Pun LR	3
529		3
AIR 1973 Raj 306		3
AIR 1972 Mys 112		3
AIR 1972 Punj & Har 421		3, 10
AIR 1970 SC 1059		3, 6
AIR 1962 Guj 296		3
AIR 1957 Cal 727		3
AIR 1952 Mys 99		3
AIR 1951 Pat 190		3
AIR 1949 PC 78 : 1948 All LJ 574		3, 6
AIR 1935 Rang 365		3, 7
AIR 1931 Mad 705		3, 9
AIR 1922 PC 412		3, 6
AIR 1915 Cal 126 :	(1914) ILR 41 Cal	3
825		3
(1913) ILR 36 Mad 151 :	(1912) 22 Mad	3
LJ 231		3

R. S. Bindra, Sr. Advocate, Rajiv Bhalla and R. S. Bhatia, with him, for Petitioner; Amar Dutt, for Respondents.

ORDER:— This revision petition is directed against the order of the trial Court dated Aug. 12, 1981, whereby the two preliminary issues, arising in the suit for the recovery of Rs. 16,74,596.98, out of which the present revision petition has arisen, have been decided against the defendant-petitioner.

2. M/s. Grindlays Bank Limited, the plaintiff-respondent, filed a suit on Sept. 25, 1978, on the allegations that defendant-respondent No. 2 was a partnership firm while defendants-respondents Nos. 1 and 3 were its partners and had been carrying on the business in their factory at Faridabad and that defendants Nos. 1 and 3 were also the guarantors for the re-payment of the amount due to the plaintiff from defendant-respondents No. 2. It was also alleged that the defendants had been taking loans from the plaintiff from time to time and, thus the total amount of Rs. 11,57,684.17 was due to the plaintiff from the defendants. It was also alleged that a sum of Rupees 5,16,912.82 was due to the plaintiff as interest and that the total amount due to it, thus, came to Rs. 16,74,596.98. Since the petitioner created mortgage over his property by depositing the title deeds of his property with it, it was prayed that on that basis, a preliminary mortgage decree for Rs. 16,74,596.98, be passed in its favour. It was also pleaded that a final mortgage decree for the sale of the mortgaged property be passed in the event of the defendants failing to satisfy the preliminary decree and that the sale proceeds thereof be paid to it towards the payment of the decretal amount. In the written statement filed on Nov. 29, 1978, it was inter alia pleaded that the suit was liable to be stayed as the matter in issue in the suit was also directly and substantially in issue in a previously instituted suit between the same parties, (suit No. 107 of 1975), pending in the High Court at Delhi. It was further pleaded that in the previous suit, the plaintiff had originally prayed for the recovery of Rs. 11,57,684.17, on the basis of the pledge of goods by hypothecation, the pledge of the machinery and the alleged mortgage of the property in suit, but subsequently, the plaintiff gave up the relief for the sale of the mortgaged property in that suit and as such, the suit out of which this revision petition has arisen, was barred under O. 2, R. 2 of the Civil P. C. (hereinafter called the Code). The other pleas taken in the written statement are not relevant at this stage. On the pleadings of the parties, the trial Court framed the following two preliminary issues :

1. Whether the suit is barred under the provisions of O. 2, R. 2 of Civil P. C.?

2. Whether the suit is liable to be stayed for the reasons stated in para-

graph No. 1 of the written statement? The defendants placed on the file, the copies of the documents, Exhibits D. 1 to D. 4. No other evidence was led by either side. Under issue No. 1, the learned trial Court held that the suit was not barred by the provisions of O. II, R. 2 of the Code. The reason given for the same was that since the mortgaged property was situated in Faridabad, the subsequent suit, for the recovery of the amount, on the basis of the mortgage of the property, could only be filed at Faridabad and not at Delhi. Under issue No. 2, it was held that the subsequent suit was not liable to be stayed under the provisions of S. 10 of the Code. Dissatisfied with the same, the defendant-petitioner has come up in revision to this Court.

3. The learned counsel for the petitioner, vehemently contended that both the preliminary issues, referred to above, have been wrongly decided by the trial Court. The subsequent suit filed by the plaintiff at Faridabad, was barred under O. II, R. 2 of the Code and, in any case, it was liable to be stayed under S. 10 of the Code. The main thrust of the argument of the learned counsel is that it was the same loan for which the previous suit had been filed in the Delhi High Court and for the recovery of which, the subsequent suit, has been filed at Faridabad. Thus, according to the learned counsel, the cause of action is the same in both the suits and, therefore, in view of the provisions of O. II, R. 2 (3) of the Code, the plaintiff was debarred from suing for any relief which he so omitted in the previous suit, filed in the Delhi High Court. The argument proceeds that even though the relief claimed may be separate in both the suits, yet the cause of action for claiming the relief is the same in both the suits and, therefore, the case was fully covered by the provisions of O. II, R. 2 (3) of the Code. In support of his contention, that the subsequent suit was barred under O. II, R. 2 (3) of the Code, the learned counsel placed reliance on *Mohammad Khalil Khan v. Mahbub Ali Mian*, AIR 1949 PC 78; *Abnashi Singh v. Smt. Lajwant Kaur*, (1976) 78 Punj LR 828 : (AIR 1977 Punj 1); *Haryana Co-operative Sugar Mills Ltd., Rohtak v. Joint Hindu Family Firm styled as M/s. Gupta Ram Supply Company*, (1976) 78 Pun LR 313 : (AIR 1976 Punj 117); *Manubothula Rama Rao v. Manubothula Venkayamma*, AIR 1931 Mad 705; *Kempe Gowda v. Lakkegowda*, AIR 1952 Mys 99 and *Jai Narain v. Syed*

Ali Murtaza, AIR 1951 Pat 190. Reliance was placed on *Shorab Merwanji Modi v. Mansata Film Distributors*, AIR 1957 Cal 727; *C. Raman and Co., Bombay v. Modern Motor Works, Ludhiana*, (1973) 75 Punj LR 529 : (AIR 1973 Punj 454); *Kedar Nath v. Firm Hira Lal Brothers*, (1975) 77 Punj LR 250 and *Channabasappa Kamadal and Sons v. Kishan Chand and Co.*, AIR 1972 Mys 112, by the learned counsel in support of the proposition that the subsequent suit was liable to be stayed by the trial Court under Sec. 10 of the Code. On the other hand, the learned counsel for the respondent submitted that the provisions of O. II, R. 2 (3) of the Code are not attracted in the present case because the cause of action in both the suits is quite distinct and separate, and different reliefs have been claimed in both the suits. The previously instituted suit in the Delhi High Court is for the recovery of the money simpliciter on the basis of the goods pledged with the plaintiff Bank by the defendants, whereas the subsequent suit at Faridabad has been filed on the basis of the mortgage created by them for the payment of the loan advanced. Thus, there are two distinct causes of action. Moreover, according to the learned counsel, it was on the objection of the defendants in the Delhi High Court that the plaintiff was required to amend his plaint because the Delhi High Court was not competent to pass any decree in the previous suit on the basis of the mortgaged property as the same was situated outside its territorial jurisdiction. The learned counsel also contended that though the loan may be the same, yet the pledging of the goods for the recovery of the said loan and the creating of the mortgage on the immoveable property of the defendants by deposit of the title deeds of the property, are independent obligations and, therefore, both the suits, as such, are competent and maintainable. It was further submitted that the limitation for the recovery of the loan simpliciter was three years under Art. 1 of the Limitation Act, 1963, (hereinafter called the Act), whereas the limitation to enforce the payment of the money secured by mortgage or otherwise charged upon immoveable property was 12 years under Art. 62 of the Act, from the date when the money sued for becomes due. Thus, the legislature itself has made a distinction and has provided two separate remedies with different periods of limitation.

In support of his contention, the learned counsel relied upon *Kishan Narain v. Pala Mal*, AIR 1922 PC 412; *Sidrammappa v. Rajashetty*, AIR 1970 SC 1059; *Ma Kyi v. P. R. M. A. C. T. V. R. Chettyar Firm*, AIR 1935 Rang 365, Gulabchand *Makanji v. Motapondha Vibhag Tenants' Co-operative Agricultural Society Ltd.*, AIR 1962 Guj 296; *Mandal & Co. v. Fazul Ellahie*, (1914) ILR 41 Cal 825; (AIR 1915 Cal 126) and *S. A. Anantanarayana Iyer v. Savithri Ammal*, (1913) ILR 36 Mad 151. On the question of the stay of the subsequent suit under Sec. 10 of the Code, it was contended that any decision, given in the previously instituted suit in the Delhi High Court, would not operate as *res judicata* in the subsequently instituted suit at Faridabad, and the relief claimed in both the suits being separate and distinct, the provisions of S. 10 of the Code are not attracted. In support of this contention, reliance was placed on *Smt. Naurati v. Mehma Singh*, AIR 1972 Punj and Har 421; *Sankhla Industries v. Hiralal Pukhraj*, AIR 1973 Raj 306 and *Shaw Wallace & Co. Ltd. v. Bholanath Madanlal Sherwala*, AIR 1975 Cal 411.

4. I have heard the learned counsel for the parties at a great length and have also gone through the judgment cited at the bar.

5. The main question for determination in this petition is whether the relief claimed in the suit filed, on the basis of the mortgage created by the deposit of the title deeds of the immovable property, at Faridabad, provides a separate and distinct cause of action, or the cause of action is the same in both the suits, i.e. to recover the loan advanced to the defendants, as contended by the learned counsel for the petitioner. Order II, R. 2 of the Code reads, —

"2. Suit to include the whole claim.—

(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim.—Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs.—A person entitled to more than one relief in respect of the same cause

of action may sue for all or any of the reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation.—For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action."

6. It is the common case of the parties that it is sub-rule (3) of R. 2 of O. II of the Code, which is relevant for the determination of the present revision petition. In order to attract the said provisions, a person must be entitled to more than one relief in respect of the same cause of action. If on the same cause of action, the same relief could not be had in the suit instituted earlier, then it could not be disputed that the bar under O. II, R. 2 (3) of the Code, is not attracted. Reference in this respect by both the parties, has been made to *Mohammad Khalil Khan's case* (AIR 1949 PC 78) (supra). In para 61 of the judgment in the said case, certain principles have been laid down by the Privy Council in order to attract the applicability of the provisions of O. II R. 2 of the Code, in a given case, and one of the principles laid down is whether the claim in the new suit is, in fact, founded upon a cause of action distinct from the one which was the foundation of the former suit. The cause of action means every fact which will be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment. If the evidence to support the two claims is different, then the causes of action are also different. The causes of action in the two suits may be considered to be the same if in substance they are identical. The cause of action has no relation whatsoever to the defence that may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour. Thus, it is clear that the 'cause of action' refers to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour. It is the common case of the parties that the suit, in the Delhi High Court, had been filed for the recovery of the loan, on the basis of the goods pledged by hypothecation with the plaintiff Bank whereas the subsequent suit, under O. XXXIV of the Code, has

been filed for the recovery of the amount of the loan advanced, by sale or otherwise of the property mortgaged in its favour. It may be that the loan is the same which was advanced by it to the defendants, but admittedly, two separate distinct securities were furnished by them for the recovery of the loan. One of the securities was by way of pledge by hypothecation of the goods to the plaintiff whereas the other security furnished was by deposit of title deeds of the immovable property, thus, creating a charge thereon. Even if the loan is the one and the same as stated earlier, but there are two distinct and separate securities furnished by the defendant for the same. The plaintiff has, under these circumstances, two different causes of action to maintain both the suits. Reference in this respect may be made to Kishan Narain's case (AIR 1922 PC 412) (supra) wherein it has been held that if the mortgage provided, as mortgagee always do in England, for an independent obligation to pay the principal and the interest then a suit brought to obtain a personal judgment in respect of the interest alone, would not prevent a subsequent claim for payment of the principal. In such a case the cause of action would be distinct. The matter is, however, different if the non-payment of the interest causes the principal money to become due, as in that case the cause of action — the non-payment of the interest — gives rise, to two forms of relief which the Code provides shall not be split. In Sidramappa's case (AIR 1970 SC 1059) (supra), the provisions of O. II, R. 2 of the Code, were again considered by the Supreme Court and it was held therein that the requirement of O. II, R. 2 of the Code is that every suit should include the whole of the claim which the plaintiff is entitled to make in respect of a cause of action. 'Cause of action', means the 'cause of action for which the suit was brought'. Cause of action is a cause of action which gives occasion for and forms the foundation of the suit. If that cause of action enables a person to ask for a larger and wider relief than that to which he limits his claim, he cannot afterwards seek to recover the balance by independent proceedings. Where the cause of action on the basis of which the previous suit was brought does not form the foundation of the subsequent suit and in the earlier suit the plaintiff could not have claimed the relief which he sought in the subsequent suit, the plaintiff's subsequent suit is not

barred by O. II, R. 2 of the Code. Reference in this behalf has also been made to Kishan Narain's case (supra).

7. Applying the abovesaid principles to the facts of the present case; it is quite evident that the cause of action, on the basis of which the previous suit has been filed in the Delhi High Court, i.e., the suit for the recovery of the loan on the basis of the hypothecation of the goods belonging to the defendants does not form the foundation of the subsequent suit filed at Faridabad, as in the earlier suit, the plaintiff could not claim the relief which he is seeking in the subsequent suit filed at Faridabad. It is not disputed that the Delhi High Court could not pass a decree in favour of the plaintiff in the earlier suit, on the basis of the mortgaged property, because the same is situated outside its territorial jurisdiction. As a matter of fact, it was on that account that an objection was taken by the defendants in that suit, on which the plaintiff amended his plaint and deleted the said relief from the original plaint. In coming to the conclusion that the provisions of O. II, R. 2 of the Code are not attracted to the present case, reliance has been placed on Ma Kyi's case (AIR 1935 Rang 365) (supra), in this Court, and it was relied upon by the trial Court as well. However, the learned counsel for the petitioner, distinguished this case on the ground that in the said case, each document constituted a distinct cause of action, because the loan in that case, was split up and for separate amounts, two separate and distinct securities were furnished. It may be so, but as observed therein, though the original obligation is single and entire, but when one party has chosen to execute separate documents for portions of the obligation and the other party has chosen to accept the said documents, each document constitutes a distinct cause of action. Similarly, in the present case, though the original obligation is the same, that is, the taking of the loan from the plaintiff Bank, but for the same loan, the defendants have furnished two distinct and separate securities and the plaintiff has accepted the same. Thus, each document constitutes a distinct cause of action.

8. It appears that in the trial Court, a reference was made to O. XXXIV, R. 14 of the Code, but the learned counsel for the plaintiff-respondent, fairly conceded that the provisions of R. 14 of O. XXXIV of the Code, were not applicable to the facts of the present case. The

main burden of his argument is, that the suit at Faridabad has been filed on the basis of the mortgage whereas the suit in the Delhi High Court has been instituted on the basis of the goods pledged with the plaintiff Bank. Once it is so held, then, all the rulings relied upon by the learned counsel for the petitioner, are distinguishable.

9. In *Manubothula Rama Rao's* case (AIR 1931 Mad 705) (supra), strongly relied upon by the learned counsel for the petitioner, the plaintiff, in a suit for maintenance against her husband, did not ask for the relief that any amount that would be decreed to her, should be made a charge on the husband's property for the reason that the husband has no property in the jurisdiction of the Court where the suit is instituted. A second suit by her in the Court within whose jurisdiction the property of the husband was situated was held to be incompetent, as she must be held to have relinquished the particular relief which might have been open to her of getting a charge on the husband's property situated in different jurisdiction. Thus, the cause of action in both the suits, in that case, was the same and, therefore, it was rightly held in that case that the provisions of O. II, R. 2 of the Code, were attracted. As observed earlier, in the present case, there is no such situation. Thus, taking into consideration all the facts and circumstances of the present case, I am of the considered opinion that it has been rightly held by the trial Court, under preliminary issue No. 1, that the subsequent suit instituted at Faridabad, was not barred under the provisions of O. II, R. 2 of the Code.

10. More or less, the answer to the above issue decides the fate of the other preliminary issue as well. Once it is held that the cause of action in both the suits is separate and distinct and the decision in the earlier suit filed in the Delhi High Court, would not operate as *res judicata* in the subsequent suit filed in the Court at Faridabad, then the provisions of Section 10 of the Code, would not be attracted. The object of Section 10 of the Code, as observed in *Smt. Naurati v. Mehma Singh*, AIR 1972 Punj and Har 421, is to prevent Courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action, the same subject-matter and the same relief and to obviate the possibility of two contradictory verdicts by one and the same Court in respect of the same relief. It

has also been held therein that Section 10 cannot apply when the final decision in the previous suit would not operate as *res judicata* in the subsequent suit. It is true that in Section 10, the words, "cause of action" have not been used. What it contemplated is that no Court shall proceed with the trial of a suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties. Thus, what is to be seen is whether the matter in issue in both the suits is directly and substantially the same? Once it is held that the relief as well as the cause of action is different in both the suits, then, it is obvious, that the matter in issue, is also not the same either directly or substantially, in both the suits. In the previous suit, the controversy between the parties is: whether the plaintiff Bank advanced any loan to the defendants and for that purpose certain goods were pledged with it by the defendants by way of security, to recover the said loan, whereas in the subsequent suit, the main question is: whether the plaintiff Bank is entitled to recover the loan by way of sale of the mortgaged property, or not? In other words; whether the defendants mortgaged the property with the plaintiff Bank by way of security, for the realisation of the loan advanced to them or not?

11. It has been observed in *Bholanath Madanlal Sherawala's* case (AIR 1975 Cal 411) (supra), that the expression "the matter in issue" in Section 10 has reference to the entire subject-matter in controversy between the parties and a mere identity of some of the issues in both the suits is not sufficient to attract Section 10 and unless the decision of the suit operates as *res judicata* in the other suit, it cannot be said that the matter in issue is directly and substantially the same in both the suits, that is to say, the decision in one suit must fail the other suit before it can be said that the matter in issue in both the suits is directly and substantially the same. Even if the Delhi High Court dismisses the plaintiff's suit on the ground that no goods were pledged by way of security with the plaintiff for the loan advanced by it to the defendants, the plaintiff would still be entitled to prove independently in the subsequent suit filed at Faridabad, that the property was mortgaged with it by the defendants to enable it to recover the said loan. In this view of the matter, the preliminary issue No. 2, has also been correctly decid-

ed by the trial Court holding that the subsequently instituted suit at Faridabad was not liable to be stayed under the provisions of Section 10 of the Code.

12. For the reasons recorded above, this revision petition fails and is dismissed with costs. In view of the decision in the main revision petition, Civil Miscellaneous Application No. 4332-CII of 1981 also stands dismissed.

Petition dismissed.

AIR 1982 PUNJAB AND HARYANA 301 FULL BENCH

S. S. SANDHAWALA, C. J.,

P. C. JAIN AND M. M. PUNCHHI, JJ.

Ram Puri, Chandigarh, Petitioner v. Chief Commissioner, Chandigarh and others, Respondents.

Civil Writ Petns. Nos. 2830 of 1970 and 1149 of 1979, D/- 18-2-1982.**

(A) Capital of Punjab (Development and Regulation) Act (27 of 1952), S. 8-A (as inserted by Central Act 17 of 1973) — Power of Estate Officer to resume building or site and to forfeit money paid by transferee — Section does not violate Art. 14. (Constitution of India, Art. 14).

The subsequent amendments introduced in Ss. 3 and 8 as also the deletion of S. 9 altogether and its substitution by S. 8-A of the Act was designed to and has undoubtedly cured the infirmities which their Lordships had discerned in the previous provisions in Jagdish Chand Radhey Shyam's case. (AIR 1972 SC 2587). By these legislative changes the charge on the transferred site has been abolished and similarly the clog on the transfer to the third party stands removed. Further there are now in-built guarantees and safeguards provided in S. 8-A itself by ensuring a reasonable opportunity to show cause against any proposed resumption or forfeiture. A

*In this case the Judges of the Full Bench differ in their views enumerated in Pt (C). The majority view is taken by S. S. Sandhawalia, C. J. and P. C. Jain, J. and the minority view by M. M. Punchhi, J. The judgments are printed in the order in which they are given in the Certified Copy.

**Decided by Full Bench on order of reference made by S. S. Sandhawalia, C. J. and S. P. Goyal, J., D/- 26-11-1980.

further limitation that forfeiture in no case shall exceed 10 per cent of the total amount of consideration money has been itself laid down therein. The Estate Officer is obliged to record his reasons after giving adequate opportunity including the right to lead evidence to the transferee before passing an order adverse to his interest. Further the statute and the rules thereunder provide for an appeal and revision against such orders. Therefore it cannot be said that S. 8-A suffer from the vice of discrimination or in any way violate the equality clause under Art. 14 of the Constitution. AIR 1974 SC 2009, Referred. C. W. P. No. 2649 of 1974, D/- 13-8-1975 (Punj & Har), Approved. (Paras 53, 69)

(B) Capital of Punjab (Development and Regulation) Act (27 of 1952), S. 8-A (as inserted by Central Act 17 of 1973) — Resumption of title and possession of property — Section does not violate Art. 19 (1) (f). (Constitution of India, Art. 19 (1) (f)).

The fundamental right under Art. 19 (1) (f) to acquire, hold and dispose of property is not an absolute right. It can be hedged in by the imposition of reasonable restrictions on its exercise in the interest of general public. Apart from this express limitation imposed by the Constitution itself, binding precedents of the Final Court have authoritatively highlighted that in this context considerations of larger, social and public purpose are germane to the construction of this Article. (Para 58)

The challenge to the constitutionality of a statute on the anvil of Art. 19 (1) (f) is not merely to be judged from the particular provisions of the Section alone. It is permissible and indeed desirable for the Court to take judicial notice of the facts which led to the enactment of the statute and the avowed objects and reason thereof. Again the preamble to the Act may provide a clue to its interpretation. Further the provisions of the impugned Section along with the other supplementary provisions of the Act as also the statutory rules made thereunder, have all to be viewed as a whole for testing its constitutionality. (Para 59)

It is well settled that the taint of unconstitutionality does not attach to a provision of law merely because there may be remote possibilities of the abuse of power conferred thereby. In such a situation it is only the arbitrary or the wrongful exercise of the power which

can be struck down but not the statute itself. (Para 67)

The entire Act was purposefully directed to provide a reasonable social control of the urbanisation visualised by the creation of an altogether new capital city for the State from scratch. The threefold pre-eminent ideas underlying the same were the need and incentive to create an altogether new town at a place where none existed and that too within the shortest possible time, and further to ensure that it conformed to an ideal concept of a planned city as against the haphazard urbanisation or the mushroom growth of slums which in the ultimate analysis can even strangle an existing town to extinction. (Para 65)

It is not mandatory for the authority to order resumption, but only in extreme cases it enables it to do so when the other powers and sanctions to enforce the purpose of the Act have failed, or in the circumstances it is the only remedial power which can be applied. Therefore, it is farcical and imaginary to assume that the authority would necessarily use this power arbitrarily and whimsically and that they will use this hammer to swat a fly. (Para 66)

In the larger conspectus of the purposes of the Act itself, its preamble; the specific provisions of S. 8-A; the setting in which it is placed along with the supplementary Sections of the Act and the rules framed thereunder; it has to be held that the enabling power of resumption conferred thereby is only a reasonable restriction on the fundamental right to hold, acquire and dispose of property and is, therefore, in no way violative of Art. 19 (1) (F). AIR 1961 SC 1602, Foll.; C. W. P. No. 2649 of 1974, D/- 13-8-1975 (Punjab & Har), Approved. (Para 68)

(C) Capital of Punjab (Development and Regulation) Act (27 of 1952), S. 8-A (as introduced by Central Act 17 of 1973) — Resumption of building or site — Word 'resumption' connotes divestiture of title also of a building or site and not merely a temporary divesting of possession only. (1980) 82 Pun LR 441, Overruled. (Punjab Capital (Development and Regulation) Building Rules (1952, Rule 11-D; Constitution of India, Art. 226; Chandigarh (Sale of Sites and Buildings) Rules (1960), R. 12).

Majority view : Per S. S. Sandhawalia, C. J. (P. C. Jain, J. agreeing; M. M. Punchhi, J. contra).

The word resumption under Sec. 8-A means clearly the divestiture of title of

a building or the site as the case may be and not merely a temporary divesting of possession only. (Para 71)

It is an error to construe the word resumption as meaning only a temporary divesting of possession in favour of a trustee who is obliged to restore the same if the default is later rectified. So construed the sanction under the statute far from being in any way effective would render the same totally futile and the misuse sought to be prohibited could be made with absolute impunity. (Para 79)

The true import and width of the word "resumption" designedly used by the legislature in S. 8-A must be construed in the context in which it is placed for the larger purposes of the Act and not in abstruse isolation. One of the avowed objects of the Act was not only to have a planned city but of creating its capital within the shortest possible time. This was sought to be effectuated by making it a necessary condition of purchase that the site sold would be built upon within a prescribed period. (Paras 74, 80)

If a violation of the aforesaid condition is made and the transferee recalcitrantly refuses to build thereon then the Estate Officer by taking possession of such a vacant site merely becomes a gratuitous caretaker of the same till the transferee chooses to exercise his option of building thereon. In a situation of this kind the very purpose and the spirit of the Act of creating a new capital speedily would be totally frustrated. Equally it would render the authorities powerless against the terrible evil of profiteering in developed urban sites by unscrupulous transferees who could defiantly bide their time till prices escalated sky high whilst the Estate Officer gratuitously guarded their unbuilt sites. (Para 80)

The newly inserted R. 11-D is a clear pointer to the basic intent and assumption of the legislature that the power of resumption provided for in S. 8-A involves a clear divestiture of title and consequently this rule provided for re-transfer of the title of such a resumed property in favour of the original transferee. The canon of harmonious construction, therefore, also requires that resumption under S. 8-A must be construed as a clear divestiture of title so as to give a meaning, content, and practical effect to Rule 11-D as well. (Para 81)

The law in India does expressly sanctify a separate title in the site as against the building or super structure constructed thereon. There was no absolute rule

of law in India that whatever was affixed or built on the soil became part of it, and was subject to the same rights of property. It is therefore erroneous to rely on the hoary wisdom of Roman law.

(Para 83)

However, there is no manner of doubt that resumption in the sense of a divestiture of title would be the ultimate civil sanction in the armoury of the authorities to effectuate the twin purpose of a regulated and planned development as also the expeditious creation of the capital city in the State. The power of resumption is the ultimate civil sanction and must, therefore, be a weapon of last resort. Inevitably it should be used with great caution and circumspection. The Act and the Rules framed thereunder vest the authority with a variety or wide ranging powers to effectuate and regulate the planned development of the city.

(Paras 86, 87)

Normally resort would be first made to the lesser sanctions aforesaid and it is only when they are ineffective, or in the extreme cases where resumption may rightly seem to be the only appropriate sanction to the authority, that recourse will be made thereto. There is no genuine basis for the apprehension that the administration would use a hammer to swat a fly or in other words resort to resumption for relatively insignificant infraction of the conditions of sale or the payment of consideration money. Equally it is well to remember that even where resumption has necessarily to be resorted to it should be liberally tampered with the provisions of the recently inserted R. 11-D which empowers the authority to retransfer the site to the original transferee in specified situations. Therefore, though the judicious and lawful exercise of the powers of resumption must be upheld and in certain situations may be both necessary and desirable, yet any arbitrary or discriminatory application thereof would at once attract the ever vigilant power of the Court under the writ jurisdiction. (1980) 82 Pun LR 441, Overruled; AIR 1980 Punj & Har 236 (FB) and AIR 1982 Punj & Har 165 (FB) and AIR 1958 SC 789, Foll.

(Para 87)

(D) Precedents — Subsequent Division Bench decision in conflict with earlier Full Bench decision — Cannot hold the field — Must give way to the weight and authority of Full Bench dictum. AIR 1960 SC 1118, Foll.

(Para 72)

(E) Capital of Punjab (Development and Regulation) Act (27 of 1952), S. 8-A (as inserted by Central Act 17 of 1973) — Power of resumption applies uniformly to all transferees — Its application is not restricted only to such transferees who have not paid whole consideration money,

The provisions of S. 8-A give not the least inkling of any distinction between transferees who have paid the whole of the consideration money due and those who have as yet to pay some part of the consideration money or the instalments and other dues thereon. The power of resumption thereunder applies uniformly to all transferees in the happening of the three pre-conditions specified thereunder. Neither on principle nor on the language of S. 8-A is it possible to draw any distinction betwixt transferees who have paid the full consideration money and those against whom some amounts are lawfully outstanding in accordance with the contract. It, therefore, cannot be said that after the full payment of consideration money the power of resumption would be denuded against such a transferee.

(Paras 89, 90)

Cases Referred : Chronological Paras
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 AIR 1981 SC 41 : (1980) 4 SCC 226 : 1980 Lab IC 1155 11
 AIR 1980 SC 800 : (1980) 2 SCC 324 : 1980 All LJ 352 11, 74
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 v. The Baltimore & Ohio R. R. Co. 20
 Kuldip Singh with R. S. Mongia, for
 Petitioner; Anand Swaroop, Sr. Advocate
 with M. L. Bansal, for Respondents.

M. M. PUNCHHI, J.:— In *Amrit Sagar Kashyap v. Chief Commr., U. T. Chandigarh*, (1980) 82 Pun LR 441, a Division Bench of this Court (the judgment of which was prepared by me and concurred by D. S. Tewatia, J.) had the occasion to interpret S. 8-A of the Capital of Punjab (Development and Regulation) Act, 1952 (for short the Act) and in particular the meaning of the words "resume" and "resumption" occurring prominently therein. The view thus taken came to be doubted very often necessitating its re-examination by a Full Bench, on these two matters being referred to it, being Civil Writ Petitions Nos. 2830 of 1970 and 1149 of 1979, which await disposal at our end. Amusingly it has again fallen to my share to prepare the judgment, be it a case of reorientation or refurbishing the earlier view or one of substitution or reversal. A fresh look on the subject becomes essential uninhibited of the view taken by the Division Bench.

2. A small legislative history would not be out of place. The town of Chandigarh, where the seat of this Court is established, found its way on the geographical map as a capital of the then State of Punjab, towards realisation of a dream of its people, who had lost their capital in the wake of the partition of the country. It was incidentally the first planned city of free India which ultimately came to be called — "The City Beautiful." To ensure its proper planning and regulate its development as a State measure, the Punjab Legislature enacted the Capital of Punjab (Development and Regulation) Act, 1952 (Punjab Act No. XXVII of 1952) which was a substitute to the earlier statute, the President's Act No. V of 1952 which was thereby repealed.

3. Certain broad features of the said Act may be noticed. The Government under S. 3 of the Act had power to sell by auction allotment or otherwise any land or building. The consideration money was to be paid in such a manner as the Government may prescribe. The unpaid portion of the consideration money was to be first charge on the site or building. The transferee except with

the previous permission in writing of the Estate Officer was prohibited to sell, mortgage or otherwise transfer any right, title or interest in the site or building until the amount which was a first charge had been paid in full. S. 8 of the Act permitted the Government to proceed against the transferee to realise the amount due on consideration money or on instalment or any other due as an arrear of land revenue. Section 8 further provided for imposition of penalty for default in payment of money and the recovery of the same as an arrear of land revenue. Besides this provision providing statutory security for the unpaid portion of the consideration money etc., Sec. 9 of the Act gave power to the Estate Officer to cause resumption of the site or building sold under S. 3 in the case of non-payment of consideration money, or any instalment thereof, or in the case of breach of any other condition of such transfer, or breach of any Rules made under the Act. Section 9 further gave the power to the Estate Officer that he could in his discretion forfeit the whole or any part of the money, if any, paid in respect of the transfer of any site or building under S. 3.

4. The vires of Section 9 of the Act came to be questioned in *Letters Patent Appeal No. 218 of 1965 (Jagdish Chand Radhey Shyam v. State of Punjab)* decided by a Division Bench of this Court on 21-2-1966. In that case, the then petitioner had purchased a commercial site on instalments and being permitted to assume possession thereon had raised a construction and installed machinery therein. On his default in making timely payments of instalments, the site was resumed and the sum paid towards consideration money was forfeited. The appellate order, which was left uninterfered with in revision, allowed the resumption to be set aside subject to payment of arrears with interest, penalty to the extent of ten per cent of the amount in arrears in cash, and to the execution of a conveyance deed in respect of the site. The then petitioner's contention before this Court, firstly in the writ petition and then before the Letters Patent Bench, that he having become the owner of the site making him immune from any action of resumption under the Public Premises and Land (Eviction and Rent Recovery) Act, 1959 was repealed. Though the formal deed of conveyance was not executed in that case, yet the relevant statutory form thereof, provided in the Rules was taken aid of in order to inter-

pret the scope of Sections 8 and 9 of the Act and to their constitutionality. D. K. Mahajan J. with whom D. Falshaw C. J. concurred observed as follows:—

"It appears to me that Sections 8 and 9 do not provide for the same set of circumstances in each case. There would be no question of resumption of property in cases where the title has passed to the transferee; nor could the legislature be considered to have vested that power with the executive, because the exercise of such a power would be violative of Article 31 of the Constitution. If a citizen cannot be deprived of his property except in accordance with law, any confiscatory provision would be hit by Article 31 of the Constitution. If this broad consideration is kept in view, it will be seen that an order under Section 9 can only be passed in cases where the title still vests in the Government and the transferee has only got the right to remain in possession of property till he has paid the full consideration for the transfer. Moment he pays the full consideration, the title will pass on to the transferee and in that event, no necessity will arise to act under Section 9. Section 9 will only come into play where the transferee has been handed over the possession subject to certain conditions and he has violated one or more of those conditions. In this situation, Government has been given the power to resume possession of its property. In cases, where title has passed and part of the consideration is still due, Government has been given the power to act under Section 8 and recover the same as arrears of land revenue. Only in one case, action could simultaneously be taken under Sections 8 and 9 and that is where the title in property has not passed to the transferee and for the use and occupation of the premises, something is still due to the State Government for the period of that use and occupation. In this class of cases, the Estate Officer can act both under Sections 8 and 9; otherwise I can visualize no other case where proceedings under Sections 8 and 9 could be initiated simultaneously."

As would be plain from the dictum of the Letters Patent Bench, Section 9 was specifically held to be inoperative in cases where title had passed to the transferee. It remained applicable so long as the title had not passed to the transferee and part of the consideration was still due. In that case proceedings could be undertaken simultaneously under Sections 8 and 9.

But the Letters Patent Bench cautioned that the Estate Officer would not take proceedings under Section 9 necessarily when he could recover the sale consideration by proceedings under Section 8. And in case of abuse of power or mala fide exercise, this Court's jurisdiction to rectify the mischief was asserted. In that view, Section 9 was held to be intra vires. The Supreme Court, however, on appeal in Jagdish Chand Radhey Shyam v. State of Punjab, AIR 1972 SC 2587, reversed the view of the Letters Patent Bench with regard to the deferred ownership aspect on the plain reading of Section 3 of the Act. It observed as follows (at p. 2589):—

"Section 3 totally repels the conclusion arrived at by the High Court that the Government remains the owner until the entire consideration money is paid. A charge is created for the unpaid portion of the consideration money. The prohibition against sale, mortgage or transfer by the transferee except with the previous permission of the Estate Officer of any right, title or interest in the site or building establishes the ownership and rights of the transferee. If the Government were the owner it could not be said that the transferee could sell, mortgage or transfer any right, title or interest. The statute speaks of payment of consideration money by sale to the transferee. The Government cannot after sale remain the owner. The statute forbids such construction. If the Government is the owner the Government cannot at the same time be entitled to a charge on the property for the balance of the consideration money. A charge on a property is under the Transfer of Property Act enforced by instituting a suit and bringing the property to sale. If the property yields a higher price than what the charge represents, the owner is entitled to the excess sum."

With regard to Section 8 of the Act, the Supreme Court observed as follows (at p. 2589):—

"14. Under the ordinary law of the land it is open to the Government to enforce the charge and to recover the due on consideration money, instalments or any other due from the transferee. It is also open to the Government under Section 8 of the Act to proceed against the transferee to realise the amount due on consideration money or on instalment or any other due as an arrear of land revenue. Section 8 provides penalty for default in payment of money and the recovery of

the same as an arrear of land revenue. These remedies are deterrent and drastic."

And in regard to Section 9 of the Act, the Supreme Court clearly discerned two concepts which were pivotal in it; one of resumption and the other of forfeiture. Dealing with them separately with regard to forfeiture, it was observed as follows (at pp. 1589, 1590):—

"15. Section 9 of the 1952 Act empowers the Government to forfeit the whole or any part of the money in case of non-payment of consideration money or instalments or other dues for breach of covenants. Under the ordinary law of the land there is relief against forfeiture for breach of covenant or provisions. Section 9 does not offer any relief against forfeiture. This feature that the Government can proceed either under the ordinary law of the land or under the 1952 Act shows that there is discrimination. There is nothing in the statute to guide the exercise of power by the Government as to when and how one of the methods will be chosen."

With regard to the concept of resumption, the Supreme Court observed as under (at p. 1590):—

"16. Section 9 confers power to resume the site. There is a charge on the land for the unpaid consideration money. This charge can be enforced by instituting a suit in a Court of Law. The owner will have the opportunity of paying the money and clearing the property of the charge. On the other hand when the Government proceeds under section 9 of the Act to resume the land or building the Government proceeds under the Punjab Public Premises and Land (Eviction and Rent Recovery) Act, 1959. There is no guidance in the Act as to when the Government will resort to either of the remedies."

17. Again in all these cases of recovery of money or resumption of land or building and forfeiture of monies paid the Government may choose and discriminate in proceeding against one person in one manner and another person in another manner."

The Supreme Court then finally while striking down Section 9 of the Act and reversing the decision of this Court observed as follows (at p. 1590 of AIR 1972 SC):—

"18. The Act creates a charge on the property. The Act forbids creation of a third party right by the transferee until the amount represented by the charge is paid in full. In the teeth of statutory se-

curity and enforceability it is totally unreasonable restriction on the enjoyment of property by resuming the site for defaults in payments of money and forfeiting the monies paid by the transferee."

19. For these reasons, we are of opinion that the Government is not entitled to forfeit the monies paid and resume the site under the provision contained in Section 9 of the 1952 Act. These provisions violate Articles 14 and 19 (1) (f). These provisions are unconstitutional."

5. Decision in Jagdish Chand Radhey Shyam's case (AIR 1972 SC 2587) (supra) came at a time when Chandigarh had ceased to be the capital of Punjab. It had become under the Punjab Reorganisation Act, 1966 a Union Territory with effect from 1-11-1966. The Parliament by Act No. XVII of 1973 caused amendment to the Act by virtue of which Section 3 was amended; Section 8 was substituted; Section 8-A was introduced and Section 9 was omitted from the Act. The broad features of the amendment brought about can well be gathered from the Statement of Objects and Reasons published in the Gazette of India Extraordinary dated the 18th December, 1972:—

"The Supreme Court in Jagdish Chand Radhey Shyam v. State of Punjab, (Civil Appeal No. 1099 of 1967) declared Section 9 of the Capital of Punjab (Development and Regulation) Act, 1952 (Punjab Act XXVII of 1952), as in force in the Union Territory of Chandigarh, as being violative of Articles 14 and 19 (1) (f) of the Constitution and held that the Central Government is not entitled to resume the site or building transferred under Section 3 of that Act, or to forfeit the money paid in respect of such transfer under the said Section 9. The main ground on which the Supreme Court had based its conclusions was that there is nothing in the Act to guide the exercise of power by the Government as to when and how any of the methods for recovering the amount of consideration in arrears specified in Sections 3, 8 and 9 of the Act, will be chosen. (Emphasis supplied).

2. The decision of the Supreme Court has created several practical difficulties in administering the provisions of the Act. Further, the situation created by the decision of the Supreme Court is already having an adverse effect on the regulation and development of the entire city of Chandigarh, which has been planned and developed with great care and

at considerable expense over the past several years. It is, therefore, essential to remove the objections pointed out by the Supreme Court by amending the Act retrospectively from the 1st of November, 1966, being the date on which the Union Territory of Chandigarh was formed, and to validate the actions taken under the impugned provisions of the Act. (Emphasis supplied)

3. The Bill seeks to achieve the aforesaid objectives."

The emphasised language reveals the concern of the Government. It was mainly directed towards recovery of consideration money. The substratum on which the judgment of the Supreme Court was based had necessarily to be shaken. Thus Section 8 was substituted. The deterrent and drastic procedure provided therein to realise the amount due on consideration money as arrears of land revenue, with or without penalty, was totally abandoned and it came out of the pale of the newly substituted section. Thenceforth Section 8 was made to confine only in respect of arrears of rent or defaulted payments of fees or taxes levied. Sub-sections (1) and (2) of Section 3 in substance remain the same. However, sub-section (3) of Section 3 was substituted. The old sub-section (3) providing prohibition imposed on the transferee with regard to sale, mortgage etc. of any right, title or interest in the property, except with the permission in writing of the Estate Officer, was abandoned. Section 9 was omitted and in its place Section 8-A was introduced. Broadly speaking, it provided for resumption of a site or building or both, as the case may be, which had been sold under Section 3. The concept of sale was preserved therein tentatively. Significant change was brought by the newly added sub-section (3) of Section 3 providing that notwithstanding anything contained in any other law for the time being in force, until the entire consideration money etc. was paid, the site or building sold under sub-section (1) thereof shall continue to belong to the Central Government. Thus by the amendment, the basis of the Supreme Court decision in Jagdish Chand Radhey Shyam's case (AIR 1972 SC 2587) (supra) with regard to the ownership aspect stood displaced. The concept of sale of property on price promised to be paid, as provided in Sec. 54 of the Transfer of Property Act was preserved in Section 8-A and its language was kept at that level. On the other hand,

Section 3 (3), with the non obstante clause, despite the sale, would remain the owner of the property sold till the entire consideration money etc. was paid. Thus instead of holding a charge over the property, the amendment fictionally provided that the Central Government would be the owner thereof. The amendment seemingly brought the situation of the law to the level as understood by this Court in Letters Patent Appeal No. 218 of 1965 aforementioned with regard to the ownership aspect, vide Objects and Reasons aforesaid and emphasised.

6. To appreciate the above deductions better, let Sections 3 and 8-A of the Act be reproduced one after the other:—

"S. 3. Power of Central Government in respect of transfer of land and building in Chandigarh—

(1) Subject to the provisions of this section, the Central Government may sell, lease or otherwise transfer, whether by auction, allotment or otherwise, any land or building belonging to the Government in Chandigarh on such terms and conditions as it may, subject to any rules that may be made under this Act, think fit to impose.

(2) The consideration money for any transfer under sub-section (1) shall be paid to the Central Government in such manner and in such instalments and at such rate of interest as may be prescribed.

(3) Notwithstanding anything contained in any other law for the time being in force, until the entire consideration money together with interest or any other amount, if any, due to the Central Government on account of the transfer of any site or building, or both, under sub-section (1) is paid, such site or building, or both, as the case may be, shall continue to belong to the Central Government.

Sec. 8A. Resumption and forfeiture for breach of conditions of transfer.— (1) If any transferee has failed to pay the consideration money or any instalment thereof on account of the sale of any site or building or both, under Section 3 or has committed a breach of any other conditions of such sale, the Estate Officer may, by notice in writing call upon the transferee to show cause why an order of resumption of the site or building, or both, as the case may be, and forfeiture of the whole or any part of the money, if any, paid in respect thereof which in no case shall exceed ten per cent of the total amount of the con-

sideration money, interest and other dues payable in respect of the sale of the site or building, or both should not be made.

(2) After considering the cause, if any, shown by the transferee in pursuance of a notice under sub-section (1) and any evidence he may produce in support of the same and after giving him a reasonable opportunity of being heard in the matter, the Estate Officer may, for reasons to be recorded in writing, make an order resuming the site or building or both, as the case may be, so sold and directing the forfeiture as provided in sub-section (1), of the whole of any part of the money paid in respect of such sale."

7. It is plain from the reading of language of Section 8-A that both the concepts of resumption as also of forfeiture was retained as of old Section 9, since repealed. The newly added section is deeming operative from 1-11-1966. Under the repealed Section 9, causing forfeiture of the whole or any part of the money, if any, paid in respect of a sale under Section 3 or paid in respect of a transfer of any site or building under Section 3 was discretionary. Now it is mandatory for the Estate Officer under Section 8-A to cause forfeiture, in addition to resumption; forfeiture of the whole or any part of the money, if any, paid in respect thereof subject to the outer limit that it cannot exceed 10 per cent of the total amount of the consideration money etc. payable in respect of the sale of the site or building, or both.

8. In *Amrit Sagar Kashyap's case* (1980-82 Pun LR 441) (supra), the Division Bench too highlighted the difference between the concepts of 'resumption' and 'forfeiture' and came to hold as follows:—

"Now it is patent that Section 8-A employs both the words 'resumption' and 'forfeit'. Resumption is tagged to the site/building, or both, and forfeit is tagged to a percentage of the consideration money etc. It is plain and suggestive that the converse is not true. The site cannot be forfeited and the requisite percentage of consideration money etc. cannot be resumed. Obviously, there is no power with the Estate Officer to forfeit the site under the garb of resumption and treat accomplished thenceforth to have divested of the title to the site of building, or both. On reimbursement of the forfeited amount of consideration money etc. the site or the building or both have to be restored to the owner for enjoyment of its possession and user, whether directly

or indirectly, but if the act of misuser complained of is attributed to the tenant, then the tenant would be required to reimburse the forfeited consideration money etc. before he can be restored possession of the resumed tenanted premises."

9. With regard to the incidence of resumption, the Division Bench in *Amrit Sagar Kashyap's case* (1980-82 Pun LR 441) (supra) held that the same was only confined to taking of possession of the site or the building, as the case may be, by the Estate Officer, unaffected the title to the property vesting in the transferee. The Bench held as follows:—

"Thus the order of resumption will carry with it a dual consequence—(1) deprival of user of the site or building, or both and (2) the added adjudged penalty in the form of forfeiture out of the already paid consideration money etc. The stoppage of user contemplated by resumption will have the effect of the Estate Officer entering upon possession of the property, and to hold it, for and on behalf of the owner till such time that the alleged misuser was stopped and the consideration money reimbursed to the extent of the forfeiture caused therefrom. It appears to us that the power of resumption conferred in the Estate Officer is somewhat akin to that of a caretaker or trustee, to hold and use of the property on behalf of the owner, till such time that the penalty is paid and the site or building is restored to its permitted use. It is only on this reasoning that Section 8-A can be called as a measure in furtherance of the development, regulation and maintenance of the planned city of Chandigarh."

10. The correctness of the aforesaid views of the Division Bench stands challenged by the Chandigarh Administration on the ground that the view that resumption affects only the possessory aspect of ownership, and not the title, runs counter to the Full Bench decision in *Brij Mohan v. Chief Administrator*, (1980) 82 Pun LR 621: (AIR 1980 Punjab & Har 236). Particular emphasis has been laid that the said judicial precedent clearly holds that resumption has the incidence of deprival of ownership rights concerning the transferee. Challenge further has been made to the meanings given to the words 'resume' and 'resumption' which according to the Administration's counsel are not sound in the context as these tended to affect the development, regulation and maintenance of Chandigarh as a

modern city which was carefully planned. To be precise, the objection was that the deterrence and sanction behind Section 8-A stood diluted with such an interpretation. It was maintained that the concepts of 'resumption' and 'forfeiture' in reality and in essence were one and the same and interchangeable. It was asserted that the law framers had intended in fact forfeiture of the site and forfeiture of the consideration money etc. to the extent indicated in Section 8-A. Thus Section 8-A, according to learned counsel, envisaged forfeiture and forfeiture alone and the sense was to divest title and impose penalty. The intention of the Legislature was conveyed by the employment of two suitable but relative words conveying the same meaning. A buttressed policy argument was put forth that the threat of confiscation of property and divestiture of title alone could compel the builders and users of property in Chandigarh to disciplined constructive activity and disciplined living. And for these purposes, as contended, the sanction spelled out in Amrit Sagar Kashyap's case (1980-82 Pun LR 441) (supra) placing it at the level of deprivation of user of the property alone was likely to be ineffective and lead to indiscipline. Some examples were cited in support of the view canvassed. One was the case of a nefarious anti-social activity like brothel keeping which would evade being controlled if after resumption of the site or the building, or both, as the case may be, where such activity was carried on, it was to be restored to the owner or the occupier, as the case may be, on the payment of the adjudged penalty, called the sum forfeited, as the nefarious activity could well be resumed again and the repetitive process of resumption rendered a complete waste and menacingly ineffective. Another example of another kind cited was of a transferee failing to build over the site within the time allotted hurdling the growth of the planned town and retaining the site for speculative purposes. And questioningly it was put what better caretaker could the transferee have than the Estate Officer, and that too a free one, who on resumption was to hold the property for the transferee as the Division Bench dictum goes.

11. The learned counsel for the Chandigarh Administration cautioned us not to go into dictionaries but see the intentment of the Legislature. He projected that selling of sites and houses was a major activity of the State and housing

was a problem which was receiving the State's foremost attention. He maintained that in giving meaning to the words 'resume' and 'resumption', we must bear in mind public interest. In support thereof, he referred to Subhash Chandra v. State of U. P., (1980) 2 SCC 324: (AIR 1980 SC 800). On the strength of Baleshwar Dass v. State of U. P., (1980) 4 SCC 226: (AIR 1981 SC 41), he projected that the underlying idea and root thought of the legislation must be discerned. On the strength of Life Insurance Corporation of India v. D. J. Bahadur, (1981) 1 Lab LJ 1: (AIR 1980 SC 2181), he cautioned about the tyranny of literality. He cited Ishwarlal Girdharilal Joshi v. State of Gujarat, AIR 1968 SC 870, to say that the dictionaries are not safe guides. He asserted that the preamble of the Act was the key to discover the intentment and that was development and regulation of Chandigarh as a planned city. All these aspects will be borne in mind.

12. On the other hand, learned counsel for the petitioners in the first instance have taken the other extreme view. They have maintained that the amendments caused by Parliament Act No. XVII of 1973 have not taken away the applicability or efficacy of the law settled by the Supreme Court in Jagdish Chand Radhey Shyam's case (AIR 1972 SC 2587) (supra). It was asserted that the concepts of 'resumption' and 'forfeiture' as re-introduced in Section 8-A of the Act tentatively still suffer from the same vice of being violative of Articles 14 and 19 (1) (f) of the Constitution, despite the latter Article not being now in force, but when the cause arose was operative. In the alternative it was contended that Section 8-A was confined only up to a stage when consideration money, or the instalments due thereon, or any other sum due on account of such sale under Section 3 remains unpaid. And so in the event of the entire arrears being cleared and the Central Government ceasing to be the owner thereof, the site or the building, as the case may be, was beyond the scope of resumption. With regard to the breach of any other conditions of such sale, it was contended that these pertain to those conditions which are germane to the incidence of sale and the breach of other covenants/conditions of the sale deed or breach of rules cannot attract the resumptory process. It was also argued in the second alternative that the view taken by the Division Bench in Amrit Sagar Kashyap's case (1980-82 Pun LR 441) (supra) was sound and unexceptionable as

deprivation of title to the property for a default affecting the development and regulation of Chandigarh City, a default which could easily be remedied, was unthinkable in a welfare State fully conscious of the fundamental rights of property to its citizens at the time when the Act came on the statute book. Additionally it was maintained that the property-holders and property-users of Chandigarh had not invited on themselves a perpetual overlordship of the State as if property in their title and possession was a mere grant resumable at the pleasure of the sovereign or the overlord. And it was emphatically asserted that the words 'resume' and 'resumption' can project no semblance or character to confiscation or penal forfeiture in the context of Section 8-A as these notions are, repugnant to those words found in English diction and reason.

13. It may be recalled that in Jagdish Chand Radhey Shyam's case (AIR 1972 SC 2587) (supra), the transferee had not paid the full consideration money. The Estate Officer had resumed the site and forfeited whatever consideration money was paid in the form of instalments, for failure of complete and timely payments. In Amrit Sagar Kashyap's case (1980-82 Pun LR 441) (supra), the total consideration money etc. had been paid. In the later case, misuser of the site/building was attributed to the tenant of the transferee. It is noteworthy that the aforesaid two cases arose out of different set of facts; the former under Section 9 since repealed and the latter under Section 8-A now subsisting. Now it is time to take note of the facts of the two cases presently in hand.

14. Broad facts of Civil Writ Petition No. 2830 of 1970 are that the petitioner therein purchased a shop-cum-flat site in public auction on 24-3-1957 for a sum of Rs. 10,600 and paid the full price. He got the deed of conveyance executed on 11-7-1961, which facts are admitted by the Chandigarh Administration. Rather copy of the deed of conveyance dated 11-7-1961 has been appended as Annexure R-1. The petitioner asserted that having paid the full price of the site, he had become full owner in possession of the property. The respondents assert that the ownership rights were subject to conditions contained in the deed of conveyance. The petitioner apparently committed a breach of the conditions embodied in the conveyance deed by not raising construction in time. Vide order dated 13-7-1965,

Annexure 'A', the Estate Officer resumed the site and forfeited whole of the money paid under Section 9 since repealed as, according to him, there was a breach of Rule 12 of the Chandigarh (Sale of Sites) Rules, 1962 by the building not being completed within time. The petitioner successfully appealed to the Chief Administrator, Chandigarh, who allowed the appeal on 20-5-1967 (Annexure 'B') and set aside the order of resumption subject to the condition that the building be completed within a period of six months from that date. It appears that the petitioner could not fulfil the condition as imposed by the Chief Administrator and the building was not completed within the time allotted. The Estate Officer vide his letter dated 17-12-1969 forbade the petitioner from proceeding with the construction as it stood resumed. Pursuant thereto, the plot in question was listed for auction. The petitioner then approached the Chief Commissioner, Chandigarh, with a prayer in the forefront that he be allowed further time. The Chief Commissioner vide his order dated 12-1-1970, Annexure 'C', declined to interfere or grant further extension for construction holding the revision petition to be time-barred. Yet, he granted partial relief to the petitioner that out of the sum of Rs. 10,600 paid as price, he kept Rs. 600 as forfeited money and ordered the balance to be paid to the petitioner. It is to challenge these orders that the petitioner approached this Court under Articles 226 and 227 of the Constitution. During the pendency of the petition, the Supreme Court judgment in M/s. Jagdish Chand Radhey Shyam's case (AIR 1972 SC 2587) (supra) came about as also the consequential amendment to the Act. As said before, Section 8-A was deeminglly applied from 1-11-1966 and not from a date before.

15. In Civil Writ Petition No. 1149 of 1979, the broad facts are that the petitioner purchased a residential site from the Estate Officer and executed a conveyance deed on 10-12-1962. He constructed a house thereon. Since the petitioner was an Army Officer and on his toes at various places of his posting, it came to be that he rented out the house to respondent No. 4 with a specific condition that the house would be used by him as his residence. Later he learnt that respondent No. 4 had started using a portion of the house as a Guest House. It seems that the Estate Officer initiated proceedings to resume the site (since that alone was sold) and on 18-12-1973, he

passed an order of resumption, Annexure P-1. The petitioner lamented that no notice was ever served on the petitioner despite his address available with the Estate Officer and in any case the stamped address of an Army Officer which is care of 56 A.P.O., Army Headquarters, New Delhi. Having learnt in June, 1977 that the house was resumed, he made enquiries and learnt that prior to the passing of resumption order, a notice was pasted on the wall of the tenanted house when he was not living there. The order of resumption proceeded on the short ground that the tenant, respondent No. 4, was misusing it as a Guest House, a user other than residential. The petitioner unsuccessfully appealed before the Chief Administrator. The appellate order dated 27-9-1977 is Annexure P-3. His revision too was rejected on 2-9-1978 by the Chief Commissioner. This gave occasion to the petitioner to approach this Court under Articles 226 and 227 of the Constitution of India.

16. Analytically, as it appears to me, the following features and questions prominently emerge from Section 8-A in the light of the amendment:—

(1) Under Section 8-A, the Government through its Estate Officer resumes its own property in the case of a credit sale. Section 3 (3) is a pointer in that direction as title still vests in it. I would earmark this incidence as 'statutory resumption' to facilitate reference.

(2) On title being with the transferee on complete payment of consideration money etc., Section 3 (3) becomes inoperative. Resumption on breach of conditions of sale is thus a separate category. I would earmark it as 'covenantal resumption'.

(3) Section 8-A confines itself exclusively to sales (whether accomplished by a formal deed or otherwise) and not to any other kinds of transfer conceived of in Section 3. Section 9 since repealed was more comprehensive as it enveloped all transfers conceived of in Section 3.

(4) The breach of Rules made under the Act attracted Section 9 but now Section 8-A is not attracted for breach of Rules but only to breach of conditions.

(5) It is not merely the non-payment of consideration money or any instalment thereof which attracts Sec. 8-A but the failure to pay such money. Non-payment of the said money or instalment thereof can be shown cause to and adequately atoned but the failure to pay such money, is an extreme situation, irreparable, calling for the drastic action of

passing an order of statutory resumption, but after providing to the transferee a hearing.

(6) The failure of the transferee to pay the consideration money, or any instalment thereof, is on account of the sale of property under S. 3 (emphasis supplied) and committal of a breach of any other conditions is also of such sale (emphasis again supplied). If it is stipulated as a condition of sale (whether accomplished by way of regular deed or not) that payment of consideration money was deferred to be paid by a particular date, or by way of periodic instalments on due dates, then these conditions are plainly imposed on account of the sale (emphasis again supplied) of the property under S. 3. Prima facie committal of the breach of any other conditions of such sale (contradistinct to other terms etc.) attracts S. 8-A only to a sale in which payment of consideration remains payable or instalments and dues are outstanding, and not after their clearance.

(7) While making an order of resumption of the site or building or both, as the case may be, the Estate Officer under sub-sec. (2) of S. 8-A passes orders in relation to property which was 'so sold'. In other words, the order of resumption can only be attracted in the case of a sale which carried deferred payment of consideration money or in instalments. Negatively, as it appears, the section seems not attracted where the entire consideration money together with interest and other dues payable in respect of the sale of the site or building or both has been made. Were it otherwise, the expression 'payable in respect of the sale' would be misfitted and it should have read 'paid in respect of the sale'.

(8) Then, is S. 8-A invocable by the Estate Officer for covenantal resumption? Is the breach of conditions on which the sale took place under S. 3, contradistinct to the breach of other terms, limitations and covenants embodied in the document of sale?

(9) Did the Legislature intend that the breach of all and every condition of sale would attract the powers of the Estate Officer under S. 8-A? If so, why the words '.....has failed to pay.....' occur in the opening of the section? Are they mere surplusage? Is it a situation which the Legislature in its wisdom was alive to? Why has the section not used all pervasive language?

17. The above deductions require thorough examination but in a broader

light. The non obstante clause in S. 3 (3) be recalled. It has been observed earlier that S. 8-A proceeds on the basis of a sale accomplished, a sale as conceived of in S. 54 of Transfer of Property Act, to mean transfer of ownership in exchange of price paid or promised or part paid and part promised. But S. 3 (3) creates a legal fiction that notwithstanding anything contained in any other law for the time being in force, until the entire consideration money together with interest or any other amount, if any, due on account of the transfer of any property sold under sub-sec. (1) is paid, the same shall continue to belong to the Government. Now here is a complex situation. The transferee has been sold the site or building or both, as the case may be, but the property sold yet belongs to the Government. The transferee is the owner of the property and yet it does not belong to him. This fictional situation is required to subsist till he pays up the entire consideration money together with interest or any other amount, if any, due on account of the sale. The payment of such sum, which would otherwise be a condition precedent to the sale before it is entered, has by conduct of parties been made a condition subsequent, the failure to perform which requires, if I may use the expression, occasion to quiet the title qua the estate. It appears to me that had S. 3 (3) been not there for the purpose, the present S. 8-A would still attract the dictum of Jagdish Chand Radhey Shyam's case (AIR 1972 SC 2587) (supra) and be within the mischief of Art. 19 (1) (f) as also within the mischief of Art. 31 and provide an unreasonable restriction on the freedom to acquire, hold and dispose of property. These Articles were in the Constitution till 20th June, 1979, from which date they were deleted under the Constitution (Forty-fourth Amendment) Act, 1978. But S. 3 (3) only saves the vice that despite the sale, the Government fictionally continues to be the owner of the property sold subject to the vendee quietening his title by making up all due payments on account of the sale. Now what are the other conditions of the sale as conceived of in Sec. 8-A? Does necessarily all what is stipulated in the transaction come up to conditions of sale? To my mind, it is not so. Under the well known rule of equity, the Court reads a written instrument in its entirety and considers it from all four corners in order to discover the true intention of the parties in harmony with this rule. Each and every part of the instrument must

be considered in relation to each other part. No portion of the instrument can be disregarded or treated as surplusage and technical terms and provisions cannot prevail as against the apparent intention of the parties. The known instruments by which transferees come about under the Act are by means of allotment letters, statutory conveyance deeds, correspondence, terms of auction and the like. And transferred under S. 2 (k) means a person (including a firm or other body of individuals whether incorporated or not) to whom a site or building is transferred in any manner whatsoever under the Act and includes his successors and assignees. All what are reflective of the sale, be it from a regular sale deed or other writing, are not necessarily conditions, they could well be covenants, exceptions, reservations and limitations, though they could also be loosely called terms. Sometimes words may be employed to create either a covenant/term or a condition, but the legal responsibility for non-fulfilment is not the same. Where there is a breach of covenant, the remedy is by way of damages; but where there is a breach of condition, a forfeiture usually though not always, results. But this forfeiture, under the civil law is nothing but the exercise of a right of re-entry. But in the context of S. 8-A, the only forfeiture mentioned is not civil in nature but sequestrat, as it tends to forfeit to the State ten per cent of the total amount of the consideration money, interest and other dues payable in respect of the sale of the property. But if the words 'resume' and 'resumption' used in the context of S. 8-A are understood to mean the right of re-entry, then it might well legitimately be in the nature of forfeiture, but only on the plane of re-entrance and never on the platitude of confiscation or forfeit. Thus, when on the failure of the transferee to pay the consideration money, or any instalment thereof, on account of the sale of the property, or on the committal of a breach of any other condition of such credit sale in which the consideration money etc. remains payable, the Estate Officer can exercise the right of resumption which is nothing but a right of re-entry over the property owned by the Government so as to quieten the title. But that is not alone. As an appendage, unwaveringly, he has to confiscate to the State, in the name of the forfeiture a sum up to ten per cent of the total amount of the consideration money, interest and other dues payable in respect of the sale of the pro-

perty, but from the sum already paid to him on account of the sale. The Chandigarh (Sale of Sites and Buildings) Rules, 1952 (now substituted by the same Rules of 1960) provide that before he enters upon any business under S. 3, the Estate Officer requires some percentage of the reserved price of the site/building paid to him as a pre-condition. He adequately safeguards what would be forfeit money of the eventuality under S. 8-A. The subsequent event having happened by the transferee's failure to pay the consideration money, or any instalment thereof, on account of the sale, or on a breach of one or more conditions of such sale, and the Central Government fictionally under the law being the owner thereof under S. 3 (3), an order of resumption thus partakes the character of nothing but an order of re-entry, the fictional title in the Government being quietened in the event, which could otherwise be quietened in favour of the transferee on timely payments of the aforesaid sums. Thus, it appears to me, that 'statutory resumption' under S. 8-A cannot cover up the situation of breaches of other conditions at a time when the entire consideration money etc. stands paid up and the transferee's title is prominently quietened. That also was the view of the Letters Patent Bench in L. P. A. No. 218 of 1965.

18. The aforesaid reasoning can also find support from English diction. It is noteworthy that neither the words 'resume' or 'resumption' nor 'forfeiture' have been assigned definitions; dictional, unreal or superficial in the statute. Per necessitus, we have to open dictionaries and take notes therefrom.

Corpus Juris Secundum, 1952 Edition :
'Resume' : To begin anew; to take again; to take back, to take up again after an interruption.

Webster's Third New International Dictionary :

'Resume' : To take up again; take back; to take back to oneself (on default, the grantor does not automatically resume title); go back to using; to take possession again.

'Resumption' : The taking again by the Crown or the authority of lands or tenements previously granted (as on the ground of false suggestions or other error).

The Oxford English Dictionary, 1933 Edition :

'Resume' : To take back to oneself something previously given or granted; to return to the use of; to resume possession.

'Resumption' : Law. The action, on the part of the Crown or other authority, of reassuming possession of lands, rights, etc., which have been bestowed on others a case of instance of this.

Wharton's Law Lexicon :

'Resumption' : The taking again by the Crown of such lands or tenements, etc., as on false suggestion had been granted by Letters Patent; by agricultural landlord, before legal tenancy ended, of the tenant's land (generally in part only) for building, etc., purposes, making an abatement or rent and giving compensation for damage to crops.

The Law Lexicon, 1940 Edition :

'Resumption' : (1) Resumption is nothing more than an unequivocal demand for possession so as to operate as a final election by the landlord to re-enter, AIR 1924 Pat 449.

(2) 'Resumption' is a word used in the statute of 31 H.6.c.7, and is there taken for the taking again into the King's hands such lands or tenements as upon false suggestion or other error he had made livery of to an heir, or granted by patent unto any man.

Words and Phrases, Permanent Edition :

'Resume', 'Resumption' : The word 'resume' as used in reference to the act of taking by the public of a road from its owners being a resumption, is used as an allusion to one of the rules of public right to take private property, whether held in fee or otherwise, and not as a suggestion that the owner's title is exceptionally defeasible. In re Opinion of the Justices, 33 A.1076, 1080, 66 N.H.629."

Corpus Juris Secundum, Vol. XXXVII:

'Forfeiture' : As divestiture of specific property without compensation resulting from failure to comply with the law.

Webster's Third New International Dictionary :

'Forfeit' : To lose or lose the right to by some error, fault, offence, or crime, to subject (as property) to confiscation as a forfeit. 'Forfeiture' : The divesting of the ownership of particular property of a person on account of the breach of a legal duty and without any compensation to him : something (as property or money) lost as a forfeit : loss of some right, privilege, estate, honor, office, or effects in consequence of a crime, offence, breach of condition or other act.

19. Although the word 'forfeit' is often used synonymously with the term 'fine', it has also been observed that there is a distinction between the two inasmuch

as 'forfeiture' means sequestration of property while the term 'fine' does not necessarily have this meaning. Forfeiture of property is resorted to as a means of punishment for non-compliance with statutory requirements so as to cause 'loss' of the property in favour of the State as confiscated to it. It is also plain from the above diction that the words 'resume' or 'resumption' have been known in English language to operate in a sphere where the title to the property, total or fractional, remains with the grantor, be it a sovereign or a landlord, as the case may be, who is entitled under the law or covenant to resume back possession of the grant. In particular, the legal definition given to the word 'resumption' in the Oxford English Dictionary above-quoted terms it an action on the part of the Crown or other authority of re-assuming possession of lands. Read with the negative example given of the word 'resume' in Webster's Third New International Dictionary, above-quoted 'resumption' does not involve automatic resuming of title by the grantor on default committed. Thus it appears to me that the kingdom of the words 'resume' and 'resumption' are confined within the boundaries of 'possession' of the grant and does not touch title to the grant at all, for these work on the assumption that the title to the property, total or fractional, was with the grantor and he never parted with it ever. If on the other hand, the transferor had conferred title on another but had reserved to himself, on the breach of the covenants in the transfer, the right to resume the property, then it cannot cause divestiture of title, but only conferment of a right to recall possession on acts of omission or commission done by the transferee. It is in this sense that I referred to 'covenantal resumption'. Then again the terms 'fine', 'forfeiture' and 'penalty' are often found used loosely and confusedly. When discrimination is made, however, the word 'penalty' in its strict sense is found to be generic in its character including both fine and forfeiture. Generally speaking, the term 'penalty' is a pecuniary charge for the violation of a statute. Such forfeiture is also a penalty. In common parlance, the term 'forfeiture' strongly implies penalty. Strictly speaking, a penalty denotes a punishment by way of a pecuniary exaction from the offender collected through an action in personam. The term, however, is fairly elastic in meaning. Viewed from a contractual context, penalty is generally a

certain sum agreed upon in consequence of a failure to perform exactly all the stipulations or terms contained in a contract. However, a forfeiture is, in its strict sense, a divestiture of property without compensation in consequence of a default or offence, such action of forfeiture being against the res, property itself, and the effect of forfeiture being to transfer the title to that specific thing from the owner to the sovereign power by means of sequestration of the property. In *Amrit Sagar Kashyap's case* ((1980) 82 Pun LR 441) (supra), the Division Bench had spelled out forfeiture of the sum as the adjudged penalty in the generic sense since it was plainly a case of covenantal resumption and not statutory resumption. The forfeiture strictly is to be caused from the sum already in hand of the Estate Officer kept as part payment of the consideration money etc. and not that any fresh sum is to be exacted from the transferee. Thus it appears to me that the Legislature deliberately avoided using terms like 'fine' and 'penalty' in Section 8-A and put it at the plane that the forfeit money was lost, yet with some elasticity. In case of statutory resumption, forfeiture is used in the strict sense as punishment and in case of covenantal resumption in the generic sense, so as to provide penalty and its measure for breach of conditions enjoined by contract. Thus 'Section 8-A, as it appears to me, provides a two pronged weapon in the hands of the Estate Officer — one pointing to a civil consequence of re-entry by resumption and the other sequestral or penal, as the case may be, dependent on the kind of resumption sought.

20. The afore-pointed distinction with regard to the colour what forfeiture takes has support of authority. Admirably the United States Supreme Court has explained the concept of 'forfeiture' in the context of statutory construction. Chief Justice Taney in the *State of Maryland v. The Baltimore & Ohio RR Co.*, (1846) 11 Law ed 714 at p. 722 observed:—

"And a provision, as in this case, that the party shall forfeit a particular sum, in case he does not perform an act required by law, has always, in the construction of statutes, been regarded not as a contract with the delinquent party, but as the punishment for an offence. Undoubtedly, in the case of individuals, the word forfeit is construed to be the language of contract, because contract is the only mode in which one person can

become liable to pay a penalty to another for breach of duty, or the failure to perform an obligation. In legislative proceedings, however, the construction is otherwise, and a forfeiture is always to be regarded as a punishment inflicted for a violation of some duty enjoined upon the party by law; and such, very clearly, is the meaning of the word in the Act in question."

The same connotation has been imparted by the Supreme Court in *Bankura Municipality v. Lalji Raja & Sons*, AIR 1953 SC 248, 250:—

"According to the dictionary meaning of the word 'forfeiture' the loss or the deprivation of goods has got to be in consequence of a crime, offence or breach of engagement or has to be by way of penalty of the transgression or a punishment for an offence. Unless the loss or deprivation of the goods is by way of a penalty or punishment for a crime, offence or breach of engagement, it would not come within the definition of forfeiture."

The aforesaid two views of high authority were attractingly quoted in *R. S. Joshi v. Ajit Mills Ltd.*, AIR 1977 SC 2279, by a Bench of seven Judges.

21. Plain English words have to be understood in their plain meaning. We as Judges cannot give them a meaning different than the one understood in the English speaking world. We cannot translate or coin English words to suit Indian fancies. We cannot in the name of interpretation indianise English words. And we as Judges are not mere translators, paraphrasers, grammarians or linguists. Had we been so, we were expected to be elsewhere. Justicing as an art practised by us is not abstract, but a live one, integrated with humanism. In dealing with people's lives and more so with their rights and properties, we have to, when called upon, to interpret words used in the context of a particular statute and have to promote clarity by giving a purposive meaning in accordance with the intent of those that made the law. Legislation in our country by and large up-till day is produced in the English language foreign to our masses. It is for this reason that the interpreting process of the Court, in a welfare State like ours, does not always lean towards the approach which is known as literal, conservative, pragmatic or ultra-legalistic. Trend has been set in this country in the post-independence era towards intention-seeking and constructive approach in the inter-

pretation of statutes. The built-up aura is discernible from the judicial verdicts handed down by the highest Court of the country. The approach is parallelly available from judicial dictums in other democracies all over the world. But liberality and constructiveness in approach does not give us the power to give an out of shape meaning to a word and to destroy the artful meaning it has come to acquire in all conceivable annals. I cannot thus, for the foregoing reasons; under the garb of interpretation, give to the words 'resume' and 'resumption' in Section 8-A the colour of penal forfeiture and equating it with the other forfeiture, hold them both as two descriptions of the same phenomenon and read in Sec. 8-A of the Act as if the site or building or both, as the case may be, by pronouncement of the order of resumption be held confiscated to the State, causing divestiture of its title from the transferee to the State, with the addition of confiscation in terms of money. I would rather, as the Supreme Court did in *Jagdish Chand Radhey Shyam's case* (AIR 1972 SC 2587) (supra), preserve the distinction between the two and let the word 'resumption' stand at the level as it is commonly understood and on the other hand forfeiture to stand at the level also so understood, without causing any fusion. And if I may pose the question why has the Parliament not removed the distinction in the two concepts as separately dealt with by the Supreme Court in *Jagdish Chand Radhey Shyam's case* (AIR 1972 SC 2587) (supra) when effecting amendment vide Act No. XVII of 1973, as also the clear view of this Court in *L. P. A. No. 218 of 1965* that the Government only resumes what it owns and not what it does not own. But in a sense the learned Counsel for the Chandigarh Administration is not altogether wrong. From the point of view of the transferee, his title is divested in the case of 'statutory resumption' on his failure to quieten it timely. But from the point of view of the Central Government, it is not so since the property sold keeps belonging to it under Section 3 (3) till the dues etc. are cleared. But in covenantal resumption, the title to the property cannot divest in favour of the Central Government by an order of resumption, since the cause for resumption arises on breach of conditions of sale and not on breach of any provision of law allowing divestiture of title as specific punishment.

22. To revert to the quotations above extracted from *Jagdish Chand Radhey*

Shyam's case (AIR 1972 SC 2587) (supra) it is noticeable from paragraph 16 of the Report, as also from Section 9 since repealed, that to exercise the power to resume the site or building, the Estate Officer had to take recourse to the Punjab Public Premises and Land (Eviction and Rent Recovery) Act, 1959. This was a step in one direction to be fructified in a legal forum. The step on the other side was to enforce the charge created by instituting a suit in a Court of law. In that forum, the transferee/owner could have the opportunity of paying the money and clearing the property of the charge. Both these procedures were twins in the opposite. The aim of both of them, though diametrically opposite in essence, was the one to quieten the title. Guidance not being there in the unamended Act as to when the Government would resort to either of the courses, the Supreme Court struck down Section 9 being violative of Articles 14 and 19 (1) (f) of the Constitution. The sting of Article 14 appears to have been taken away by the amendments to Sections 3, 8, 8-A and 9 of the Act. The emerged concept is that there is no charge over the property transferred and thus no statutory security for the unpaid sums. Though the transferee obtains the property by way of sale on partial credit and becomes the owner, but fictionally the property belongs to the Government till the entire credit and dues on account of sale stand paid up. Thus both the opposite forums i.e. the Civil Court for enforcement of the charge and the authority under the Punjab Public Premises and Land (Eviction and Rent Recovery) Act, 1958 for resuming the property have been closed. In its place, the Estate Officer has been authorised under Section 8-A to be the forum to pass an order of resumption within its ambit, supported by reasons, after giving an opportunity to the transferee of being heard. The order is appealable to the Chief Administrator and revisable by the Central Government under Section 10 of the Act. So a self-contained hierarchy is available to operate for purposes of Section 8-A without having to look for relief elsewhere. Instead of being a litigant, as hithertofore, the Estate Officer has now become the arbiter of the cause. One being the forum, Article 14 of the Constitution cannot now obviously be attracted in the situation. But, as expressed earlier, if the transferee has been sold the property and he has paid all dues on account of the sale to the Government, then he being the owner thereof cannot

be deprived of the title to the property as such action would be violative of Articles 19 (1) (f) and 31 of the Constitution as applicable till 20th June, 1979. A contrary interpretation to the section would immediately attract the dictum of Jagdish Chand Radhey Shyam's case (AIR 1972 SC 2587) (supra) and Sec. 8-A would be unconstitutional. I would vie with that idea and rather preserve constitutionality of the provision in the light of the interpretation given by me earlier to Section 8-A.

23. With regard to forfeiture, paragraph 15 of the Report in Jagdish Chand Radhey Shyam's case (AIR 1972 SC 2587) (supra) noticed violation of Article 14 of the Constitution in the matter of forfeiture for breach of covenant or provisions. It was noticed that under the ordinary law of the land, there is a relief against forfeiture for breach of covenant and provisions but Section 9 does not offer any relief against forfeiture. Despite the repeal of Section 9, forfeiture, which was optional thereunder, is now obligatory under Section 8-A. The two concepts now work together. The Legislature, it appears, has offered relief against the forfeiture contemplated, to minimise it to the extent up to ten per cent of the total sum of consideration money etc. payable. The relief is inbuilt in Sec. 8-A by providing a discretion to the Estate Officer to cause sequestration (or to cause exaction by way of penalty in the other context to be explained later) of even a lesser sum. It can even be imposed as a token to satisfy the requirement of law. The discretion so exercised can be corrected in appeal or revision. Thus, by the amendment, vice of discrimination and the attractability of Article 14 of the Constitution stand removed by providing now only one forum and a fair amount of discretion to the measure of forfeiture. At the same time the amendment has barred, vide Section 19, the jurisdiction of any Court to entertain any suit in relation to the forfeiture of any money under Section 8-A. Thus Section 8-A on the foregoing interpretation cannot be held to be unconstitutional.

24. All the rules which are made, or are capable of being made under the Act, to carry out purposes of Section 3, provide guidance towards settlement of terms and conditions of the sale envisaged thereunder. But the imposition of the terms and conditions of a sale are within the discretion of the Central Government. That discretion can vary from deal to

deal or to classes of deals. The only fetter is that those terms cannot violate any rules that may be made under the Act. Thus the mere existence of rules on the Statute Book do not have universal applicability. One becomes a transferee of some property from the Central Government under Section 3 (1) of the Act, and has to come to terms and subject himself to conditions as the Central Government has chosen fit to impose. This appears to me the reason why the amendment took out the breach of Rules from the ambit of Section 8-A of the Act and kept it confined to breach of conditions of sale to individual cases.

25. As said a moment earlier, violation any more of the Rules framed under the Act do not attract the applicability of Section 8-A. It is noticeable that under Section 22 of the Act, which provides for making of rules for carrying out the purposes of the Act, two important sets of Rules have been framed. These are the Chandigarh (Sale of Sites and Buildings) Rules, 1960 (a substitute of 1952 Rules). These provide the procedure in which the sale of sites and buildings would take place. Those sales can be by auction or allotment and also by hire purchase agreement. In either situation before the deal starts, the proposed transferee has to tender some percentage of the price. The balance is payable either in lump sum or in instalments. The transferee is entitled after the bargain to delivery of possession and to erect the building, if any, within the time allotted and in any case within less than five years, but the time limit is extendable. The transferee is forbidden to fragment any site or building or to carry on any obnoxious trade without the permission in writing of the Chief Administrator. The transferee is required not to use the site or building for a purpose other than that for which it has been sold to him. The transferee is further required to execute and bear and pay all the expenses in respect of execution and registration of deed of conveyance (including the stamp duty and registration fees payable therefor). These Rules also prescribe the statutory forms of the deeds of conveyance applicable to variety of deals. These contain all the terms of the sale. These would be dealt with in a later part of the judgment. These Rules carry out the purposes of Section 3 of the Act. A parallel set of Rules are the Chandigarh Leasehold of Sites and Buildings Rules, 1973, but with these we are not concerned. The second

set of Rules are the Punjab Capital (Development and Regulation) Building Rules, 1952. These are a complete Code as to how the structure over a site is to be built and how the buildings are to be kept and maintained. Section 5 of the Act provides that no person shall erect or occupy any building at Chandigarh in contravention of Building Rules made under the said section and the aforesaid Rules have been made to carry out the said purpose. Now if any person commits any contravention of any of the Rules, Section 15 of the Act provides penalty for breach thereof. It is in these terms:—

"15. Penalty for breach of Rules.— Except as otherwise provided for in this Act, any contravention of any of the rules framed thereunder shall be punishable with fine which may extend to five hundred rupees, and in the case of a continuing contravention, with an additional fine, which may extend to twenty rupees, for each day during which such contravention continues after the first conviction; and the Court while passing any sentence on conviction of any person for the contravention of any rule, may direct that any property or part thereof in respect of which the rule has been contravened, shall be forfeited to the Central Government.

Illustration.— Where an unauthorised structure has been constructed or any obnoxious material or substance is collected or heaped on a site in any unauthorised manner, or where an advertisement board has been set up in contravention of the Advertisements Control Order, such structure, material, substance or board shall be liable to forfeiture, and not the site or building on which the same may be located or fixed:

Provided that if a building is begun, erected or re-erected in contravention of any of the building rules, the Chief Administrator shall be competent to require the building to be altered or demolished by a written notice delivered to the owner thereof within six months of its having begun or having been completed, as the case may be. Such notice shall also specify the period during which such alteration or demolition has to be completed and if the notice is not complied with, the Chief Administrator shall be competent to demolish the said building at the expense of the owner:

Provided further that the Chief Administrator may, instead of requiring the alteration or demolition of any such

building accept by way of compensation, such sum as he may deem reasonable." It is plain from the illustration that the offending material or substances and the like which stand as eye sores to the regulation and development of the planned town are liable to forfeiture and not the site or building on which the same may be located or fixed. It is indicative that the Legislature was conscious that the sites or buildings are not to be forfeited for violation of rules. Violation of building rules can be compounded by payment of compensation as the proviso to Section 15 suggests. Section 18 prescribes the procedure for prosecution for offences punishable under the Act or any rule made thereunder. That is the realm of criminal law which acts in terroram to ensure obedience to rules.

26. Directions can be issued in respect of erection of buildings under Section 4 (2) of the Act on the matters provided in Section 4 (1), which inter alia provides for directions with regard to restrictions of the use of site for purposes other than erection of buildings. Directions can also be issued under Section 6 with regard to the condition or use of any site or building if it is prejudicially affecting the proper planning or the amenities in any part of Chandigarh or in the interest of the general public there. Procedure is provided therein of issuance of notice to the transferee or the occupier. Any person contravening the provisions of Section 4 (2) or Section 6 can on prosecution be convicted and punished under Section 13 on a complaint filed under Section 18. This too is a sphere of the criminal law. Orders have been issued to preserve trees and control advertisements. Any person contravening any provision of those Orders can be tried and punished under Section 14 read with Section 18. This again is the sphere of criminal law. In the teeth of these sanctions and criminal prosecutions, the attempt of the Chandigarh Administration is futile in hunting for sanctions for proper maintenance, development and regulation of the city from the provisions of Section 8-A. If the measure of punishment provided for the contravention of Rules, directions and orders punishable under the Act is inadequate, since it is mostly in terms of money and inflation has eroded its relevance, the Legislature can, and then may, raise the measure of punishment. But what is available specifically and plainly as a sanction in other sections cannot dubiously be sought in

Section 8-A for the breach of Rules, directions or orders.

27. It was also canvassed on behalf of the Chandigarh Administration that the forfeiture money, being barely up to ten per cent of the total sum of consideration money etc. payable, works no terror on the transferee in view of the high rise in prices in recent times. It was pointed out that the measure of forfeiture is measurable only on the sums involved in the deal between the Central Government and the transferee which of old was far too less with the prices now prevailing. This argument deserves outright rejection being one in despair. For this, the Chandigarh Administration has to seek relief elsewhere.

28. It was also elaborated, when asked, on behalf of the Chandigarh Administration that the event of resumption visits a building, if the building was sold by the Government, and a site, if the site was sold by the Government. When asked to explain what happened to the site which was built upon by the transferee at the time when the process of resumption was started, the learned counsel appearing on its behalf gave out to us a practice which was prevailing in the Administration. He maintained that on resumption of the site, the site and the building constructed thereon was put to auction and the price received of the structure was paid to the transferee. But with regard to the price of the site at which the deal was struck between the State and the transferee, he was somewhat evasive. At times he maintained that when the full price had been paid of the site, the Government only deducted its ten per cent towards the sum forfeited. On the other hand, he maintained that when the price was not fully paid, the Government would again deduct its forfeit money and pay the balance due to the transferee. Now this kind of practice prevalent in the Chandigarh Administration runs counter to the stance now taken by the learned counsel that the site or building sold, as the case may be, stands confiscated to the State in the event of resumption. The practice afore-referred to is nothing but a step towards enforcement of charge in case of sums/dues left to be paid on account of the sale of site or building, as the case may be, by an executive fiat. The concept of charge over the property sold, as said before, has been abandoned. That practice, to my mind, has no sanction of law. In the event of no due remaining and

the sale getting out of the ambit of Section 3 (3) of the Act, it automatically goes out of the purview of statutory resumption under Section 8-A of the Act, for nothing remains payable. But if it is held that Section 8-A kept applying, even after every paisa was paid, on the breach of other conditions of sale, even then the Estate Officer causing covenantal resumption cannot, in observance of the practice afore-referred to effect sale of the property merely to recover the adjudged penalty. Under the ordinary law, as observed by the Supreme Court in Jagdish Chahid Radhey Shyam's case (AIR 1972 SC 2587) (supra), there is relief available against forfeiture, but there is none under Section 8-A (old Section 9). The vice of discrimination under Article 14 of the Constitution would immediately set in. The principle of *Maganlal Chhaganlal (P.) Ltd. v. Municipal Corpn. of Greater Bombay*, AIR 1974 SC 2009 cannot save the vice for these are not merely procedural matters where two paths are open to reach the same destination. The end results of both courses are different. Under ordinary law, the transferee can pay the forfeited money and avoid other consequences. But the stance of the Government under Section 8-A is that it must sell the property and recover the forfeited money from the proceeds, refusing to have it directly from or on behalf of the transferee. This, to preserve its constitutionality, it must be held that the Estate Officer has to keep the property intact and release it on the payment of the adjudged penalty in the case of covenantal resumption. That is what was held in *Amrit Sagar Kashyap's case* (1980-82 Pun LR 441) (supra) which has to be approved to this aspect of the case. For the aforesaid reasoning, the Estate Officer has no choice in the matter.

29. On the other limb, the argument on behalf of the Chandigarh Administration that the title to the site is divested in its favour sans the building constructed thereon appears to me wholly chimerical and unworkable, besides being iniquitous. Three Latin maxims will convey the point:—

(i) "Aedificatio solc, solo cedit" (That which is built on land becomes part of the land).

(ii) "Quicquid plantatur solo, solo cedit" (whatever is affixed to the soil belongs to the soil).

(iii) "Omne quod solo inaedificator, solo cedit"

(Everything which is built upon the soil passes with the soil).

These maxims have the advantage of embodying the wisdom of many under each of the one who coined them. And it is said, these maxims are 'prying emanations of the eternal wisdom'. It is undoubtedly true that their usefulness increases, rather than diminishes, as the law grows complex and involved, for they bring back the mind to the just principles. Now to say that the site vests in the Government and not the structure thereon, which becomes part and parcel of the site, is begging the question. Such a construction put by the Chandigarh Administration to the effect of resumption causes destruction of an estate; the two ownerships attempting to pull apart, but vainly. Thus interpreting Section 8-A, I would refrain from an odious construction which would lead to the destruction or dissipation of an estate, and as was done in *Amrit Sagar Kashyap's case* (1980-82 Pun LR 441) (supra) settle the term 'resumption' to a right of re-entry on the property resumed.

30. Another difficulty which the Chandigarh Administration expressed was that unless it acquires title on resumption, it cannot invoke the provisions of the Punjab Public Premises and Land (Eviction and Rent Recovery) Act, 1959. Before proceedings under that Act can be undertaken, the property must belong to the Government. Fear was expressed that if resumption cannot divest title, then the provisions of that Act would become uninvokable. Let me allay those fears. In the first place, till the entire dues are paid on account of sale, the property sold belongs to the Central Government under Section 3 (3) of the Act. Now belonging is not necessarily owning. The term 'belong' is a relative term which establishes a connection between one and his possessions. Be that apart, the provisions of the aforesaid Act, as long as Section 3 (3) is operative, can be invoked. But I fail to see the reason why the provisions of that Act have to be invoked for the purpose in the presence of the inbuilt power under Section 8-A of the Act to cause re-entry over the property resumed, unless the Government intends to bypass Section 8-A. Once Section 3 (3) becomes inoperative, Section 8-A, as said before, too becomes inoperative for statutory resumption. But if it remains operative for covenantal resumption, the order of resumption passed by the Estate Officer in that case is also capable of enforcement to effectuate his re-entry. He is the self-enforcing agency of his own

orders and has not to seek elsewhere to get another order enforcing it. Prior to the amendment of Parliament Act No. XVII of 1973, he was obliged to, since he could not pass an order. After the amendment, he has been given the powers to pass an order of resumption and enforcing it is a logical consequence. Habit bound, the Estate Officer has not to invoke the Punjab Public Premises and Land (Eviction and Rent Recovery) Act, 1959. Even otherwise, it is noticeable that the said Act is not so much concerned with the title as with the possessory rights vested in the Government and not so much to the origin of, that makes any premises a public premises under the Act. See in this connection a Division Bench judgment in *S. R. B. Gaikwad v. Union of India*, AIR 1977 Bom 220.

31. In the realm of precedents, attention must be invited to *Brij Mohan v. Chief Administrator*, (1980) 82 Pun LR 621: (AIR 1980 Punj & Har 236) (FB) which was a case to which the principles of covenantal resumption would be attracted. In that case, the Full Bench held that one of the dual consequences of resumption was the depriving of ownership right in the site or building which concerns only the owner of the site or building. Approvingly it can safely be said that it did not connote that title to property or right stood wiped out by resumption. Deprivation of ownership right there would be when an important right of property 'jus possedendi' is to be assumed by the Estate Officer in exercise of powers under Section 8-A. Thus there is no conflict between *Brij Mohan's case* (supra) and *Amrit Sagar Kashyap's case* (1980-82 Pun LR 441) (supra) in which the concept of resumption was so spelled out. Some assistance can also be sought from the fact that had there been any conflict, the judgment of the Division Bench normally was not expected to be concurred by D. S. Tewatia J. who was also the author of the Full Bench judgment in *Brij Mohan's case* (supra). Thus it is crystal clear that there is no conflict as was feared by the learned counsel for the Chandigarh Administration. The other case worth noticing is Civil Writ Petition No. 2649 of 1974 decided on 13-8-1975 in which the vires of Section 8-A were upheld by a Division Bench of this Court. What precisely was resumption was never mooted in that case. Tewatia J. was a party to that judgment also. This case was put on the shelf in *Amrit Sagar Kashyap's case* (1980-82 Pun LR 441) (supra) obviously for reasons

that the said Division Bench had to cover a different field. There is no apparent conflict between the two Division Bench judgments aforesaid and none was pointed out. Moreover, in the realm of legal knowledge, nothing is finite or absolute. What can be canvassed in one context before a Court of law cannot be prohibited to be canvassed in a similar context in another instance before a Court of Law. The doors of the Court are not merely open, but are kept widely open to perform its fundamental duties. Now since I have upheld the vires of Section 8-A but on grounds not dealt with by the said Division Bench, I would leave that case to its own facts without expressly approving or disapproving it.

32. At one stage, an idea was about to be toyed with that if statutory resumption under Section 8-A was operatable when the entire consideration money etc. had been paid, then could it possibly be interpreted to mean that by order of resumption and of the requisite forfeiture, the total price paid would fall short of the sum forfeited and thus possibly the legal fiction under Section 3 (3) of the Act would revive. The idea did not catch the imagination either at the bar or the Bench. On closer scrutiny, the hypothesis is a castle of sand. Section 3 (3) talks of 'until the total consideration money etc. is paid'. Once it is paid, then Sec. 3 (3) is rendered inoperable and so does Section 8-A for the purpose. Neither any forfeiture therefrom is permissible nor can it revive the legal fiction under Section 3 (3) of the Act. Such a construction is obviously odious and impermissible.

33. Now it is time to enter the sensitive field of 'covenantal resumption'. It is worthwhile to recall that the Central Government has been given the power to sell any land or building belonging to it on such terms and conditions as it may think fit to impose. Rule 8 of the Chandigarh (Sale of Sites) Rules, 1952 provided that on receipt of at least 25 per cent of the sale price, whether the sale is effected by allotment or by auction, the transferee shall execute a deed of conveyance in the form annexed to these Rules. Schedule B, in such manner as may be directed by the Estate Officer. Clause 11 of Schedule B conferred the right on the Estate Officer to effect re-entry in the event of non-payment of any instalment and for such resumption neither the transferee was entitled to a refund of the purchase money nor to any compensation. The 1952 Rules were substituted by the

Chandigarh (Sale of Sites and Buildings) Rules, 1960 with effect from 8th March, 1960. Here again, Rule 8 provided for the execution of a conveyance deed in a suitable form. Rule 8 was substituted on 1-7-1969 and along therewith Rule 8-A was added. These covered varied forms 'B', 'C', 'D' and 'E' suited to the deal. Right from the inception, the statutory forms of conveyance deeds have been kept substituted, added to or clauses therein modified from time to time to carry out the purposes of the Act. Details apart, however, in some form or the other, the right of the Estate Officer to cause re-entry and resumption on one event or the other has been kept preserved therein. Thus in cases where conveyance deeds came to be executed, the terms and conditions of the sale have been found embodied therein varying from transferee to transferee dependent on the time factor. In none of the respective conveyance deeds, which have so far remained as statutory forms, was ever any mention of S. 8-A or about any forfeiture. But that apart, in the present two cases, the terms and conditions of the deed have specifically been relied upon by the Chandigarh Administration to justify its action.

34. In Civil Writ Petition No. 2830 of 1970 in Annexure R. 1, the copy of the conveyance deed, cl. 11 preserves the right of resumption which is as under:—

"In the event of non-payment of any instalment on due date by the transferee it shall be lawful for the Estate Officer notwithstanding the waiver of any previous cause or right for re-entry, to enter into and upon the said site or building thereon or any part thereof and to re-possess, retain and enjoy the same as to his former estate and the transferee shall not be entitled to a refund of the purchase money or any part thereof or to any compensation whatsoever on account of such resumption."

Similarly in Civil Writ Petition No. 1149 of 1979, the Chandigarh Administration in its reply has relied on cl. 10 of the conveyance deed which is as under:—

"In the event of the breach by the transferee of any of the terms and conditions contained in this deed and to be performed and observed by him, it shall be lawful for the Estate Officer notwithstanding the waiver of any previous cause or right for re-entry to enter into and upon the said site or building thereon or any part thereof and to re-possess, re-

tain and enjoy the same as to his former estate and the transferee shall not be entitled to a refund of the purchase money or any part thereof or to any compensation whatsoever on account of such resumption."

In the Rules now in force, the statutory forms have a condition akin to the aforesaid clause 10 of the conveyance deed in Civil Writ Petition No. 1149 of 1979. The resumption contemplated in the deed is on breach of terms and conditions of the deed contradistinct to only breach of conditions on which S. 8-A is operatable.

35. So far as the case of Civil Writ Petition No. 2830 of 1970 is concerned, the resumption clause is rendered otiose because the total money stands paid. There is thus no right reserved for resumption on the breach of terms and conditions of the conveyance deed.

36. So far as Civil Writ Petition No. 1149 of 1979 is concerned, it is pertinently noticeable that neither in cl. 10 is any reference made to S. 8-A nor is there mention of any forfeiture. Cl. 10 embodying only covenantal resumption permits the Estate Officer to cause re-entrance over the property for breach of the terms and conditions and obedience is covenanted of rules and orders issued under the Act. Now the statutory deed itself has a clause widening the term 'transferee'. It is expanded in this way that the transferee includes his lawful heirs (permitted) successors, representatives, assigns, transferees, lessees and any person or persons in occupation of the said building with the permission of the Estate Officer. In Brij Mohan's case (AIR 1980 Punj & Har 236) (FB) (supra), the Full Bench had brought the tenant to the level of an assign and thus a transferee as defined in the Act. It is unnecessary to touch that view. Sufficedly, the tenant comes within the term "transferee" in the statutory deed and premises in his possession can be subjected to covenantal resumption. For that matter, any occupier, authorised or unauthorised, comes within the term 'transferee' under the deed. Thus the occupier of a property in Chandigarh, the title of which, whether in a site or a building, passed out to a citizen under written covenants and more so under the statutory deeds, is a transferee for purposes of such written instruments, and the instrument permitting, can be coerced to disciplined living as initially covenanted. The threat is twofold. For

breach of Rules, directions or orders — criminal prosecution; and for breach of covenants — deprivation of user of the property by resumption. It is a glaring fact that housing, whether in building process or inhabiting, is a problem and more so in Chandigarh town. Deprivation of possession of a property by way of such resumption, even for a brief moment, carries with it adequate sanction for disciplined construction activity and disciplined user. For such breach, as is patent, there is no authority under the deed for the imposition of any forfeiture, penalty or fine.

37. It is also noticeable that assuredness to the peaceful enjoyment of the rights and privileges conveyed under the statutory deed are dependent on a given state of circumstances to exist. When there is occurrence of change in such circumstances, the assuredness, by covenant, is subject to be withdrawn. It cannot even remotely terminate title automatically. It just gives to the Estate Officer (who by himself is not the vendor in his own designation) a right of re-entry as a corrective measure. To recall the dictum of the Supreme Court in Jagdish Chand Radhey Shyam's case (AIR 1972 SC 2587) (supra), the employment of the terms 'sale' and 'consideration money' in the deed settles the doubt that the transferee is the owner of the property so sold. But if the statutory deed which, under the rules he is required to execute in order to have clear title, carries with it incidence of resumption on breach of terms and conditions mentioned in the deed, then it cannot go beyond the right of reentry and have a different meaning.

38. Now patently there has appeared a gap. As noticed earlier, Sec. 8-A is a complete code for statutory resumption. The conveyance deed is a complete document conferring a right on the Estate Officer for reentry/resumption for breach of terms and conditions of the deed. All covenants stipulated in the sale deed are not necessarily conditions. A breach of a covenant as also of a condition confers right on the Estate Officer to cause reentry under the terms of the deed. It is not required to be answered here how he will effectuate this right. The sensitive question is whether on a breach of condition of sale at a time when the title vests in the transferee, can he undertake proceedings under Section 8-A and, while ordering resumption, impose penalty. As is easily discernible, the language of S. 8-A on this aspect is

at par with Section 9 since repealed. The Letters Patent Bench in L. P. A. No. 218 of 1965 had said in so many words that an order under S. 9 can only be passed in cases where the title still vests in the Government. The Supreme Court in Jagdish Chand Radhey Shyam's case (AIR 1972 SC 2587) (supra), while upsetting the said decision did not specifically overrule the interpretation so put by this Court on S. 9. Taking that as a precedent or even adopting it anew, I could have placed the same construction on S. 8-A, the language of which is by now very familiar. But adopting such construction would mean that S. 8-A would be short-lived and the Estate Officer is relegated to his civil remedies under the contract of sale on breach of terms and conditions of sale. This appears to me a glaring lacuna; an absurd and unjust situation. To say that nothing can be done about it is frustrating the purposes of the Act, as suggestive from the preamble, that is, the development and regulation of the planned city. And I may quote the words of Lord Denning, Master of Rolls, in *Nothman v. Barnet Council*, (1978) 1 WLR 220, advantageously:—

"The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the 'purposive approach'.....In all cases now in the interpretation of statutes we adopt such a construction as will 'promote the general legislative purpose' underlying the provision. It is no longer necessary for the judges to wring their hands and say: 'There is nothing we can do about it'. Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it — by reading words in it if necessary — so as to do what Parliament would have done, had they had the situation in mind."

Famous Jurist Synder in his Preface to Jurisprudence (1954) has also observed as under:—

"In deciding between the alternatives open to them within the contours of pre-existing laws, the judges try to make the just or the juster choice. Though it is more important that a rule of law should be settled than it should be theoretically correct, a trial is however a mere exercise in logical perfection and it should be unnecessary to remind ourselves that constitution and laws are designed to establish justice. If there were no rules, we would be governed by men and not

law. Order is not only Heaven's 1st law, order is the essence of jurisprudence. But rules are not the ultimate and, the main thing, that main thing is justice itself, the very right of the matter. The rules are only in aid of that main thing — the working tools whereby it is attained."

Bearing the aforesaid principles in mind, I would at the cost of causing strain and stretch to the language of S. 8-A facilitate covenantal resumption and read power for the Estate Officer to proceed thereunder. He would proceed under that section on a breach of one or more conditions of such sale and not on breach of terms simpliciter. What would be a condition of sale need not be answered for the present. Since the event arises after the entire consideration money stands paid and the title vesting in the transferee, the forfeiture in the event would shed its colour and be read as penalty to the extent of ten per cent of the total consideration money etc. paid. And this penalty as adjudged would be an action in personam to be exacted from the transferee in the event of his seeking restoration of possession of the property resumed. It is in this light that in *Amrit Sagar Kashyap's case* ((1980) 82 Pun LR 441) (supra), where the distinction between statutory and covenantal resumption did not arise, did the Bench proceed on the plane that the order of resumption was to visit the possessory aspect of ownership and for payment of the adjudged penalty. Such course is necessary and reasonable restriction on the right to property — a sacrifice at the altar of the City Beautiful. The Division Bench, it seems to me, arrived at the correct conclusion on this aspect of the matter but without having to expand the discussion as done herein.

39. In *Amrit Sagar Kashyap's case* ((1980) 82 Pun LR 441) (supra), the Division Bench had also held that the Estate Officer, after entering upon possession of the property, was required to hold it for and on behalf of the owner till such time that the alleged misuser was stopped and the consideration money reimbursed to the extent of forfeiture caused therefrom. It was held that the Estate Officer's powers were somewhat akin to a caretaker or a trustee to hold and use the property on behalf of the owner till such time that the penalty is paid and the site or building is restored to its permitted use. In the light of the foregoing discussion, as also the covenants of the statutory deed, this view of the Division

Bench needs rectification. In statutory resumption under S. 8-A, the Estate Officer quietens the title in his favour and disengages the Central Government from the deed. In that case he becomes the owner of the property resumed having been led to the wall to take the drastic action on the failure of the transferee to clear up the dues or observing other conditions of such sale. In that event, he is an owner in his own right. He resumes the site for the Central Government absolutely. The quintessence of this power is nothing else but again a right of re-entry since the property still remained belonging to the Central Government under Section 3 (3) of the Act which made Section 8-A. operatable. In covenantal resumption, no title is involved, but the Estate Officer effects the right of re-entry. Under the deed, he withdraws assuredness and uses the property resumed as part of his former estate and retains it as such. In this situation as well, the Estate Officer possesses the property by himself and is not to keep it held on behalf of the transferee. So in the case of both the resumptions, the Estate Officer does not hold the resumed property for and on behalf of the transferee and as a necessary corollary, he is neither a caretaker nor a person akin to a trustee. This view of the Division Bench should stand rectified.

40. On account of the foregoing discussion, the concept of resumption and interpretation of Section 8-A of the Act as done now is super-imposed on the view taken by the Division Bench in *Amrit Sagar Kashyap's case* (1980-82 Pun LR 441) (supra) which should be taken to be partially modified, explained and affirmed to the extent and manner aforedealt with. For the view now taken, neither are the examples quoted by the Chandigarh Administration in an earlier part of the judgment supportive of its view towards resumption worth being dealt with nor the numerous counter-examples which arise from the infraction of numerous rules and orders suggestedly attracting the processes for resumption under the statutory deeds as conditions. A single swallow does not make a summer. Examples and counter-examples though amuse, yet can be no effective guides in the interpretation of statutes. Those are apt food for the Legislature.

41. Now let us revert back to the facts of Civil Writ Petition No. 2830 of 1970. Despite the life given to the re-

sumption orders by the validation clause in Section 7 of the Parliament Act No. XVII of 1973, the provisions of the amending Act became retrospectively applicable from 1-11-1966, but S. 7 at once with effect from 9-4-1973. It was provided in S. 7 that whatever had been done under the principal Act shall, in so far as it is consistent with the provisions of the Principal Act as amended by the Amendment Act, be deemed to be as valid and effective as if such thing or action was done or taken under the principal Act as amended by the amending Act. Applying the principles above-noted and enunciated, as also S. 7 of Parliament Act No. XVII of 1973, the Estate Officer had no jurisdiction to pass an order of resumption resuming the site and forfeit the whole of consideration money on 13-7-1965. That order has to be treated as non est on the basis of Jagdish Chand Radhey Shyam's case (AIR 1972 SC 2587) (supra) and the amendment. The basic order having gone and not being one under S. 8-A even deeming, the same cannot merge in the appellate order of the Chief Administrator dated 20-5-1967, Annexure 'B', or even validate it. It cannot in isolation stand without the foundation of an order under S. 9 of the unamended Act deeming to be one under S. 8-A of the amended Act. On the same reasoning, order dated 29-1-1970, Annexure 'C', by the Chief Commissioner cannot be sustained. No right was alive under the conveyance deed for resumption on breach of certain conditions. Thus, this petition has necessarily to be allowed quashing the impugned orders, Annexures 'A', 'B' and 'C' respectively.

42. In Civil Writ Petition No. 1149 of 1979, a number of grounds were raised in the petition, yet the ones which surfaced were whether the resumption of the house of the petitioner was in violation of his fundamental rights under Articles 14 and 19 of the Constitution of India as also the ambit of S. 8-A of the Act. A procedural point whether the impugned orders were passed in utter violation of rules of natural justice without affording an opportunity of being heard to the petitioner and whether the service was sufficient in the eye of law were also mooted. The respondents, on the other hand, maintained that the service on the petitioner was legal and he was provided for an opportunity of being heard which he failed to avail. It was maintained that the resumption of the house did not violate the fundamental rights of

the petitioner guaranteed under the Constitution.

43. It is noteworthy that this petition came up for consideration before the Motion Bench on 11-4-1979. Notice of motion was issued. Finally it was admitted on 9-5-1979. As noticed in an earlier part of the judgment, fundamental rights under Articles 19 (1) (f) and 31 of the Constitution were available to the petitioner until 20-7-1979. Had the case been heard and decided on 9-5-1979, the day on which it was admitted, it is indisputable that the petitioner could invoke the applicability of those Articles. Can he do so now is the moot question. It is only of academic interest to answer this question for the way in which S. 8-A of the Act has been interpreted. All the same, the deletion of these Articles during the pendency of writ petition would not have an adverse effect to his cause on the assumption that we have to see if the relief was available to the petitioner on the day he invoked the extraordinary jurisdiction of this Court. Sustenance to the view is available in Rameshwar v. Jot Ram, 1975 Pun LJ 454 : (AIR 1976 SC 49), a decision rendered by the Supreme Court. It is held therein (at p. 52) :—

"The philosophy of the approach which commends itself to us is that a litigant who seeks justice in a perfect legal system gets it when he asks for it. But because human institutions of legal justice function slowly; and in quest of perfection, appeals and reviews at higher levels are provided for, the end product comes considerably late. But these higher Courts pronounce upon the rights of parties as the facts stood when the first Court was first approached. The delay of years flows from the infirmity of the judicial institution and this protraction of the Court machinery shall prejudice no one. *Actus curiae nominem gravabit* ('Acts of the Court shall prejudice no one' Latin for Lawyers: Sweet & Maxwell)."

Clause 10 of the deed has specifically been relied upon by the Chandigarh Administration to justify the order of resumption. Now here, proceedings under S. 8-A were undertaken by the Estate Officer whereby the site was resumed and ten per cent of the total amount of consideration money etc. was forfeited. The orders were maintained in the appellate and the revisional stages. Concededly, the entire price had been paid and the sale completed in the first instance. Thus for the view above taken,

no proceedings under S. 8-A could be initiated against the petitioner or his tenant towards statutory resumption and causing of forfeiture. The plea taken up by the official respondents was that there were breaches of conditions of the sale only, which only authorised them to initiate proceedings for covenantal resumption. Thus the present action and orders of the respondents are wholly without jurisdiction and thus deserve to be quashed, all the more when I am not satisfied about the opportunity granted to the petitioner to show cause, as also if availed of to what benefit. It may, however, be made clear that it would be open to the respondents to undertake covenantal resumption if permissible to them in accordance with the law laid down heretofore.

44. For the foregoing discussion, both petitions (C. W. P. Nos. 2830 of 1970 and 1149 of 1979) are allowed and the respective impugned orders therein are hereby quashed. The re-examination of the view in *Amrit Sagar Kashyap's case* ((1980) 82 Pun LR 441) (supra) being intra-Court, there would be no order as to costs.

S. S. SANDHAWALIA, C. J.:— 45. Whether the resumption designedly envisaged by the legislature inserting S. 8-A in the Capital of Punjab (Development and Regulation) Act, 1952, connotes in essence a divestiture of title, and not merely a temporary divesting of possession only is one of the significant questions, which has necessitated this reference to the Full Bench. Before us, the very constitutionality of the aforesaid S. 8-A was also made the subject-matter of serious challenge. Equally in issue is the discordance of views in the Division Bench judgment in *Amrit Sagar Kashyap v. Chief Commissioner U. T. Chandigarh* (1980) 82 Pun LR 441, on one hand and the Full Bench decision in *Brij Mohan v. Chief Administrator*, (1980) 82 Pun LR 621 : (AIR 1980 Punj & Har 236), on the other.

46. The issues aforesaid arise against the panoramic backdrop of the very concept and the subsequent rise of the planned city of Chandigarh (which now vies for the aesthetic claim of being the City Beautiful), now the joint capital of the sister States of Punjab and Haryana. In the broader perspective the root question is, whether the ultimate sanction of the resumption of sites and buildings (including within its sweep the divestiture of title) can be made available to the authority for the larger purpose of the

crying need of planned urban development in order to prevent the mushroom growth of slums, or the haphazard accumulation of what has been rightly termed as concrete jungles.

47. As is manifest, the core questions herein are so pristinely legal that it may well be unnecessary to enter the thicket of facts of the two individual cases before us. This is the more so, because I would propose that their ultimate decision be left to the referring Division Bench in the light of the reply to the questions before the Full Bench. Therefore, a skeletal reference to the facts in *C. W. P. 2830 of 1970 (Shri Ram Puri v. Chief Commissioner, Chandigarh)* suffices. The petitioner, therein purchased a shop-cum-flat site in public auction way back on March 24, 1957 for a sum of Rupees 10,600/- and after payment of the Full price thereof, a deed of conveyance was executed four years later on July 11, 1961. The petitioner asserted that having paid the full price of the site, he had become the full owner in possession of the property irrespective of any condition, whilst the stand of the respondent-Chandigarh Administration was that these ownership rights were clearly subject to the covenants contained in the deed of conveyance, including that of raising a construction on the site within a prescribed time. The petitioner committed a breach of this condition by not building thereon. By his order dated July 13, 1965, the Estate Officer resumed the site and forfeited the whole of the money paid under S. 9 (since repealed) of the Capital of Punjab (Development and Regulation) Act, 1952 (hereinafter called 'the Act'), because there had been a breach of R. 12 of the Chandigarh Sale of Sites Rules, 1962, for the building not having been completed within time. The petitioner successfully appealed to the Chief Administrator, Chandigarh, who allowed the same on May 20, 1967 (Annexure 'B') and set aside the order of resumption subject to the condition that the building be completed within a period of six months from that date. The petitioner again failed to fulfil the condition imposed by the Chief Administrator and the building was not completed within the time allowed. The Estate Officer proceeded to resume the plot and listed it for public auction. The petitioner again approached the Chief Commissioner, but by his order dated Jan. 29, 1970 (Annexure 'D'), he declined to interfere with the orders of the Estate Officer or to grant any further time for

construction, holding the revision petition to be time barred. Nevertheless, he granted a partial relief to the petitioner that out of the sum of Rs. 10,600/- paid as price, he forfeited only an amount of Rs. 600/- and ordered the balance of Rupees 10,000/- to be refunded to the petitioner. It is to challenge these orders that the present writ petition has been preferred.

48. It is not only apt but is indeed a pre-requisite herein to view both the constitutionality as also the construction of S. 8-A of the Act against the background of its legislative history. When originally enacted in 1952, the Act did not contain this provision and its legislative parent was S. 9 of the Act. In Jagdish Chand Radhey Shyam v. State of Punjab, LPA 218 of 1965, decided on the 21st Feb. 1966, S. 9 of the Act was challenged as being ultra vires of Art. 14 of the Constitution of India but this contention was repelled and the appeal dismissed. However, on further appeal their Lordships in Jagdish Chand Radhey Shyam v. State of Punjab, AIR 1972 SC 2587 reversed the High Court judgment and struck down S. 9 as being violative of Articles 14 and 19 (1) (f) of the Constitution of India. It was thereafter that the legislature effected the necessary statutory changes by amending S. 3 of the Act and inserting S. 8-A in its present form whilst altogether deleting Section 9 therefrom. That a conscious attempt to conform to the final Court's dictum was made in order to remove the defects which had attracted the vice of unconstitutionality is patent from the following statements of objects and reasons for Act No. 17 of 1973:—

"The Supreme Court in Jagdish Chand Radhey Shyam v. State of Punjab, (C.A. (contd. on col. 2)

Earlier provisions

Section 3. (1) The State Government may sell, lease or otherwise transfer, whether by auction, allotment or otherwise, any land or building belonging to the Government in Chandigarh on such terms and conditions as it may, subject to any rules that may be made under this Act, think fit to impose,

(2) The consideration money for any transfer under sub-section (1) shall be paid to this State Government in such manner and in such instalments and at such rate of interest as may be prescribed,

No. 1099 of 1967) declared S. 9 of the Capital of Punjab (Development and Regulation) Act, 1952 (Punjab Act XXVII of 1952), as in force in the Union Territory of Chandigarh, as being violative of Articles 14 and 19 (1) (f) of the Constitution and held that the Central Government is not entitled to resume the site or building transferred under Sec. 3 of that Act, or to forfeit the money paid in respect of such transfer under the said S. 9. The main ground on which the Supreme Court had based its conclusions was that there is nothing in the Act to guide the exercise of power by the Government as to when and how any of the methods for recovering the amount of consideration in arrears specified in Sections 3, 8 and 9 of the Act, will be chosen.

2. The decision of the Supreme Court has created several practical difficulties in administering the provisions of the Act. Further, the situation created by the decision of the Supreme Court is already having an adverse effect on the regulation and development of the entire city of Chandigarh, which has been planned and developed with great care and at considerable expense over the past several years. It is, therefore, essential to remove the objections pointed out by the Supreme Court by amending the Act retrospectively from the 1st of November, 1966, being the date on which the Union Territory of Chandigarh was formed and to validate the actions taken under the impugned provisions of the Act.

3. The Bill seeks to achieve the aforesaid objectives."

In conformity with the above the requisite changes were made in the statute and it is apt to juxtapose the earlier and the later provisions of the Act:—

Later provisions

Section 3 (1) subject to the provisions of this section, the Central Government may sell, lease or otherwise transfer, whether by auction, allotment or otherwise, any land or building belonging to the Government in Chandigarh on such terms and conditions as it may, subject to any rules that may, be made under this Act, think fit to impose.

(2) The consideration money for any transfer under sub-sec. (1) shall be paid to the Central Government in such manner and in such instalments and at such rate of interest as may be prescribed,

(3) The unpaid portion of the consideration money together with interest or any other amount, if any, due to the State Government on account of the transfer of any site or building under sub-sec. (1) shall be a first charge on that site or building, as the case may be; and notwithstanding anything contained in any other law for the time being in force, no transferee shall, except with the previous permission in writing of the Estate Officer be entitled to sell, mortgage or otherwise transfer (except by way of lease from month to month) any right, title or interest in the site or building transferred to him under sub-sec. (1) until the amount which is a first charge under this sub-section has been paid in full to the State Government.

Section 9 in the case of non-payment of consideration money or any instalment thereof on account of the transfer of any site or building under S. 3 or of any rent due in respect of the lease of any such site or building or in case of the breach of any other conditions of such transfer or breach of any rules made under this Act, the Estate Officer may, if he thinks fit, resume the site or building so transferred and may further forfeit the whole or any part of the money, if any, paid in respect thereof.

(3) Notwithstanding anything contained in any other law for the time being in force, until the entire consideration money together with interest or any other amount, if any due to the Central Government on account of the transfer of any site or building, or both, under sub-sec. (1) is paid, such site or building, or both, as the case may be, shall continue to belong to the Central Government.

8-A (1) if any transferee has failed to pay the consideration money or any instalment thereof on account of the sale of any site or building or both, under S. 3 or has committed a breach of any other conditions of such sale, the Estate Officer may, by notice in writing, call upon the transferee to show cause why an order of resumption of the site or building, or both, as the case may be, and forfeiture of the whole or any part of the money, if any, paid in respect thereof which in no case shall exceed ten per cent of the total amount of the consideration money, interest and other dues payable in respect of the sale of the site or building, or both should not be made.

(2) After considering the cause, if any, shown by the transferee in pursuance of a notice under sub-sec. (1) and any evidence he may produce in support of the same and after giving him a reasonable opportunity of being heard in the matter, the Estate Officer may, for reasons to be recorded in writing, make an order resuming the site or building or both, as the case may be, so sold and directing the forfeiture as provided in sub-sec. (1), of the whole or any part of the money paid in respect of such sale."

49. In the wake of the aforesaid historical backdrop one must first inevitably advert to the challenge raised against the constitutionality of S. 8-A of the Act. Learned counsel for the peti-

tioner had pressed the same primarily on the anvil of Article 19 (1) (f) of the Constitution. However, since some veiled rumblings on the basis of Art. 14

were also sought to be raised, it is best to dispose them of at the outset.

50. It is manifest that the attack on Section 8-A on the basis of Article 14 is only a hang over of the striking down of the earlier Section 9 of the Act by their Lordships of the Supreme Court in Jagdish Chand Radhey Shyam's case (AIR 1972 SC 2587) (supra). On the analogy of the observations made therein it was still sought to be suggested that the present provision of Section 8-A continued to suffer from the same vice, despite the deletion of Section 9 from the statute and the amendments made in Sections 3 and 8 of the Act as also the insertion of the present provision therein.

51. That the aforesaid tenuous submission is now wholly untenable is manifest from a bare reference to the observations of their Lordships in Jagdish Chand Radhey Shyam's case (AIR 1972 SC 2587 at p. 2590) itself. Therein Section 9 was struck down basically on the ground that there were two procedures available to the authority — the one being more drastic than the other and no guideline had been provided for resort to either one of them. It was observed —

"..... This feature that the Government can proceed either under the ordinary law of the land or under the 1952 Act shows that there is discrimination. There is nothing in the statute to guide the exercise of power by the Government as to when and how one of the methods will be chosen."

It is obvious that in essence the unconstitutionality was plainly rested on the ratio of Northern India Caterers (Private) Ltd. v. State of Punjab, AIR 1967 SC 1581 which still held the field.

52. At the very outset it may be noticed that the Northern India Caterers' case was specifically overruled by their Lordships in Maganlal Chhagganlal (P.) Ltd. v. Municipal Corporation of Greater Bombay, AIR 1974 SC 2009. Consequently that line of reasoning is no longer valid and the very corner stone on which the alleged unconstitutionality of the earlier Section 9 rested has vanished.

53. Now apart from the above the subsequent amendments introduced in Sections 3 and 8 as also the deletion of Section 9 altogether and its substitution by Section 8-A of the Act was designed to and has undoubtedly cured the infirmities which their Lordships had discerned in the previous provisions in Jagdish Chand Radhey Shyam's case (AIR 1972 SC 2587). By these legislative changes the

charge on the transferred site has been abolished and similarly the clog on the transfer to the third party stands removed. Further there are now in-built guarantees and safeguards provided in Section 8-A itself by ensuring a reasonable opportunity to show cause against any proposed resumption or forfeiture. A further limitation that forfeiture in no case shall exceed 10 per cent of the total amount of consideration money has been itself laid down therein. The Estate Officer is obliged to record his reasons after giving adequate opportunity including the right to lead evidence to the transferee before passing an order adverse to his interest. Further the statute and the rules thereunder provide for an appeal and revision against such orders. Therefore it is now vain to contend that Section 8-A suffers from the vice of discrimination or in any way violates the equality clause under Article 14 of the Constitution.

54. In fairness to Mr. Kuldip Singh, the learned counsel for the petitioner, it must be noticed that in the ultimate analysis he candidly conceded his inability to raise any meaningful challenge to the vires of Section 8-A on the basis of Article 14. The contention which he ultimately pressed in all seriousness was with regard to the violation of Article 19 (1) (f) of the Constitution. Though counsel shrank from the brink of contending that every resumption (in the sense of being a divestiture of both ownership and possession) would necessarily be violative of the right of property because of its rigour, he nevertheless contended that normally such a power of resumption must be construed as irrational or unreasonable when the evil sought to be corrected could be prevented by a milder remedy. It was pointed out that the Act gives a wide variety of sanctions against the infringements of the Act and the Rules to the authorities ranging from a mere fine under Sections 13 and 14 on the one hand as against the ultimate power of resumption of title and possession of the property itself. Such an amplitude of unguided powers in the authority, according to the learned counsel, was unreasonable and violative of the right to property. In nutshell the argument is that the resumption of title and possession was a sanction so rigorous that the Courts must presume it to be violative of the fundamental right under Art. 19 (1) (f) of the Constitution.

55. At the very threshold Mr. Anand Swaroop the learned counsel for the respondent-Chandigarh Administration took up the stand that the fundamental right to property both under Article 31 and under Article 19 (1) (f) having now been taken away in view of the repeal of the aforesaid provisions by the Forty-Fourth amendment, it was no longer permissible to permit a challenge to the vires of Section 8-A on the basis of the aforesaid provision. With considerable plausibility it was contended that the constitutionality of the provision has to be tested on the anvil of the Constitution as it exists at the time of the challenge. The submission was that it would be incongruous today to strike down Section 8-A on the basis of Article 19 (1) (f) of the Constitution which is no longer on the statute book. Counsel also went to the extreme length of contending that in the peculiar context the repeal of the fundamental right to property under Articles 31 and 19 (1) (f) must be deemed to be retrospective.

56. In fairness to Mr. Anand Swaroop, it must be conceded that his stand is not devoid of plausibility on principle despite the fact that learned counsel for the parties were unable to cite any precedent for or against the proposition. However, because of the fact that I am of the considered view (for reasons which appear hereafter) that Section 8-A is in no way violative of Article 19 (1) (f) it is both unnecessary and academic to finally pronounce on the merits of this stand taken by Mr. Anand Swaroop on behalf of the respondent-Chandigarh Administration.

57. Coming to grips to the challenge under Article 19 (1) (f) it seems plain that the issue must be viewed within the authoritative guidelines in this context laid way back by the final Court itself in *Jyoti Pershad v. Administrator for the Union Territory of Delhi*, AIR 1961 SC 1602. Therein also the analogous provisions of the Slum Areas (Improvement and Clearance) Act 1956 intended for the planned development of the National Capital were pointedly assailed on the basis of the fundamental right to property. Repelling the attack and upholding the constitutionality of Section 19 of the Slum Areas (Improvement and Clearance) Act 1956, their Lordships spelt out the following two guidelines (amongst others) for approaching the issue of constitutionality in this context—

"(i) It is manifest that the above rule would not apply to cases where the legislature lays down the policy and indicates

the rule or the line of action which should serve as a guidance to the authority. Where such guidance is expressed in the statutory provision conferring the power no question of violation of Article 14 could arise, unless it be that the rules themselves or the policy indicated lay down different rules to be applied to persons or things similarly situated. Even where such is not the case, there might be a transgression by the authority of the limits laid down or an abuse of power, but the actual order would be set aside in appropriate proceedings not so much on the ground of a violation of Art. 14, but as really being beyond its power.

(ii) It is not, however, essential for the legislation to comply with the rule as to equal protection, that the rules for the guidance of the designated authority, which is to exercise the power or which is vested with the discretion, should be laid down in express terms in the statutory provision itself".

Further elaborating the matter in the particular context of Article 19 (1) (f) it was observed as follows:—

".....Where the legislature fulfils its purpose and enacts laws, which in its wisdom, are considered necessary for the solution of what after all is a very human problem the tests of 'reasonableness' have to be viewed in the context of the issues which faced the legislature. In the construction of such laws and particularly in judging of their validity the Courts have necessarily to approach it from the point of view of furthering the social interest which it is the purpose of the legislation to promote, for the Courts are not, in these matters, functioning as it were in vacuo, but as parts of a society which is trying by enacted law to solve its problems and achieve social concord and peaceful adjustment and thus furthering the moral and material progress of the community as a whole,"

and again

".....But if, as we have held earlier, the Act by its preamble and by its provisions do afford a guidance to the 'competent authority' by pointing out the manner in which the discretion vested in him should be exercised, the provision as to an appeal assumes a different significance. In such cases, if the 'competent authority' oversteps the limits of his powers or ignores the policy behind the Act and acts contrary to its declared intention, the appellate authority could be invoked to step in and correct the error. It would, therefore, be a provision for

doubly safeguarding that the policy of the Act is carried out and not ignored in each and every case that comes up before, 'the competent authority'. The procedure laid down by the Act for the hearing by the 'competent authority' and the provision for enquiry, renders the 'competent authority' a quasi-judicial functionary bound to follow fixed rules of procedure and its orders passed after such an enquiry are to be subject to appeals to the Administrator. We consider these safeguards very relevant for judging about the reasonableness of the restriction. In considering these matters one has to take into account the fact—a fact of which judicial notice has to be taken—that there has been an unprecedented influx of population into the capital, and in such a short interval, that there has not been time for natural process of expansion of the city to adjust itself to the increased needs."

58. At the very threshold one has to remind oneself that the fundamental right under Article 19 (1) (f) to acquire, hold and dispose of property is not an absolute right. It can be hedged in by the imposition of reasonable restrictions on its exercise in the interest of general public. Apart from this express limitation imposed by the Constitution itself, binding precedents of the Final Court have authoritatively highlighted that in this context considerations of larger, social and public purpose are germane to the construction of this Article. The crux of the matter, therefore, is whether the restrictions spelled out by Section 8-A of the Act on the right of property are reasonable and in public interest?

59. Now it seems plain from the ratio of *Jyoti Parshad's case* (AIR 1961 SC 1602) (supra) that the challenge to the constitutionality of a statute on the anvil of Article 19 (1) (f) is not merely to be judged from the particular provisions of the section alone. It is permissible and indeed desirable for the Court to take judicial notice of the facts which led to the enactment of the statute and the avowed objects and reasons thereof. Again the preamble to the Act may provide a clue to its interpretation. Further the provisions of the impugned section along with the other supplementary provisions of the Act as also the statutory rules made thereunder, have all to be viewed as a whole for testing its constitutionality.

60. Applying the aforesaid guidelines one cannot lose sight of the backdrop against which the present Act and its

predecessor provisions were enacted. The partition of the country in 1947 led to the severance of the erstwhile province of Punjab into East Punjab in India and West Punjab in Pakistan. The human holocaust that followed this division resulting in uprooting of millions of people on either side of the border is indeed too well known and recent to need any great elaboration. Not only very large sections of the people in East Punjab were thereby rendered homeless, but the State also lost its famed and legendary capital of Lahore, whose origin went back to times immemorial. The city of Lahore had always been to the province of Punjab what Paris has been to France. It was against this background of the State of East Punjab being without a permanent capital of its own, that the idealist statesman and first Prime Minister of India conceived his favourite dream child of an altogether new capital for the State of East Punjab. The choice of any of the existing cities was deliberately avoided, and a wholly virgin site against the backdrop of Shivalik foothills was chosen. This idea was concretised by an equally great mind in the field of architecture Monsieur Le 'Carbousier. All this is a pointer to the fact that the larger purpose was to create a model capital city unshackled by any existing construction or constructions and what was more to create it quickly. Both the urge and the urgency of a capital city are writ large in the Capital of Punjab (Development and Regulation) Act, 1952 (President's Act No. 5 of 1952). The brief objects and reasons thereof underscore the aforesaid facts in the following terms:—

"The construction of the new Capital of the Punjab at Chandigarh is in progress. It is considered necessary to vest the State Government with legal authority to regulate the sale of building sites and to ensure that the purchasers construct buildings in accordance with by-laws and generally observe the conditions of sale. It is necessary also to provide for the maintenance of the amenities provided in the Capital before a properly constituted local body takes over the administration of the City. The Capital of Punjab (Development and Regulation) Act, 1953, seeks to carry out the above objects."

61. On December 19, 1952, the President's Act was repealed and its provisions were re-enacted with some modification in the present Capital of Punjab (Regulation and Development) Act, 1952. The

concern of the legislature for the planned development and regulation of the new capital of the city is again manifest from the following objects and reasons of the supplementary legislation in the shape of the Punjab New Capital (Periphery) Control Act, 1952:—

"The Punjab Government are constructing a New Capital named "Chandigarh". The Master Plan providing for the future extension of the Capital will extend over a much greater area than the area acquired so far, for the construction of the first phase of the Capital. To ensure healthy and planned development of the new city it is necessary to prevent growth of slums and ramshackle construction on the land lying on the periphery of the new City. To achieve this object it is necessary to have legal authority to regulate the use of the said land for purposes other than the purposes for which it is used at present."

62. It is obvious from the above as also from the provisions of the Punjab New Capital (Periphery) Control Act, 1952, that not only was the legislature deeply concerned about the regulated planned development within its new capital city, but with a larger foresight had sought to prevent any haphazard growth or the creation of slums and ramshackle construction even on the periphery of the new town extending to a distance of five miles on all sides from the outer boundary of the capital.

63. Reference in this context is again called to the preamble of the Act, which is in the following terms:—

"An act to make certain provisions in respect of the development and regulation of the Capital of Punjab."

64. It is in the above setting along with the other supplementary provisions of the Act as also the Punjab Capital (Development and Regulation) Building Rules, 1952, framed thereunder, that the constitutionality of Section 8-A has to be viewed in the larger perspective.

65. In repelling the attack on the constitutionality of Section 3-A, Mr. Anand Swaroop, learned counsel for the Chandigarh Administration rightly highlighted the fact that the entire Act was purposefully directed to provide a reasonable social control of the urbanisation visualised by the creation of an altogether new capital city for the State from scratch. The threefold pre-eminent ideas underlying the same were the need and incentive to create an altogether new town at a place

where none existed and that too within the shortest possible time, and further to ensure that it conformed to an ideal concept of a planned city as against the haphazard urbanisation or the mushroom growth of slums which in the ultimate analysis can even strangle an existing town to extinction. The counsel submitted that it was to effectuate these purposes that the ultimate civil sanction by way of resumption of sites and buildings in case of the grossest violation of the provisions of the Act or the rules framed thereunder has to be viewed in a broader perspective and this is nothing but a reasonable restriction on the right of property.

66. Adverting specifically to Sec. 8-A the restrictions for the exercise of the powers vested thereby exist not only in the express provision thereof, but are equally discernible from the larger purpose of the Act, its preamble as also the other sections thereof when read with the statutory rules framed thereunder. The larger purpose of the planned development and regulation of the new capital city, as spelled out in the preamble of the Act, is the fixed Pole Star to which the ultimate exercise of the power of resumption under Section 8-A is hitched. What deserves highlighting herein is that this power of resumption under Section 8-A is merely a discretionary and an enabling power. The statute does not lay down any mandate that it must necessarily be exercised in a particular situation. In sub-section (1) thereof it is first in the discretion of the Estate Officer that he may issue a notice to show cause why an order of resumption of site or building may not be made. Equally under sub-section (2) after considering the cause shown against such a notice it is optional for the Estate Officer to order such resumption or not. The word used in both the sub-sections is 'may' and not 'shall'. Mr. Anand Swaroop rightly pointed out that this power of resumption is indeed the last arrow in the quiver of a number of sanctions to enforce the planned development and the regulation of the capital and to be only resorted to in a situation commensurate with its necessary exercise. To put it in plain language it is not mandatory for the authority to order resumption, but only in extreme cases it enables it to do so when the other powers and sanctions to enforce the purpose of the Act have failed, or in the circumstances it is the only remedial power which can be applied. Therefore, it is farcical and imaginary to assume that the authority

would necessarily use this power arbitrarily and whimsically and that they will use this hammer to swat a fly. As Section 8-A now stands (in sharp distinction to the deleted Section 9) it mandatorily requires a notice to show cause to the person concerned whenever the exercise of this power is contemplated. Not only is such a person entitled to have a reasonable opportunity of contesting such a notice, but the law in terms confers on him the power to lead evidence in support of his stand. The mandate as laid on the Estate Officer is to record his reasons in case he orders resumption. Apart from these inbuilt safeguards under Section 8-A, it is the statutory rules which provide for an appeal against the order of resumption by the Estate Officer, to the Chief Administrator. It is thereafter that the rules zealously provide for a revision to the Chief Commissioner, who is the executive head of the Union Territories. Obviously in a proper case the right to approach the Court under Article 226 of the Constitution of India is equally open.

67. Reference must also be made to the provisions of Sections 4, 5, 6, 13 and 15 of the Act, which provide a variegated armoury of sanctions and penalties against the violation of the Act, rules or the conditions of allotment. It seems to be rather writ large in the statute itself that normally resort would be made to these provisions before applying the ultimate sanction spelled out in Section 8-A. In the last analysis even if an order of resumption has been made, Rule 11-D which has been recently added to the rules must be adverted to which is in the following terms:—

"11-D. (1) Where a site has been resumed under Section 8-A of Act No. XXVII of 1952 for any reasons, the Estate Officer may on an application, retransfer the site to the outgoing transferee, on payment of an amount equal to 10 per cent of the premium originally payable for such property or one-third of the difference between the price paid and its value at the time when the application for transfer is made whichever is more:

xx xx xx."

It is obvious that this rule tampers the rigour and softens the strictness of resumption by making it possible to offer the same property to the original transferee on certain liberal terms.

It is well-settled that the taint of unconstitutionality does not attach to a provision of law merely because there may be

remote possibilities of the abuse of power conferred thereby. In such a situation it is only the arbitrary or the wrongful exercise of the power which can be struck down but not the statute itself.

68. In conclude, in the larger conspectus of the purposes of the Act itself, its preamble; the specific provisions of Section 8-A; the setting in which it is placed along with the supplementary sections of the Act and the rules framed thereunder; it has to be held that the enabling power of resumption conferred thereby is only a reasonable restriction on the fundamental right to hold, acquire and dispose of property and is, therefore, in no way violative of Article 19 (1) (f).

69. Before parting with this aspect of the constitutionality of the provision it is necessary to recall that soon after the insertion of Section 8-A in the Act its vires were the subject matter of strenuous challenge in C.W.P. No. 2649 of 1974 —S. P. Gandhi v. Union of India, decided on 13th of August, 1975. The Division Bench, however, concluded as follows:—

"..... There is no infringement of the right to hold property by Ujagar Singh, respondent, Section 8-A of the Act is not violative of Article 19 of the Constitution of India and the contention of the learned counsel for the petitioner is rejected as devoid of force."

and again

"..... In view of the law laid down in Maganlal Chhagganlal (P.) Ltd. v. Municipal Corporation of Greater Bombay, AIR 1974 SC 2009, the provisions of Section 8-A are not violative of Article 14 of the Constitution and, therefore, the contention of the counsel for the petitioner is rejected."

For the relatively elaborate reasons recorded in the earlier part of the judgment we are in respectful agreement with the aforesaid ratio in S. P. Gandhi's case, which is hereby affirmed.

70. Having upheld the constitutionality of Section 8-A one must now advert to its true nature and scope. Herein the core question is the import of the word 'resumption' which indeed has primarily necessitated this reference to the Full Bench. Does it connote in essence a divestiture of title? Or, does it mean, (as canvassed on behalf of the petitioner) only a temporary divesting of possession in favour of a trustee who is obliged to restore the same if the default is later rectified.

71. Before one examines the aforesaid issue critically on principle and the speci-

fic language of Section 8-A, it appears to me at the very threshold that the matter is covered by authoritative precedent. Judicial discipline, therefore, demands that the question being not *res integra* the same must be viewed in the light of existing precedent. Reference in the connection, therefore, must first be made to the Full Bench judgment in *Brij Mohan v. Chief Administrator*, (1980) 82 Pun LR 621: (AIR 1980 Punj & Har 236). Therein also the width of Section 8-A of the Act had specifically fallen for consideration. The longstanding view in this Court earlier was that resumption in essence involved a divestiture of title so much so that the person aggrieved thereby was only the owner in whom such title vested and not the tenant or any other person who may have some possessory rights with regard thereto. This view was challenged on the ground that resumption under the statute in essence involved both a divestiture of title and equally of possession and, therefore, both the owner and his tenant in lawful possession would be affected by the same and, therefore, would be entitled to a hearing. The Full Bench reproduced Section 8-A in extenso and adverted in depth to its true ambit both on principle and the existing authorities and then concluded as follows (at pp. 240, 241):—

"The proposed order of resumption has dual consequences; (i) the depriving of ownership right in the site or building which concerns only the owner of the site or building; and (ii) the deprivation of the lessee of his lawful possession thereof. Such being the consequences of the order of resumption both lessee and his lessor would be affected by the order and would thus be entitled to be heard before such an order is passed".

The aforesaid conclusion appears to me as both clear and categorical. That being so it is not justifiable to presume that the words of the Full Bench do not mean what they specifically say in terms. As already noticed the question was squarely before them and their adjudication thereon is clearly one of the *ratio decidendi* therein. Before us no meaningful challenge to the correctness of the above view could be raised. Apart from being bound by the said judgment I am equally and unreservedly in agreement with the said view. On existing precedent, therefore, it is authoritatively settled that resumption under Section 8-A means clearly the divestiture of title of a building or the site as the case may be.

72. However, there is direct discordance with the aforesaid view in the following observations of the later Division Bench in *Amrit Sagar Kashyap's case* (1980-82 Pun LR 441) (supra):

"..... The stoppage of user contemplated by resumption will have the effect of the Estate Officer entering upon possession of the property, and to hold it, for and on behalf of the owner till such time that the alleged misuser was stopped and the consideration money reimbursed to the extent of the forfeiture caused therefrom. It appears to us that the power of resumption conferred on the Estate Officer is somewhat akin to that of a caretaker or trustees, to hold, and use the property on behalf of the owner, till such time that the penalty is paid and the site or building is restored to its permitted use. It is only on this reasoning that Section 8-A can be called as a measure in furtherance of the development, regulation and maintenance of the planned city of Chandigarh."

It seems to be clear that the aforesaid view is in direct and headlong conflict with what the Full Bench had earlier laid down in *Brij Mohan's case* (AIR 1980 Punj & Har 236). This line of reasoning, therefore, cannot hold the field and must give way to the weight and authority of the Full Bench dictum. In *Jai Kaur v. Sher Singh*, AIR 1960 SC 1118, their Lordships have unequivocally laid down as follows in such a situation (at pp. 1122, 1123):—

"..... It is true that they did not say in so many words that these cases were wrongly decided, but when a Full Bench decides a question in a particular way every previous decision which had answered the same question in a different way cannot but be held to have been wrongly decided. We had recently occasion to disapprove of the action of a Division Bench in another High Court in taking it upon themselves to hold that a contrary decision of another Division Bench on a question of law was erroneous and stressed the importance of the well-recognised judicial practice that when a Division Bench differs from the decision of a previous decision of another Division Bench the matter should be referred to a larger Bench for final decision. If, as we pointed out there, considerations, of judicial decorum and legal propriety require that Division Benches should not themselves pronounce decisions of other Division Benches to be wrong, such considerations should stand

even more firmly in the way of Division Benches disagreeing with a previous decision of the Full Bench of the same Court."

In the light of the aforesaid authoritative enunciation it has necessarily to be held that on the doctrine of precedent itself Amrit Sagar Kashyap's case does not lay down the law correctly.

73. Despite the above it nevertheless becomes necessary to examine (dehors any precedent) the observations in Amrit Sagar Kashyap's case (1980-82 Pun LR 441) because the specific point of reference to the Full Bench is with regard thereto and further because of the exhaustive adherence to that view (albeit with considerable modification) by my learned brother Punchhi, J.

74. Now what is the true import and width of the word 'resumption' designedly used by the legislature in Sec. 8-A? It goes without saying that the same must be construed in the context in which it is placed for the larger purposes of the Act and not in abstruse isolation. The tyranny of an overly literal construction has to be avoided and it is well to remind oneself of the following picturesque words of Krishna Iyer J., in *Subhash Chandra v. State of U. P.*, (1980) 2 SCC 324: (AIR 1980 SC 800 at p. 801):—

"So, dictionary versus dictionary leaves the matter at large, apart from the plain function of the court to gather the meaning, not under the dictatorship of dictionaries but guided by the statutory purpose without being deflected by logomachic exercises, the mischief to be countered and the public interest to be advanced."

75. Nevertheless some reference to the authoritative dictionary meaning of the word is inevitable though plainly enough it cannot be conclusive. The Webster's Third New International Dictionary traces the origin of the word 'resumption' from its latin parents of 're' meaning 'back' and 'sume' 'to take', i.e. to take back whatever has been given.

Resume: to take up again, take back, to take back to oneself (on default, the grantor does not automatically resume title); go back to using; to take possession again.

Resumption: the taking again by the Crown or other authority of lands or tenements previously granted (as on the ground of false suggestions or other errors.).

Similarly in the *Corpus Juris Secundum* 77 the undermentioned meaning is given:—

"To begin anew, to take again; to take back; to take up again after an interruption."

It would thus be plain that in essence 'resumption' therefore, means that whatever right, interest or grant is given the same is taken back. As a term of art, therefore, it means the restoration of status quo ante. The use of the word 'resumption'; therefore, implies that the parties revert to the same position as existing at the time of the original giving away. Therefore, it would follow that where initially only title has passed its resumption would involve a divestiture of title and on the other hand where only possession has passed, resumption would necessarily imply a divestiture of possession.

76. Again an analysis of the provisions of Section 8-A itself which is relevant for the purpose would show that the sanction of resumption was attracted only on the existence of three alternative pre-conditions:—

(i) the failure to pay the consideration money for the sale of any site or building;

(ii) failure to pay any instalment due of the aforesaid consideration money; and

(iii) breach of any other condition of the sale.

Once any one of these conditions stood satisfied (it bears repetition that the use of this power is not mandatory) then an enabling power was conferred on the Estate Officer to resort to two distinct penalties, that is, the resumption of the site and building as such, or secondly the forfeiture of the consideration money, interest and other dues payable in respect of the sale but limited to only 10 per cent thereof. It is thus manifest that the statute provides for two distinct sanctions, namely, the divestiture of title and possession of the transferee with regard to the site or building as such and the forfeiture up to 10 per cent of the consideration money paid. That these are and were meant to be separate penalties is manifest from the distinct terminology advisedly used by the legislature, namely, resumption on the one hand and forfeiture on the other. On this aspect there appears to be little dispute and in fact this was virtually the common stand of the parties.

77. That resumption both under the original Section 9 and its successor provision of Section 8-A connoted the divestiture of title was the consistent view

from the original enactment in 1952 right up to the final seal of approval set thereon by the Full Bench in Brij Mohan's case (AIR 1980 Punj & Har 236). Equally it is worth recalling that a similar power to resume was also conferred by Section 10 of the Punjab Urban Estates Development and Regulation Act, 1964. Under the statute also the meaning attributed to that section invariably was that it took away clearly the title of the owner. No earlier judgment under any one of these provisions could be cited which had ever taken a contrary view. In this unbroken line of precedent extending over three decades the discordant note was struck for the first time in Amrit Sagar Kashyap's case (1980-32 Pun LR 441) where the view has been taken that resumption under Section 8-A means only the divestiture of possession without affecting the title or ownership of the transferee and further that even the resumption of such a possession was merely akin to that of a caretaker or a trustee to hold and guard the property on behalf of the owner till such time the penalty is paid and the site or building is restored to its permitted use.

78. Frontally assailing the ratio in Amrit Sagar Kashyap's case (1980-32 Pun LR 441) Mr. Anand Swaroop contended that it was an error to construe Section 8-A in isolation. Both the section and the concept of resumption therein have to be considered in the light of the amended Section 3 and the other provisions of the Act as also the recently inserted Rule 11-D and the covenants in the prescribed sale deed forms. Highlighting the anomalous results which would flow from the construction placed on Section 8-A in Amrit Sagar Kashyap's case it was pointed out that thereby the title would continue to vest in the transferee and merely a possessory right as a trustee would arise in favour of the Estate Officer. How is even this possessory right to be exercised or effectuated? No procedure for obtaining possession from the transferee or his lessees or sub-lessees in such a situation is provided by law. If the Estate Officer were to choose to make resort to the obvious provisions of the Public Premises Act he would straightway be faced by the insurmountable hurdle, that the same applies only to premises which are under public or State ownership. Therefore if the ownership does not vest in the State resort would not be possible to obtain possession under the aforesaid statute and in effect even the tenuous possessory right in favour of the

Estate Officer would remain an ethereal one and incapable of actual execution or enforcement.

79. Equally it was forcefully pointed out that on the ratio of Amrit Sagar Kashyap's case (1980-32 Pun LR 441) the moment the Estate Officer takes possession for the misuser of the property in violation of the conditions of sale, the same would obviously be discontinued with the result that he would be obliged to restore possession immediately with all the obligations laid on him as a caretaker or a trustee. Assuming that the possession is delivered back the transferee or his lessees may again revert to the same misuse or even a more grievous one with the result that another futile exercise of securing possession may be resorted to by the Estate Officer and the moment he does so he would be forthwith under the obligation of restoring it to the transferee. This process could go on ad infinitum. Therefore, it was rightly argued that so construed the sanction under the statute far from being in any way effective would render the same totally futile and the misuse sought to be prohibited could be made with absolute impunity.

80. Another aspect which particularly calls for highlighting is the fact that one of the avowed objects of the Act was not only to have a planned city but of creating its capital within the shortest possible time. This was sought to be effectuated by making it a necessary condition of purchase that the site sold would be built upon within a prescribed period. Rule 12 of the Chandigarh (Sale of Sites) Rules, 1952 was in the following terms:—

"The transferee shall complete the building within five years from the date of issue of allotment order, in accordance with the rules regulating the erection of buildings, unless otherwise it is mutually agreed upon that the construction shall be completed within any period less than five years. This time limit may be extended by the Estate Officer if he is satisfied that the failure to complete the building within the said five years of the period mutually agreed upon, was due to causes beyond the control of the transferee."

Now if a violation of the aforesaid rule is made and the transferee recalcitrantly refuses to build thereon then the Estate Officer by taking possession of such a vacant site merely becomes a gratuitous caretaker of the same till the transferee chooses to exercise his option of building thereon. There is no manner of doubt that in a situation of this kind the very

purpose and the spirit of the act of creating a new capital speedily would be totally frustrated. Equally it would render the authorities powerless against the terrible evil of profiteering in developed urban sites by unscrupulous transferees who could defiantly bide their time till prices escalated sky high whilst the Estate Officer gratuitously guarded their unbuilt sites.

81. The recently inserted Rule 11-D has already been referred to and quoted above in para 21 of the judgment. It deserves recalling that it makes it permissible to retransfer the resumed sites or building to the original owner with certain penalties. Mr. Anand Swaroop submitted that no challenge has been raised to either the vires or the plain purpose of this provision. Therefore to consider resumption as a mere divestiture of possession without in any way affecting title would render the whole of Rule 11-D as totally otiose and utterly meaningless. It was rightly pointed out that Rule 11-D was a clear pointer to the basic intent and assumption of the legislature that the power of resumption provided for in Section 8-A involves a clear divestiture of title and consequently this rule provided for retransfer of the title of such a resumed property in favour of the original transferee. The canon of harmonious construction, therefore, also requires that resumption under Section 8-A must be construed as a clear divestiture of title so as to give a meaning, content, and practical effect to Rule 11-D as well. Equally, it has to be noticed that this later provision would considerably temper the rigour of Section 8-A in appropriate cases and yet leave a meaningful sanction in the hands of the Estate Officer which is necessary in the larger interest of social control and as an ultimate safeguard for the object of a planned and regulated urban development.

82. It is a well-settled canon of construction that even where two constructions of a provision are possible, an interpretation which leads to glaringly anomalous results and would tend to frustrate the basic object of the statute, must be avoided. On the basis of this larger principle also, the view expressed in *Amrit Sagar Kashyap's case* (1980-82 Pun LR 441) (supra) has to be necessarily deviated from.

83. For arriving at the conclusion, which he has, my learned brother Punchhi, J., has proceeded from the premise that the title to a site can never be

distinct or separate from the building constructed thereon. He has relied on three hoary Latin maxims and accepted them as axiomatic and prying emanations of the eternal wisdom. With the greatest respect I am unable to agree that the hoary wisdom of Roman law still governs this field completely in view of the following authoritative dictum of their Lordships to the contrary in *Dr. K. A. Dhairyawan v. J. R. Thakur*, 1959 SCR 799: (AIR 1958 SC 789):—

"There was no absolute rule of law in India that whatever was affixed or built on the soil became part of it, and was subject to the same rights of property."

The aforesaid view has been recently elaborated by the Full Bench of this Court in C. Rev. No. 2298 of 1980, *Hari Parshad Gupta v. J. K. Kaushik*, decided on November 30, 1981: (Reported in AIR 1982 Punj & Har 165) to hold that the law in India does expressly sanctify a separate title in the site as against the building or superstructure constructed thereon.

84. Again it is plain from the very exhaustive judgment of my learned brother Punchhi, J., that he has himself found the ratio of *Amrit Sagar Kashyap's case* (1980-82 Pun LR 441) (supra) as unsupportable in its totality. In paragraphs 39 and 40 of his judgment, he has clearly opined (in direct contradiction to the earlier view) that the Estate Officer would not hold the resumed property for and on behalf of the transferee and further that he would neither be a caretaker nor a person akin to a trustee. To sustain the remaining part of the ratio (as partially modified and explained and affirmed by him) in *Amrit Sagar Kashyap's case* (supra) my learned brother with great erudition has resorted to an altogether fresh classification of statutory and covenantal resumption and thereafter sought to import the doctrine of 'quietening the title'. With the greatest respect I have not been able to persuade myself to subscribe to that line of reasoning.

85. With great deference I am compelled to conclude that both on the existing precedent of the Full Bench in *Brij Mohan's case* (AIR 1980 Punj & Har 236) (supra) as also on principle, and the construction of the language of Section 8-A, *Amrit Sagar Kashyap's case* (1980-82 Pun LR 441) (supra) does not lay down the law correctly and is hereby overruled.

86. I have above upheld both the constitutionality of Section 8-A and subscribed to the view of a wider scope of

the power of resumption conferred thereby. However, there is no manner of doubt that resumption in the sense of a divestiture of title would be the ultimate civil sanction in the armoury of the authorities to effectuate the twin purpose of a regulated and planned development as also the expeditious creation of the capital city in the State. However, once it is held that such a power is within the four corners of the Constitution, it is then entirely for the legislature or the executive to determine whether as a matter of policy they wish to assume such a power and invoke its use. Nevertheless, learned counsel for the Chandigarh Administration highlighted the fact that such a power was not only desirable but a necessary one for a planned and regulated urbanization which is the crying need of the hour as against the mushroom growth of slums and haphazard growth of ramshackle towns. The creation of the City Beautiful of Chandigarh was pointed out as a notable example in this field with the judicious exercise of such a power. Mr. Anand Swaroop appeared to be on a firm ground in contending that perhaps in the absence of this ultimate sanction, the twin object of the Act to urgently create a capital city from scratch and to have a planned and regulated development where not only whole sectors but sometimes each building site etc., was allocated for specific purposes, would not have been possible. It was pointed out that because of the need for the early and immediate building of a viable capital town, it had to be invariably provided that the transferred sites should be built upon within a specific time and even a clog on their transfer had to be imposed in order to prevent a mere profiteering in urban land in the interest of the larger social necessity. The Master Plan of the town provided for residential, industrial, commercial and educational zoning and even within these zones specific buildings were earmarked for specific purpose. If such a planned city (the idea whereof was rather new in the country) was to be translated into reality, it was inevitable and necessary to give the ultimate sanction in the hands of the authorities to resume the sites and buildings if the transferees recalcitrantly refuse to conform to the ideal of a well-planned and well-regulated development, especially with regard to the need of quick urbanization. Even learned counsel for the petitioner had to half-heartedly concede that this object cannot be achieved but by resum-

ing the sites on which the transferees either refuse or are unable to build within the prescribed time. It would thus appear that the ultimate sanction of resumption (though it should be one of last resort) is a necessary power in the hands of the authority to achieve the larger social purpose. It appears that, in essence, the conflict herein is between the individualistic property rights and the larger public weal of planned and regulated urbanization. The head-on clash is between the doctrine of laissez faire against the somewhat urgent need of the welfare State to provide a planned and regulated urbanization for its citizenry. Inevitably private interest must give way to public weal and the larger interest of social control must override the outmoded theories of laissez faire. I am inclined to the view that the ultimate sanction of the resumption may well be a necessary power for sound and planned urbanization and its selective use undoubtedly advances that purpose.

87. I must, however, sound a sharp note of caution. It bears repetition that the power of resumption is the ultimate civil sanction and must, therefore, be a weapon of last resort. Inevitably it should be used with great caution and circumspection. The Act and the Rules framed thereunder vest the authority with a variety of wide ranging powers to effectuate and regulate the planned development of the city. Reference in this connection may be made to S. 4 which empowers the Central Government or the Chief Administrator to issue directions in respect of the erection of buildings and also to S. 5 which bars the erection of buildings in contravention of the Building Rules. Again S. 6 empowers the authority to require a proper maintenance of sites and buildings. Section 8 then confers the power to impose penalties and prescribes the mode for the recovery of arrears. More specifically Ss. 13, 14 and 15 provide for penalties for the contravention of directions and the violation of the Trees Preservation Order and the Advertisement Control Order as also for the breach of Rules. Section 17 then warrants an entry into building and land after notice for purposes of survey and verification that the construction thereon is in conformity with the law. A violation of the statutory provisions and the directions given thereunder can also be visited by criminal prosecutions and Section 18 prescribes the procedure therefor.

Without pretending to be exhaustive, other sanctions are also spelt out in the Rules framed under the Act. From all this it seems to follow that normally resort would be first made to the lesser sanctions aforesaid and it is only when they are ineffective, or in the extreme cases where resumption may rightly seem to be the only appropriate sanction to the authority, that recourse will be made thereto. I see no genuine basis for the needless apprehension expressed by the learned counsel for the petitioner that the administration would use a hammer to swat a fly or in other words resort to resumption for relatively insignificant infraction of the conditions of sale or the payment of consideration money. Equally it is well to remember that even where resumption has necessarily to be resorted to it should be liberally tampered with the provisions of the recently inserted R. 11-D which empowers the authority to retransfer the site to the original transferee in specified situations. I would, therefore, hold that though the judicious and lawful exercise of the powers of resumption must be upheld and in certain situations may be both necessary and desirable, yet any arbitrary or discriminatory application thereof would at once attract the ever vigilant power of the Court under the writ jurisdiction.

88. Before parting with this judgment (despite its relative prolixity) it is necessary in fairness to Mr. Kuldip Singh to notice his last ingenious submission on the applicability of S. 8-A. He attempted to divide this provision into two sharply distinct compartments. It was submitted that the power of resumption is attracted only in case where the transferee has as yet not paid the whole consideration due for the site or building. The core of the argument was that Section 8-A was applicable only to such transferees who because of the non-payment of the total consideration had not perfected their title of ownership which remained contingent under sub-section (3) of Sec. 3 of the Act. According to him only in such a context resort could be had to resumption because under the later provision such a property continues to belong to the Central Government.

89. I am wholly unable to agree. The provisions of S. 8-A give not the least inkling of any distinction between transferees who have paid the whole of the consideration money due and those who

have as yet to pay some part of the consideration money or the instalments and other dues thereon. The power of resumption thereunder as analysed by me earlier applies uniformly to all transferees in the happening of the three pre-conditions referred to in para 30 above. Neither on principle nor on the language of S. 8-A is it possible to draw any distinction between transferees who have paid the full consideration money and those against whom some amounts are lawfully outstanding in accordance with the contract. On the aforesaid argument of the learned counsel he was necessarily and logically pushed to take the stand that once the whole consideration has been paid then S. 8-A would have no application whatsoever whatever may be the breach of the conditions of sale or however gross the misuse of the site or the building. Faced with a problem of a transferee of an unbuilt site who after payment of full consideration money blatantly refuses to conform to the condition of constructing a building thereon within a specified period counsel had to say that no resumption under the statute was either possible or conceivable. Similarly he had to take the stand that in case of a building where the transferee flagrantly violated the specified use of the building, that is, converting a residential, building into factory or a shop into a residence then the Administration was powerless to resort to S. 8-A against him. It was sought to be submitted that this gross mischief may perhaps be corrected by an amendment of the law only.

90. Learned counsel for the petitioner even when pressed could cite no authority for his stand that after the full payment of consideration money the power of resumption would be denuded against such a transferee. I have already noticed that neither principle nor the language of S. 8-A warrants such an interpretation. The anomalous results that flow therefrom have already been noticed and it is hardly any satisfaction to hold that the legislature should now intervene to remedy the mischief. In view of the exhaustive discussion in the earlier part of this judgment this contention of the learned counsel for the petitioner is also to be rejected.

91. To conclude, for the detailed reasons recorded above, I would hold that—

(1) Section 8-A is not violative of either Art. 14 or Art. 19 (1) (f) of the Constitution;

(2) In conformity with the earlier Full Bench view in Brij Mohan's case (AIR

1980 Punj & Har 236), the resumption under S. 8-A of the Act, in essence, connotes a divestiture of the title of the transferee; and

(3) Amrit Sagar Kashyap v. Chief Commissioner (1980) 82 Pun LR 441 does not lay down the law correctly on this point and is hereby overruled.

The case would now go back to the Division Bench for disposal on merits in accordance with the answer to the aforesaid pristinely legal questions.

PREM CHAND JAIN, J.:— 92. I have gone through the judgments of the learned Chief Justice and brother M. M. Poonchi, J., I agree with the view taken by the learned Chief Justice.

ORDER OF THE COURT

In accordance with the view of the majority, it is held that—

(1) Section 8-A is not violative of either Art. 14 or Art. 19 (1) (f) of the Constitution;

(2) In conformity with the earlier Full Bench view in Brij Mohan's case (AIR 1980 Punj & Har 236), the resumption under S. 8-A of the Act, in essence, connotes a divestiture of the title of the transferee; and

(3) Amrit Sagar Kashyap v. Chief Commissioner, (1980) 82 Pun LR 441, does not lay down the law correctly on this point and is hereby overruled.

The case would now go back to the Division Bench for disposal on merits in accordance with the answer to the aforesaid pristinely legal questions.

Order accordingly.

AIR 1982 PUNJAB AND HARYANA 339

S. S. SANDHAWALIA, C. J.

AND S. S. KANE, J.

Angrez Kaur, Appellant v. Baldev Singh, Respondent.

Letters Patent Appeal No. 197 of 1979, D/- 14-4-1982.*

Hindu Marriage Act (25 of 1955), Section 13-A (as inserted by the Amendment Act 68 of 1976) — Applicability — Petition for divorce by husband on ground of desertion — Husband wholly guilty of maltreatment — No matrimonial misconduct attributable even remotely to wife — S. 13-A not attracted. AIR 1980 Punj & Har 171, Reversed.

*Against judgment of Harbans Lal, J. reported in AIR 1980 Punj & Har 171.

Section 13-A does not or could not ever have been intended to give a total carte blanche to a matrimonial court to grant a decree of judicial separation where no ground whatsoever for a decree of divorce has even remotely been established. Section 13-A vests a discretion in the Court only to grant the alternative lesser relief of judicial separation in a petition for divorce provided the requisite ground therefor prescribed by S. 13 of the Act, has been established.

(Paras 8, 10)

Where the husband who had filed a petition for divorce under S. 13 on the ground of desertion, was entirely responsible for turning the wife out of his house by maltreating her and because of the same, the wife would not resume cohabitation with him, no matrimonial misconduct even remotely could be laid at the door of the wife. Consequently, no relief against her could be granted. Therefore S. 13-A could not be attracted. AIR 1980 Punj & Har 171, Reversed.

(Para 11)

Cases Referred : Chronological Paras
1981 Marriage LJ 84 : (1980) 17 Delhi LT 386 9A

Amarjit Markan, for Appellant; T. S. Mangat, for Respondent.

S. S. SANDHAWALIA, C. J.:— The true scope and ambit of the discretion vested in the Matrimonial Court by the recently inserted S. 13-A of the Hindu Marriage Act, 1955 is the primary question which has come to the fore in this appeal under Cl. X of the Letters Patent.

2. For the determination of the aforesaid legal issue (upon which alone, the fate of the appeal would turn), it seems unnecessary to delve deeply into the long drawn out conjugal bitterness between the spouses, which stands fully recapitulated in the judgment under appeal. It suffices to mention that the marriage took place way back on Feb. 16, 1948 and two daughters were born out of the wedlock of whom the elder survived. It would appear that the marriage virtually broke up after four years and a separation between the two spouses was brought about. On Jan. 15, 1962, the respondent-husband, filed a petition for the restitution of conjugal rights under S. 9 of the Hindu Marriage Act, 1955 (hereinafter called 'the Act'), which was dismissed with the findings that in fact he had maltreated his wife

and turned her out of the house. No appeal was filed against the said judgment and these findings achieved finality. The appellant-wife on Feb. 8, 1962 had preferred a petition under S. 488, Criminal P. C., 1898, for maintenance which was allowed by the Magistrate by granting Rs. 30/- per mensem for the appellant and Rs. 20/- per mensem for her daughter from the date of her application. In the revisional proceedings, before the District Judge and later in the High Court, the said judgment was maintained on March 6, 1967. The High Court further took the view that the alleged offer made by the respondent-husband before it to take the appellant-wife back to resume matrimonial ties, was not bona fide.

3. Nearly 29 years after the solemnization of the marriage and decades after the separation of the parties, the respondent-husband on Oct. 25, 1977 preferred a petition for divorce under S. 13 of the Act. The learned Additional District Judge, Sangrur, allowed the same and granted a decree for dissolution of marriage by divorce between the parties on Sept. 21, 1978.

4. On appeal, by the appellant-wife, the learned single Judge, on merits, took a view entirely in favour of the appellant-wife and held as follows:—

"From the above narration of events and the assessment of evidence on record, I have no doubt in my mind that it was the respondent who was responsible for turning the appellant out of his house by maltreating her for one reason or the other and his offer even in March, 1967, during the pendency of the revision petition in the High Court to restore the matrimonial relations and to accept her back in his house was not bona fide. In the petition, there was no averment that any Panchayat had been taken to bring the appellant back. In view of the same, the evidence of the respondent that he along with some witnesses had gone to the house of the appellant for compromise or reconciliation cannot be given any credence."

xx xx xx

".....As the appellant cannot be held guilty of desertion, the respondent was not entitled to the decree of divorce and the same passed by the trial court cannot be sustained....."

Despite the aforesaid findings, the learned single Judge observed that an unfor-

tunate situation had arisen where both the spouses had taken categorical stands which rendered the resumption of matrimonial ties no longer possible. On that premise alone, and purporting to act, under S. 13-A of the Act, he granted a decree for judicial separation. On the question of laches, under S. 23 (1) (d) of the Act, he opined, that because the decree for divorce was being declined, therefore, the question of delay had no relevance.

5. The solitary, though meaningful contention, raised on behalf of the appellant-wife herein is that the learned single Judge having unreservedly found that the respondent-husband alone was at fault and thus not the least ground for the grant of divorce was made out, then he could not invoke S. 13-A of the Act to pass a decree for judicial separation.

6. Inevitably, the submission of the learned counsel for the parties revolve around S. 13-A of the Act. However, before one adverts to its specific language, the matter calls for a perspective in the context of its legislative history. This Section was inserted in the Act by the Marriage Laws Amendment Act, 1976, and was part of significant changes simultaneously brought out in the Act as also in the Special Marriage Act. Amongst other reasons, the legislature had intended to give effect to the 59th Report of the Law Commission. The penultimate part of the Statement of Objects and Reasons is as under:—

".....The objects of the legislation are mainly, (1) to liberalise the provisions relating to divorce; (2) to enable expeditious disposal of proceedings under the Act; and (3) to remove certain anomalies and handicaps that have come to light after the passing of the Act.

The Bill seeks to achieve the above-mentioned purposes."

Further, Cl. 8 of the notes on clause of the said Bill, evidences the undermentioned reasons for introducing Ss. 13-A and B in the Act:—

"New Sec. 13-A is proposed to be inserted to provide that under certain circumstances the court may, while dealing with a petition for divorce, have a discretion to grant a decree for judicial separation instead. New S. 13B seeks to provide for divorce by mutual consent." With the aforesaid background, one can now turn to the particular provision itself, which is in the following terms:—

"13A. Alternate relief in divorce proceedings :

".....In any proceedings under this Act, on a petition for dissolution of marriage by a decree of divorce, except in so far as the petition is founded on the grounds mentioned in cls. (ii), (iv) and (vii) of sub-sec. (1) of S. 13, the Court may, if it considers it just so to do having regard to the circumstances of the case, pass instead a decree for judicial separation."

A plain look at the aforesaid provision would indicate that primarily it vests a discretion in the Court that instead of granting a decree of divorce, it may pass a decree of judicial separation. What, however, calls for notice is that this discretion is not an unguided and uncanalised one. It is expressly provided that no such discretion can be exercised where the claim for a divorce is rested on the ground of one of the spouses has ceased to be a Hindu by conversion to another religion; has renounced the world by entering any religious order; or has not been heard of as being alive for a period of seven years. In all these three situations, the exercise of the power under S. 13-A of the Act is expressly prohibited.

7. Again, it seems to be plain that the legislature has intended to vest this power only for the grant of an alternate relief in a petition for divorce, where the grounds necessary therefor are established. Both, the larger import of the language as also its heading highlights the fact that once the basic postulate is established, then the relief therefor may be moulded in the alternative, if the Court considers it just. One may revert back to the position prior to the insertion of this provision. Further, in a petition for divorce — where the petitioner had successfully established his claim, the only relief could be that of a decree of divorce. The change brought about appears to be only to the effect that now an option has been given to the Court either to grant a decree of divorce on the established grounds or to give the lesser relief of judicial separation, as a last hope of saving a wrecked marriage. This is so because if a decree of judicial separation remains unsatisfied for a period of one year, that itself, would be a strong ground for seeking the ultimate relief. What deserves highlighting is the fact that either of the two reliefs can only be granted on the terra firma of

one or the other of the grounds specified under S. 13 of the Act for the grant of divorce barring those mentioned in clauses (ii), (iv) and (vii) of sub-sec. (1) thereof.

8. The aforesaid view is again buttressed by the designed use of the word 'instead' in the penultimate part of the Section. Keeping this in mind, the Section when read incisively lays down that instead of granting a decree of divorce, the Court may, in the particular justice of the case, give only the lesser relief of judicial separation. It follows that the grounds for the grant of a decree of divorce are a necessary postulate before the Court can decree judicial separation 'instead'. I do not think that the Section does or could ever have been intended to give a total carte blanche to a matrimonial Court to grant a decree of judicial separation where no ground whatsoever for a decree of divorce has even remotely been established.

9. Equally instructive it is to turn to S. 10 of the Act providing for judicial separation. This provides for presenting a petition for judicial separation on any of the grounds specified in sub-sec. (1) of S. 13 of the Act and in case of wife, on the added grounds specified in sub-sec. (2) thereof. It is thus obvious that the legal grounds for the grant of judicial separation and divorce (Prescribed by S. 13) are identical. That being so, the statute has now rightly provided that where these identical grounds are established, the Court may have the discretion to grant only the lesser relief even though the major relief of divorce alone, had been prayed for. It bears repetition that the establishment of the prescribed grounds for either of the relief has not in any way been abrogated.

9-A. The matter merits consideration from another angle as well. Whilst there have been certain changes in the law and rumblings of further amendments, but as yet the relief for divorce or judicial separation under the Act is still rested broadly on the foundation of a matrimonial offence or disability. Unless the pre-requisites of the prescribed matrimonial misconduct or disability under S. 13 of the Act are established, no decree for divorce or judicial separation can be granted under the Act, apart from further impediments prescribed in S. 23 of the Act. To repeat, some mis-

conduct or fault liability is the sine qua non for the grant of either of the reliefs of divorce or judicial separation. To my mind, S. 13-A only provides for the alterations of these reliefs once the necessary ingredients of the matrimonial offence or disability has been established as a fact. The view I am inclined to take is buttressed by the following lucid observation of Avadh Behari Rohatgi, J. in *J. S. Sodhi v. Smt. Amar Jit Kaur*, 1981 Marriage LJ 84 (Delhi):—

"The divorce law of India is founded on the concept of the matrimonial offence. The offending spouse is charged with cruelty. Before marriage can be dissolved the complaining spouse has to prove that the other party is guilty of cruelty. Cruelty is not a crime, it is true. But the offending spouse has to be found guilty. In some jurisdictions the expression "guilty of cruelty" is used instead of "treated with cruelty". This concept of guilt is the underlying assumption in the divorce law which gives some justification for breaking an indissoluble union against the will of the offending spouse. If relief is granted, each party must alike forfeit the status of matrimony. One party loses it voluntarily, the other involuntarily. But the guilty party cannot take advantage of his own wrong."

Equally, in this context, the analogy of criminal law, though somewhat remote, seems to highlight the issue. Therein also, the ingredients of the offence have to be first established on the foundation of facts before the imposition of sentence which can be provided in the alternative. To take the extremist example in this context, once the factual ingredients of murder are established, Sec. 302 of the I. P. C. provides alternative punishments of a sentence of death or that of imprisonment for life. However, either of the two sentences can only be rested on the firmest foundation of the establishment of the criminal offence beyond reasonable doubt. One cannot, therefore, imagine that these necessary ingredients may not be established, yet one or the other sentences be imposed in the alternative. On a somewhat similar analogy, it would follow that if the matrimonial offence or fault which is a pre-requisite, has not been established at all, then in fact no relief under the Act can be granted either. Sec. 13-A of the Act, therefore, only provides alternative reliefs, but these can come into play only once

the pre-requisite of establishing one of the requisite grounds for divorce are made out.

10. To conclude, Sec. 13-A of the Act vests a discretion in the Court only to grant the alternative lesser relief of judicial separation in a petition for divorce provided the requisite ground therefor prescribed by Sec. 13 of the Act, has been established.

11. Now applying the abovesaid rule, it seems plain that the learned single Judge himself held that the respondent-husband entirely was at fault and, therefore, was not entitled to the decree of divorce passed by the trial court which could not be sustained. It having been established beyond cavil that the respondent-husband was wholly the guilty party, the wife's stand that because of the same, she would not resume cohabitation with him, was obviously justified. No matrimonial misconduct even remotely could be laid at the door of the appellant-wife far from the same having been established. Consequently, no relief against her could be granted. Sec. 13-A of the Act, therefore, could not be attracted to the situation and with great respect, the learned Judge erred in making resort thereto. It is significant to recall that the findings of fact by the learned single Judge have in a way achieved finality because the respondent-husband did not choose to file any appeal against the same and even otherwise not the least meaningful challenge could be raised against them. This appeal has, therefore, to be allowed. The judgment of the learned single Judge is, hereby set aside as also that of the trial court and the petition for divorce preferred by the husband dismissed. The appellant would be entitled to her costs as well.

Appeal allowed.

AIR 1982 PUNJAB AND HARYANA 342
M. M. PUNCHHI, J.

Jagdish Rai, Petitioner v. The State of Haryana and others, Respondents.

Civil Writ No. 3020 of 1973, D/- 22-3-1982.

Land Acquisition Act (1 of 1894), S. 6
— Acquisition of land for "public purpose" — Acquisition for Municipal Committee — Notification under S. 6 shall mention that "public purpose" is that of municipality.

DZ/EZ/B772/82/AMG

In case of acquisition of land for Municipal Committee by the State Government, while issuing declaration under Sec. 6 of the Act the Government has, necessarily to declare therein that the payment towards fulfilment of it would be expended from the municipal fund. Thus the source from which the cost is to be borne has ex facie to be mentioned in the declaration. (Paras 8, 11)

Cases Referred : Chronological Paras

AIR 1977 SC 448: (1978) 1 SCC 800 9

AIR 1970 SC 1188 10

P. S. Jain, for Petitioner; Arun Walia for Advocate General, Haryana and C. D. Dewan, for Respondents.

ORDER:— These are two petitions being C. W. P. Nos. 3020 and 3021 of 1973 preferred by two property owners, who both are now dead and represented by legal representatives, challenging acquisition of their land situated in Bahadurgarh, District Rohtak. An effort had been made by the State of Haryana in conjunction with the Municipal Committee, Bahadurgarh, to acquire the land of the petitioners for the purposes of constructing a shopping centre as also a public park. Notifications issued by the State Government under S. 4 of the Land Acquisition Act and its declaration under S. 6 for the purpose are the subject matter of challenge in these petitions. Besides, the aforesaid two petitions there is one other being C. W. P. No. 3130 of 1973 preferred by Rizk Ram and others through Shri Kartar Singh Kwatra, Advocate, who is no more. The petitioners in that petition are not yet represented by any counsel. Since the points raised herein are common to all the three petitions, reference to the same has become necessary, as all the three petitions have been listed together.

2. For facility of disposal facts from C. W. P. No. 3020 of 1973 be taken note of. The petitioner therein claimed to be in possession of land situated within the municipality of Bahadurgarh fully detailed in para 1 thereof. He initially obtained the land as vacant from the erstwhile owners but claims to have raised construction thereon at considerable cost and subjected himself to the liability of paying property tax as well. The petitioner claims that alongside his property there was a pond in part of Khasra No. 2214 which the Municipal Committee, Bahadurgarh thought of converting into a park. Though the object was laudable,

the Committee out of sheer greed and vindictiveness set up a proposal not only for Khasra No. 2214 including the pond portion thereof but also proposed to acquire the land of the petitioner with view to setting up a shopping centre there. On such movement it is undisputed that the State of Haryana issued notification under S. 4 of the Land Acquisition Act on 14th Dec. 1970, Annexure 'B' to the petition, the relevant portion whereof is reproduced here:

"No. 9346-3/CI-70/34215.— Whereas the land specified below is required for the purpose of the Punjab Municipal Act, 1911, namely, for the construction of shopping centre and public park at Bahadurgarh, Tehsil Jhajjar, District Rohtak.

And whereas in pursuance of the provisions of S. 58 of the said Act, the Municipality Bahadurgarh has required the Government of Haryana to acquire the said land under the provisions of the Land Acquisition Act, 1894, on payment by the said Municipality Bahadurgarh of compensation awarded under the Land Acquisition Act, 1894 and of any other charges incurred in acquiring the land as specified below:—

"And whereas it appears to the Government of Haryana that the land as mentioned below is likely to be needed for public purposes, namely, for the construction of shopping centre and public park in Bahadurgarh, District Rohtak, it is hereby notified that the land described in the specification below is likely to be needed for the said public purpose."

3. The petitioner filed objections under S. 5-A of the Act, copy of which is appended as Annexure 'C', taking therein a specific objection that the municipality could not acquire an area for the setting up of a shopping centre as it would be violative of S. 58 of the Punjab Municipal Act. All the same, apprehending his objections would be turned a deaf ear to and in that event a declaration under S. 6 would follow, he searched and came to know that such a declaration under S. 6 of the Act had in fact been published in Government Gazette on 7th Aug. 1973, a copy whereof is Annexure 'D' to the petition. The relevant portion of that declaration is to the following effect:—

"Whereas the Governor of Haryana is satisfied that the land specified below is needed by the Government at public expense, for a public purpose, namely for

the construction of Shopping Centre and Public Park at Bahadurgarh, Tehsil Jhajjar, district Rohtak for which notification No. 9346-3CJ-70/34215, dated the 14th Dec. 1970, under S. 4 of the Land Acquisition Act, 1894, has been published, it is hereby declared that the land described in the specification below is needed for the above purpose.

This declaration is made under the provisions of S. 6 of the Land Acquisition Act, 1894, for the information of all to whom it may concern." (Emphasis supplied)

4. Challenging these notifications, the petitioner approached this Court way back in Sept. 1973, and obtained from the Motion Bench stay of his dispossession on 5th Sept. 1973. Presumably he continues to be in possession and the purpose by efflux of time stands frustrated. Keeping that apart, however, the legality of the action, as pointed out by the petitioner, has to be examined.

5. Learned counsel for the petitioner has raised only two points before me in support of the petition; (1) that S. 52 of the Punjab Municipal Act the equivalent of which is S. 57 of the Haryana Municipal Act, 1973, does not authorise expending of municipal fund for the construction of a shopping centre though it does authorise the creation of a public park (On the score of providing for a public park, the learned counsel for the petitioner has no challenge to offer) and (2) that the declaration under S. 6 of the Act has patently been made by the Government for acquiring the land for a public purpose at public expense and not for the purposes of the Punjab Municipal Act at the expense of the Municipal fund. Let these contentions be examined in detail.

6. Section 50 of the Land Acquisition Act provides for the acquisition of land at the cost of a local authority of company. Thereunder, where the provisions of the Act are put in force for the purpose of acquiring land at the cost of any fund controlled or managed by a local authority, the charges of or incidental to such acquisition have to be defrayed from or by such fund. Similar is the case with regard to a Company for whom the provisions of the Act are put into force for the purpose of acquiring land for it. In the matter of S. 4 of the said Act, however, there appears to be a distinction with regard to the land being

acquired for a company and the local authority. Section 38 (2) of the said Act statutorily requires that when an acquisition is being made for a company, suitable words in S. 4 of the Act get automatically substituted so as to serve the purpose. To be precise, for the expression 'for such purpose' the words 'for the purpose of the company' are to be substituted. The mandate of the statute is thus firm that in the case of acquisition of land for the purpose of a company notification under S. 4 of the Act has to carry those statutory expressions so that the Government's intention for the purposes of the company becomes distinctly manifest. But it seems that there is no such requirement for the purpose of acquisition for the local authority and the acquisition can proceed perhaps on the assumption that it is being undertaken by the State of its own. In the same strain Sec. 6 (3) of the Act makes a declaration of intended acquisition to be conclusive evidence that the land is needed for a public purpose or for a company as the case may be. Here again acquisition for the purpose of a local authority nowhere figures in Section 6 (3). A comparative reading of the aforesaid provisions leads to the indication that perhaps the acquisition for the purpose of a local authority is in sum and substance an acquisition by the Government but for a local authority. But it needs further probe.

7. At this stage it would be worthwhile to take note of S. 58 of the Punjab Municipal Act which provides for acquisition of land. It is provided therein that when any land, whether within or without the limits of a municipality, is required for the purposes of the Act, the State Government may, at the request of the committee, proceed to acquire it under the provisions of the Land Acquisition Act, 1894, and on payment by the committee of the compensation awarded under that Act, and of any other charges incurred in acquiring the land, the land shall vest in the committee. The purposes of the Punjab Municipal Act are those on which the municipal fund formed by each municipality can be expended and the list is provided in S. 52 of the said Act. Sub-sec. (2) (c) thereof provides amongst other items, the construction, establishment and maintenance of markets and other works of public utility. It goes without saying that a shopping centre as also a park would

fall within the meaning of the words and expressions 'markets' and other works of 'public utility'. Practically similar are the provisions in the succeeding statute, the Haryana Municipal Act, 1973, in which S. 57 is the equivalent of S. 52 and S. 65 is the equivalent of S. 58 of the Punjab Municipal Act. Since it stands provided in so many words in the statute itself the claim based on the first argument does not seem to cut any ice and it would be appropriate to give it a death blow right at this juncture holding that askance by the committee for the acquisition of the land for constructing a shopping centre and a public park were for the purposes of the Punjab Municipal Act.

8. Now S. 4 of the Land Acquisition Act authorises the appropriate Government to issue a preliminary notification thereunder as a step towards acquisition of land for any public purpose. The expression 'public service' has by now been well understood not only in legal annals but by public at large. The acquisition for the purposes of Punjab Municipal Act would in any event be statutory purposes and would collate with 'public purposes' as well. In a given case, a particular purpose might fall under both the expressions and in another there may be some difficulty. The list as contained in sub-sec. (2) of S. 52 of the said Act in various sub-clauses, however, is a pointer to indicate that all the items enumerated therein for the purposes on which municipal fund can be expended fall squarely as public purposes which are likely to be for the benefit and use of public at large and in any case for a sizable section of the public. The public purpose in the instant case as given in the notification under S. 4 of the Act reproduced above is by now well known. The point is whether notification under S. 6 of the Act has simultaneously to mention that the public purpose is that of the municipality and is being realised by acquisition of land at the expense of the municipal fund. In other words the public purpose must avowedly be fulfilled not by providing funds from the public exchequer but out of municipal funds and this has been pressed into service with great vehemence by the learned counsel for the petitioner since the relevant words are lacking in the notification.

9. On the other hand learned counsel for the State as also the municipality

have pointed out that the acquisition under the Land Acquisition Act is in every case by the Government be it an acquisition by it for its own, or for a company, or a local authority. Reference was invited to S. 16 of the said Act to contend that when the Collector has made an award under S. 11, he may take possession of the land which may thereupon vest in the State Government free from all encumbrances. The said section was pressed into service to contend that initially it is the Government in whom the land acquired vests and then it reverts in the company or in the local authority on payment made by it as the case may be. On the question of terminology employed with regard to the public purpose as given in S. 6 notification it was contended that non-legal terminology was immaterial if the public purpose can be ascertained for which it was acquired. Reliance was placed on *Gulam Mustafa v. State of Maharashtra* (1976) 1 SCC 800 : (AIR 1977 SC 448). There can be no quarrel with this proposition. User of wrong words, when otherwise the intention is clear is immaterial. But here the problem is of the absence of terminology and not of wrong user thereof.

10. In *Kanaiyalal Maneklal v. State of Gujarat*, AIR 1970 SC 1188, the Supreme Court had the occasion to deal with a notification under Sec. 4 of the Land Acquisition Act issued at the instance of Ahmedabad Municipal Corporation wherein there was no reference to any purpose of the said Corporation but the notification proceeded as if the land was being acquired by the State Government. The objection taken was that it was needed for raising a memorial of Mahatma Gandhi at a place which had some association with him and not a public purpose as defined in the Provincial Municipal Corporation Act, 1949. The Supreme Court while answering that contention took the view that the purpose of acquisition was one which fell within the normal connotation of the expression "public purpose" as used in S. 4 of the Land Acquisition Act and it was unnecessary to rely upon the extended meaning of the expression 'public purpose' as provided by S. 78 (1) of the Provincial Municipal Corporations Act, 1949. The Court also held that since the land was being acquired for the public purpose as held by it no further inquiry

need be made, whether if the municipal funds were to be utilised for setting up a memorial of Mahatma Gandhi after the land is vested in the State after acquisition, or would the Municipality be acting within the limits of its authority.

11. Neither counsel has been able to produce any precedent for and against the proposition whether a declaration under S. 6 of the Act must contain the recital that the acquisition was for the purposes of the municipality. After giving my careful thought to the point raised I have been veered round to the view that in such a declaration provision of the requisite statement would be essential. To sustain the view I have drawn light from the language of the 2nd proviso to S. 6 (1) and of S. 6 (3) which I have touched to some extent in an earlier part of the judgment while assuming that acquisition for the purposes of the local authority would perhaps be an acquisition for the State Government. But is it an acquisition for the State Government? The answer clearly is no. The acquisition began on a projected statutory purpose, a public purpose which was pre-judged by the municipality alone as it was the sole judge on that aspect. The fact that the municipality before expending towards it was required to obtain the sanction of the Government under S. 52 (2) would not alter the situation. It is for that reason that the Government took care while notifying under S. 4 of the Land Acquisition Act that the action was to acquire the land for the purposes stated therein for the Punjab Municipal Act at the askance of the municipality as required by law. The objections to be invited under S. 5-A of the said Act had also to confine to the limited domain of contending that the above purpose was not one under the Punjab Municipal Act or that the land sought to be acquired was not suited for the purposes. The decision of the Government thereon also again is pre-emptory inasmuch as it has to balance the needs of the municipality vis-a-vis the purpose of the Act on one side and the objection on the other. And lastly while issuing declaration under S. 6 of the Act the Government has, as it seems to me, necessarily to declare therein that the payment towards fulfilment of it would be expended from the municipal fund for the purposes of the Punjab Municipal Act. The 2nd proviso to S. 6 (1) provides that no such declaration shall be made unless

the compensation to be awarded for such property is to be paid by a company, or wholly or partly out of public revenues or some fund controlled or managed by a local authority. Thus the source from which the cost is to be borne has ex facie to be mentioned in the declaration. As is plain from the second notification Annexure 'D' the land on the contrary was being acquired by the Government for a public purpose at public expense. But one can have no objection to the public purpose named therein as the construction of the shopping centre and public park at Bahadurgarh. All the same the notification is clear and can be spelled out to mean that it is the Government who has usurped the process of the acquisition and wants to construct the said structures, or lay out such park at the expense of the Government to be borne by the State exchequer. This very distinction, as it appears to me, has to be borne in mind to avoid ambiguity while carrying the process further in such like cases after notification under Sec. 4 of the said Act. There is no question of any vacillation on the point and the doubt, if any, creeping in must lead to such notification being held vague, indefinite, or foundationless and likely to be quashed on that score. Now plainly, notification Annexure 'D', the declaration under S. 6, is deficient of the relevant particulars. And since it is now being contended that the Government was acquiring land for the municipality which had asked for the acquisition, the notification being conclusive evidence as envisaged under S. 6 (3) of the Act says to the contrary and at least indicates so. It is in deviation from what was sought to be done under S. 4 of the Act, which course is impermissible.

12. No other point has been urged.

13. For the view I have taken, these two writ petitions 3020 and 3021 of 1973 deserve acceptance by quashing the declaration under S. 6 of the Act, Annexure 'D' alone. And if that is so, Sec. 4 notification Annexure 'B' too has to be annulled in the same strain as no fresh declaration under S. 6 can be issued now by the State Government as a period of three years has expired thereafter. Accordingly, both the notifications, though one primarily and other sequently, have to be quashed.

14. Though neither counsel nor party is present in C. W. P. No. 3130 of 1973

but since it has to be abided by the result of the connected two writ petitions, I shall grant relief to the petitioner in absentia. Accordingly, all these three writ petitions are allowed but with no order as to costs.

Petitions allowed.

AIR 1982 PUNJAB AND HARYANA 347

S. S. SANDHAWALIA, C. J.
AND D. S. TEWATIA, J.

State of Punjab and others, Appellants v. Subhash Chander and another, Respondents.

Letters Patent Appeal No. 125 of 1979.
D/- 12-3-1982.*

Drugs and Cosmetics Act (23 of 1940), Ss. 33D and E — Enforcement of Ss. 33D and E — Legality of — Sections being legal and valid, their enforcement in a particular State cannot be challenged under Art. 19 (1) (f) and (g) and Art. 304 (b) of Constitution merely on ground that they have not been enforced in other States. (Constitution of India, Articles 19 (1) (f) and (g) and 304 (b).) AIR 1979 Punj & Har 238, Reversed.

Legality, constitutional or otherwise, of the requirement of a licence for manufacturing the drugs envisaged u/s. 33-D of the Act and of the prohibition u/s. 33E to stock, sell and exhibit unlicensed drugs, admittedly being not in dispute, then the enforcement of these provisions by the State, indeed, cannot be questioned either by a manufacturer of such drugs being located in such a State or the dealer who stocks, sells and exhibits such drugs, on the ground that their counter-parts in other States were not required to take a licence to manufacture or stock, sell and exhibit the drugs manufactured without a licence, as the case may be. AIR 1979 Punj & Har 238, Reversed. (Para 11)

M. J. S. Sethi, Addl. Advocate General, for the State, R. K. Chhibbar, for Respondents.

D. S. TEWATIA, J.:— Subhash Chander, respondent No. 1 to the present Letters Patent Appeal, successfully impugned, before the learned single Judge in Civil Writ No. 6070 of 1975, notification, Annexure R. 2, dt. 15-1-1975, of the

*Against judgment of M. R. Sharma, J., reported in AIR 1979 Punj & Har 238.

appellant State of Punjab enforcing the provisions of S. 33-E of the Drugs and Cosmetics Act, 1940, hereinafter referred to as the Act, and consequently got quashed the criminal proceedings launched against him. The present Letters Patent Appeal at the instance of the State of Punjab and three others, namely, the Hon'ble Health and Family Planning Minister, Punjab, Civil Secretariat, Chandigarh; The Controller of Drugs, Punjab, Chandigarh; and the Inspector Ayurveda, Punjab, Chandigarh, is directed against this judgment.

2. The appellant State, with great plausibility, canvassed before us that if the provisions of S. 33-D of the Act, which imposes the condition of licence for manufacturing Ayurveda (including Siddha) and Unani drugs, and S. 33-E of the Act, which imposes the restriction on storing, selling or exhibiting any Ayurvedic (including Siddha) or Unani drugs not manufactured by a licensed manufacturer, are found to be legal and valid, then how could an innocuous step of bringing them into operation be considered illegal and ultra vires the constitutional provisions of Art. 19 (1) (f) and (g) and Art. 304 (b) of the Constitution of India.

3. Before proceeding with the consideration of the contention advanced on behalf of the appellant State, some of the provisions of the Act deserve noticing.

4. The Act was enacted in 1940 with a view to regulate the import, manufacture, distribution and sale of drugs. Subsec. (3) of S. 1 of the Act envisages that the provisions of Chap. IV shall take effect in a given State only from such date as the State Government might, by a notification, appoint in that behalf. Besides the above provision, Ss. 33-D and 33-E of the Act, the relevant portions of which are in the following terms, also envisage their coming into force from such dates as might be fixed by the State Government by notification in the official gazette.

"33-D. From such date as may be fixed by the State Government by notification in the Official Gazette in this behalf, no person shall himself or by any other person on his behalf, manufacture for sale any Ayurvedic (including Siddha) or Unani drug —

* * * * *

33-E. From such date as may be fixed by the State Government by notification in the Official Gazette in this behalf, no person shall himself or by any person on his behalf, sell, or stock or exhibit for sale, or distribute, any Ayurvedic (including Siddha) or Unani drug other than that manufactured by a manufacturer licensed under this Chapter."

Initially, the provisions of both the aforesaid sections of the Act were enforced with effect from 25-2-1971 by notification, Annexure R. 1, dt. 25-2-1971, which is in the following terms :

"In exercise of the powers conferred by Ss. 33-D and 33-E of the Drugs and Cosmetics Act, 1940 (Central Act 23 of 1940), the Governor of Punjab is pleased to fix the date of publication of this notification in the official gazette as the date for the purpose of the aforesaid section."

The State Government then issued the notification, Annexure R. 2, partially modifying Annexure R. 1 by changing the date of enforcement of the provisions of S. 33-E from 25-2-1971 to 24-1-1975. Annexure R. 2 is in the following terms :

"In exercise of the powers conferred by S. 33-E of the Drugs and Cosmetics Act, 1940, and in partial modification of Punjab Government Health and Family Planning Department Notification No. 973-2HB-II-71/3801, dated 25th February, 1971, the Governor of Punjab is pleased to fix the date of publication in the official gazette as the date for the purpose of the aforesaid section."

Section 33-P of the Act, which is reproduced below, authorises the Central Government to give necessary direction to the State for the purpose of carrying into execution in any given State any of the provisions of the Act or rule or order made thereunder :

"33-P. The Central Government may give such directions to any State Government as may appear to the Central Government to be necessary for carrying into execution in the State any of the provisions of this Act or of any rule or order made thereunder."

The plea that the action of the State Government in prosecuting the petitioner-respondent for the violation of S. 33-E of the Act was violative of the provisions of Art. 20 of the Constn., did not find favour with the learned single Judge.

5. However, the other plea prevailed with the learned single Judge. The

learned single Judge observed that since the charge against the petitioner in substance amounted to this that the drugs stocked and sold by him had been produced by a manufacturer who should have obtained a licence u/s. 33-D of the Act, even though the State in the territory of which such drugs were being manufactured had not issued any notification making it incumbent upon such manufacturers to obtain a licence as required u/s. 33-D of the Act, the action complained against by the petitioner was prima facie discriminatory. The learned single Judge, therefore, ruled that the prohibition imposed upon the petitioner-respondent in the peculiar circumstances of the case, obviously, impinged on his right to possess and sell commodities and therefore, the impugned notification was clearly violative of his rights under Art. 19 (1) (f) and (g) and Art. 304 (b) of the Constn.

6. With utmost respect, we are not impressed with the plea of the petitioner-respondent that has found favour with the learned single Judge.

7. The restrictions imposed by Ss. 33-D and 33-E of the Act, on the face of it being to safeguard the public health and, therefore, in public interest and thus being reasonable and, in any case, no challenge to the vires of the said provisions having been laid in the writ petition, one cannot but assume that the said provisions are constitutionally valid ones.

8. These provisions did not become operative in any given State automatically after the passing of the Act. These had to be enforced by a given State Government by a notification issued in the Government gazette. It would be seen that, to begin with, both the sections were brought into force by notification, Annexure R. 1, from the same date. This was, perhaps, somewhat unreasonable, for some time-gap should have been given in the application of the two provisions in question to enable the manufacturers of the drugs to take the requisite licences and also to the dealers engaged in the stocking, selling and exhibiting of the said drugs to clear out such drugs as had been manufactured prior to the obtaining of the manufacturing licence by the manufacturers. This unreasonableness of the step that the State Government had taken by bringing into operation simultaneously the provisions of Ss. 33-D and 33-E had

not been lost upon the State Government as well and, therefore, it modified the notification dt. 25-2-1971, Annexure R. 1, by issuing fresh notification, Annexure R. 2, dt. 15-1-1975, making the provisions of S. 33-E effective from 24-1-1975 instead of 25-2-1971. Not only this, the State Government did not take any punitive action against any person or firm engaged in the stocking, selling and exhibiting of the drugs during all this period. Such being the position, nobody can label as unreasonable the action of the State Government in making the provisions of S. 33-E of the Act effective from 24-1-1975. Here again, if the State functionaries were to swoop down upon the person or firm engaged in the stocking, selling and exhibiting of such drugs on the very next morning of the issuance of the notification, or within a week thereof, and take action against them for violating the provisions of S. 33-E of the Act, the complaint would have been justified, but in the present case the State functionaries in question paid a visit to the premises of the petitioner-respondent's firm not before 8-8-1975 and found the petitioner-respondent still selling drugs which had not been manufactured by a licensed manufacturer and thus violating the provisions of S. 33-E of the Act.

9. It is not the petitioner-respondent's case that the drugs and medicines that had been taken into possession from his premises by the Inspector, Ayurveda, Punjab, were those which had been purchased prior to 24-1-1975 in order to show that the said drugs when purchased could be sold without violating the provisions of S. 33-E of the Act.

10. What appears to have weighed with the learned single Judge is the fact that since other States had not enforced the provisions of Ss. 33-D and 33-E nor the Central Government had issued directions u/s. 33-P of the Act, the manufacturers located outside the Punjab State could continue to manufacture without a licence and the dealers in such States could continue to stock, sell and exhibit such drugs without incurring liability for criminal prosecution, while dealers in the Punjab State engaged in stocking, selling and exhibiting such drugs as were manufactured outside the Punjab State without licence could not do so without incurring liability for criminal prosecution.

11. Legality, constitutional or otherwise, of the requirement of a licence for manufacturing the drugs envisaged u/s. 33-D of the Act and of the prohibition to stock, sell and exhibit unlicensed drugs, admittedly being not in dispute, then the enforcement of these provisions by the State, indeed, cannot be questioned either by a manufacturer of such drugs being located in such a State or the dealer who stocks, sells and exhibits such drugs, on the ground that their counter-parts in other States were not required to take a licence to manufacture or stock, sell and exhibit the drugs manufactured without a licence, as the case may be. Say for example, if in one State the Prohibition is enforced while in another State Prohibition is not enforced, can the affected person in the State, in which prohibition is imposed, plead that the prohibition is unreasonable or violative of his right under Art. 304 (b) of the Constn. of India merely on the ground that his counter-parts in the other State were not prohibited either from manufacturing the liquor or selling and consuming the same. In our opinion, such a plea is not sustainable.

12. For the reasons aforementioned, we allow the appeal, set aside the judgment of the learned single Judge and dismiss the petition, but with no order as to costs.

S. S. SANDHAWALIA, C. J.:— I agree.
Appeal allowed.

AIR 1982 PUNJAB AND HARYANA 349

I. S. TIWANA, J.

Joginder Singh and others, Appellants
v. Gurdev Singh and others, Respondents.

Regular Second Appeal No. 975 of 1971,
D/- 26-2-1982.*

Limitation Act (36 of 1963), S. 3 and Art. 61 — Suit for redemption whether in time — Burden of proof on the plaintiff — Mutation or revenue entries how far helpful. (Punjab Land Records Manual, Paras 7.32 and 7.3).

The initial burden to prove that the suit for redemption is within the period prescribed by the Limitation Act is on the plaintiff and normally the mutation

*From order of S. K. Jain, Senior Sub. J., Sangrur, D/- 8-7-1971.

DZ/EZ/B540/82/TVN/SNV

or revenue entries which only prove the existence or subsistence of the mortgage and do not give the actual date of mortgage may not be of any help to him.

(Para 4)

In the instant case the entries made by the revenue authorities which contained the date of mortgage were made in view of the obligations placed upon them by the provisions of the Punjab Land Records Manual.

Held that the entry could be relied upon to show that the suit for redemption was within the period of limitation. AIR 1948 PC 36, AIR 1950 All 88 and AIR 1950 East Punj 157, Referred.

(Paras 4, 5)

Cases Referred : Chronological Paras

AIR 1950 All 88 : 1950 All LJ 86 4

AIR 1950 East Punj 157 4

AIR 1948 PC 36 : 1948 All LJ 20 4

H. L. Sarin, Sr. Advocate with M. L. Sarin, for Appellants; B. S. Shant, for Respondents.

JUDGMENT:— In this Regular Second Appeal grouse against the concurrent decrees of the lower two Courts is about the redemption of the suit land in favour of the plaintiffs-respondents on payment of Rs. 400/-. The following facts furnish the necessary background of the case.

2. Sarwan Singh, the original owner of the land, had mortgaged the same with possession for a sum of Rs. 400/- with Kaka Singh, husband of predecessor-in-interest of the defendants. The plaintiffs claim that though they had got this land redeemed on 9th May, 1966, yet in subsequent civil litigation initiated by the defendants they had succeeded in securing the possession of the suit land. On the basis of their claim as mortgagors with effect from 11th May, 1954, they filed the present suit for redemption of the land. The suit was contested by the defendants primarily on the ground that the same was barred by limitation as, according to them, prior to the purchase made by their predecessor-in-interest of the mortgagee rights on 11th May, 1954, the same had been mortgaged in favour of Gurdev Singh and others and that mortgage had taken place more than sixty years prior to the filing of the suit.

3. As already indicated, both the lower Courts repelled the stand of the defendants and holding the suit to be within limitation, allowed the claim of the plaintiffs.

4. The solitary contention now raised by the learned counsel for the appel-

lants is that since the plaintiffs-respondents have failed to produce and prove on record the original mortgage deed i.e. pertaining to mortgage in favour of Gurdev Singh and others, the suit of the plaintiffs cannot be held to be within limitation. The learned counsel urges with some amount of vehemence that as the plaintiffs are required to prove the exact date on which that mortgage had taken place, it cannot be assumed that the mortgage had been created within a period of sixty years. For making this statement the learned counsel relies on the provisions of S. 3 of the Limitation Act, 1963, and on the following precedents; Mohammad Akbar Khan v. Mt. Motai, AIR 1948 PC 36, Suraj Bali v. Rang Bahadur, AIR 1950 All 88, and Mt. Bharti v. Des Raj, AIR 1950 East Punj 157. In these judgments it has been laid down that the initial burden is always on the plaintiff to prove that the suit for redemption is within the period prescribed by the Limitation Act and in order to determine that, it cannot be assumed on the basis of the mutation or revenue entries that the mortgage was created on any particular date. Such type of entries only prove the existence or subsistence of the mortgage but not the actual date of mortgage. The learned counsel for the respondent-plaintiff does not dispute this legal position. He, however, maintains that in the case in hand, there is something more available on the record and that is the date of mortgage itself. This date is mentioned in column 13 of Exhibit P-10 i.e. mutation relating to mortgage created in favour of Gurdev Singh and others. What is required to be incorporated in this column of the mutation form is noted in the heading of this column and reads, "Nature and date of transfer with particulars in case of sale and amount of mortgage debt in case of mortgage". This entry reads as follows:—

"Rehan Bajaria Registry 13 Chet 1993
Jare Rehan Mublag Rs. 400. Bajaria
Form No. 945."

The English translation of this entry reads as follows:

"Mortgage through registered deed dated 13 Chet 1993, Mortgage amount Rs. 400."

The learned counsel for the appellants submits that even this entry in Exhibit P-10 does not satisfy the requirements of law as interpreted in the above-noted judgments. He maintains that, firstly,

there was no obligation on the part of the Sub-Registrar on whose information this entry appears to have been made to communicate any particulars or the date of mortgage to the revenue officials, and, secondly, the revenue official making this entry in Exhibit P-10 was not under any duty or obligation to incorporate the date of mortgage and unless that is so, this entry would not be admissible in evidence in terms of S. 35 of the Evidence Act.

5. After giving my thoughtful consideration to this aspect of the matter, I do not find any substance in this submission of the learned counsel. Para 7.32 of the Punjab Land Records Manual clearly lays down that Registrar and Sub-Registrar registering a document relating to the transfer of agricultural land shall send every month the particulars of the registered deed to the office kanungo, who, in turn, would inform the Field Kanungo and the Patwari in accordance with the requirements prescribed in the relevant form. Again, the form of mutation is prescribed by para 7.3 of this Manual. The subsequent paras contain the relevant instructions as to how this form is to be filled in or the revenue record in pursuance thereof has to be prepared. A reading of these paras of the Manual clearly indicates that the Sub-Registrar registering a document with regard to transfer of agricultural land is under a duty to inform the revenue officials about the same and those revenue officials in turn are under an obligation and duty to make the entries in accordance with the instructions contained in these paras. It was in pursuance of this procedure laid down in this Manual that the entries were made in Exhibit P-10. That being the situation, it cannot reasonably be disputed that the original mortgage was created on 13th Chet 1993 (B. K.) equivalent to 26th March, 1937. This date, obviously, is within the period of limitation from the date of filing of the present suit. Thus, I do not find any infirmity in the concurrent findings recorded by the lower Courts on the point of limitation.

6. No other point has been urged by the learned counsel for the appellants.

7. In view of the discussion above, this appeal fails and is dismissed but with no order as to costs.

Appeal dismissed.

AIR 1982 PUNJAB AND HARYANA 351

S. S. SANDHAWALIA, C. J. AND
J. V. GUPTA, J.

Amarya, Appellant v. Mohd. Hayat Khan and others. Respondents.

Letters Patent Appeal No. 200 of 1979, D/- 19-2-1982.*

Punjab Security of Land Tenures Act (10 of 1953), Ss. 18 and 5-B (2) — Tenant filing purchase application under S. 18 — Landlord neglecting to reserve permissible area — Landlord should be taken to have selected from out of the area in his possession — Fresh determination of surplus area and demarcation does not arise. 1980 Pun LJ 11, Reversed.

Where the landlord without any sufficient cause neglects to reserve or select his permissible area under S. 5-B (2) of the Act he should not be allowed to contend that the tenant's application under S. 18 for purchasing the surplus land ought not to be granted until and unless the surplus area was determined and demarcated. The defaulting landlord should be taken to have selected to the extent permissible, his permissible area from out of the land in his possession. Once the surplus area was determined there was no question of a fresh determination of the surplus area. 1980 Pun LJ 11, Reversed. (Para 3)

Cases Referred: Chronological Paras

1971 Pun LJ 766: 73 Pun LR 996 2

M. L. Sarin, for Appellant; Ram Rang, for Respondents.

J. V. GUPTA, J.:— The appellant is the tenant, who filed a purchase application in form 'Q', under Section 18 of the Punjab Security of Land Tenures Act (hereinafter to be referred as 'the Act'), which was allowed by the Assistant Collector 1st Grade vide Annexure 'A' to the writ petition. However, the said order was set aside in appeal by the Collector. But then on further appeal the learned Commissioner restored the order of the Assistant Collector allowing the purchase application vide his order dated 20th March, 1968, Annexure 'C' and the same was maintained by the learned Financial Commissioner in revision petition filed by the landlord, vide his order dated 29th May, 1969, Annexure 'D'. It has been stated therein that the land-

*Against judgment of S. S. Kang, J. reported in 1980 Pun LJ 11.

owner's plea was that they should be allowed an opportunity to have their permissible area demarcated now by the Collector under Section 5-B (2) of the Act and though this plea was allowed by the Collector, the learned Commissioner did not agree with that view and in his opinion the Collector's view was erroneous and also unjust to the tenant. It has been further observed that it is totally wrong to permit a defaulting landowner who omits to reserve or select his permissible area to take advantage of his default for the purposes of blocking or delaying the purchase rights of tenants under S. 18 of the Act, particularly when the default, as in this case, is without sufficient cause. Being dissatisfied the landowners filed the writ petition (C.W.P. No. 2168 of 1969) in this Court, challenging the said order of the Financial Commissioner. This writ petition has been allowed by the learned single Judge on the ground that the purchase application filed by the tenant could not be allowed in this case as the permissible area of the landowners had not been reserved by them. Reliance in this respect was placed on *Jee Ram v. Gobind*, 1971 Pun LJ 766; wherein it has been held:—

"When an application is made under S. 18 of the Punjab Security of Land Tenures Act for purchase and there has been no reservation, the first thing that will have to be done by the Collector is to make a reservation for the landowner under S. 5-B. It is after the reservation has been made that the tenant will be entitled to purchase the land which has been declared surplus and of which he is the tenant provided he satisfies the remaining requirements of S. 18."

It has been further directed by the learned single Judge that the Assistant Collector will send the file first to the Collector to determine the surplus area.

This Letters Patent Appeal has been filed by the tenant against the said order of the learned single Judge. Along with the appeal, a copy of the order of the Collector dated 16th June, 1961 has been filed as Annexure R-1, whereby the surplus area of the said landowners was determined. Though no separate application has been filed to bring this additional evidence on the record, yet an oral prayer has been made in this behalf which we hereby allow after hearing both the parties.

2. The learned counsel for the appellant submitted that in view of the order of the Collector dated 16th June, 1961 (Annexure R-1), there was no question of determining the surplus area again as directed by the learned single Judge. According to the learned counsel it was the duty of the writ petitioners to place this document on the record along with the writ petition. Failure to do so on their part has resulted in obtaining the order under appeal, which apparently is not sustainable in view of this order. The argument proceeded that as a matter of fact this was not their case even before the Financial Commissioner. The only contention raised there was that they should be provided with an opportunity to have their permissible area demarcated under S. 5-B (2) of the Act. On the other hand learned counsel for the respondents argued that what they wanted was the determination of the surplus area and not the demarcation as stated by the Financial Commissioner and the said order of the Financial Commissioner has been rightly quashed in the writ petition. It was also submitted that the said order of the Collector dated 16th June, 1961 (Annexure R-1) is still under consideration by the authorities themselves and, therefore, the same cannot be treated as final.

3. After hearing learned counsel for the parties we find merit in the contention raised on behalf of the appellant. In view of the order dated 16th June, 1961, of the Collector (Annexure R-1) it could not be successfully contended that the surplus area of the landowners has not been determined. The question of demarcation is different from determining the surplus area, and when after the declaration of surplus area there does not occur any change in possession, the landowner is deemed to have selected to the extent permissible, his permissible area out of the land in his possession. Moreover, it has been rightly observed by the learned Financial Commissioner that:

"It is totally wrong to permit a defaulting landowner who omits to reserve or select his permissible area, to take advantage of his default, for purpose of blocking or delaying the purchase rights of the tenants under S. 18 of the Punjab Security of Land Tenures Act, particularly when the default, as in this case, is without sufficient cause."

The land with the tenant-appellant was surplus and he was on the land when the application was made. In these circumstances no infirmity or illegality could be found in the said order of the learned Financial Commissioner, and the learned single Judge seems to have erred in interfering with the same in writ jurisdiction. The said order was quashed as observed earlier because the order of the Collector Annexure R-1 was not brought to the notice of the learned single Judge by either party. Once the surplus area of the landowners already stands determined, no direction can be given to determine the same afresh.

4. In this view of the matter, this appeal succeeds and the order of the learned single Judge is set aside and the writ petition is dismissed, with no order as to costs.

S. S. SANDHAWALIA, C. J.:— I agree.
Appeal allowed.

AIR 1982 PUNJAB AND HARYANA 353

J. M. TANDON, J.

Praja Singh and others, Petitioners v. Gurdip Singh and others, Respondents.

Civil Revn. No. 2257 of 1981, D/- 3-3-1982.

Limitation Act (36 of 1963), Art. 136 — Decree for possession made executable on payment of specified money to the judgment-debtors — Decree-holders could enforce it forthwith paying or depositing the money — Decree-holders levied Execution within 12 years but deposited the money beyond that period — Execution application was dismissed as time barred. AIR 1974 All 275, Dissented from.

The suit for possession was decreed on 8-9-66 with a direction that the plaintiffs should pay to the defendants Rs. 9,803 before taking possession of the property. The execution application for recovering possession was filed within 12 years on 23-8-1978 but the amount was deposited beyond 12 years on 13-8-1981. It was held that under Art. 136 which applied to the case the application for executing the decree ought to be filed within 12 years from the date it became enforceable. The decree was enforceable

from the date it was passed on the decree-holders paying the amount or depositing it into court which was in their control. The deposit having been made after the lapse of 12 years from 8-9-66 the execution application could not be taken to have been initiated within the period of limitation. The contention that the payment made on 13-8-81 related back to the date of the filing of the execution application was rejected. AIR 1938 Bom 367, AIR 1952 Trav-Co 78, AIR 1951 SC 16 and AIR 1975 Punj 246 (FB) Followed; 1978 Cur LJ (Civ) 470, Distinguished; AIR 1974 All 275 (FB), Dissented from. (Paras 8, 10, 12 to 14)

Cases Referred: Chronological Paras

1978 Cur LJ (Civ) 470 : 80 Pun LR 634	13
AIR 1975 Punj 246 : 77 Pun LR 540 (FB)	9, 11
AIR 1974 All 275 : 1974 All LJ 399 (FB)	7, 11
AIR 1952 Trav-Co 78	9
AIR 1951 SC 16	9, 11
AIR 1938 Bom 367	9
AIR 1931 Nag 54	9

K. P. Bhandari with Ravi Kapur, for Petitioners; B. S. Brar, for Respondents.

ORDER:— Isher Singh owned land measuring 189 Kanals 4 Marlas in Samana Pati Ghurame, District Patiala. After his death, the land was inherited by his widow and children, including Gurdip Singh, Balwinder Singh, Pritam Kaur and Jasbir Kaur respondents. On June 27, 1964, the respondents were minors. On that date their mother Vir Kaur sold the land owned by her and her minor children without permission of the Court for a sum of Rs. 17,200 in favour of Praja Singh and others (petitioners). The respondents through their uncle and next friend Gurbachan Singh filed a suit for possession of their share, that is, 4/7th of the land against Praja Singh etc. which was dismissed by the trial Court on August 25, 1965. The respondents then filed an appeal which was accepted by the Additional District Judge, Patiala, vide order dated September 8, 1966. The appellate Court passed the following operative order:—

"So I allow the appeal, set aside the judgment and decree of the Court below and pass a decree in favour of the plaintiff for the possession of the 4/7th share of the disputed land with a direction that before taking possession

the plaintiffs shall pay to the vendee defendants a sum Rs. 9,803, that is, 4/7th share of the total consideration which is made a condition precedent."

2. On August 23, 1978, the respondents, who had in the meantime attained majority filed an execution application to execute the decree passed in their favour by Additional District Judge, Patiala, on September 8, 1966. They prayed for being put in possession of the land on payment of Rs. 9,803 to the judgment-debtors-petitioners. The respondents, however, did not deposit the amount in Court nor did they pay the same to the judgment-debtors when they filed the execution application. The proceedings in the execution application started. On Nov. 4, 1980, the judgment-debtors-petitioners (hereinafter petitioners) filed objection alleging that the decree-holders-respondents (hereinafter respondents) had effected a compromise with them to treat the decree as satisfied on payment of Rs. 50,000. The respondents denied that they had compromised the matter or had received the amount. The executing Court framed the following issue:—

Whether the decree stands satisfied by way of compromise as alleged?

3. The petitioners did not lead any evidence with the result that the executing Court vide order dated July 30, 1981, dismissed the objection petition and directed the respondents to deposit Rupees 9,803 on or before August 13, 1981. The respondents deposited the amount in Court on August 13, 1981.

4. On August 29, 1981, the petitioners submitted an application under Order 47, Rule 1, Civil Procedure Code, read with S. 151, Civil Procedure Code, praying that the objections regarding limitation raised by them in their objection petition which had been disposed of vide order dated July 30, 1981, be decided. The executing Court thereupon framed the following additional issues:—

Whether the execution application is time barred?

5. The executing Court vide order dated September 4, 1981, held that the execution application was filed within time inasmuch as it was filed on August 23, 1978, that is, within 12 years of the passing of the decree on September 8, 1966. It was further held that the late deposit of the decretal amount on August 13, 1981, is of no consequence as it

would relate back to the date when the execution application was filed. The petitioners have assailed the orders dated July 30, 1981 and September 4, 1981, in the present revision. The petitioners have also assailed the order dated June 11, 1981, closing their evidence in support of their plea that the respondents had effected a compromise with them on payment of Rs. 50,000.

6. The learned counsel for the petitioners has addressed no arguments about the orders dated June 11, 1981 and July 30, 1981. The learned counsel for the petitioners has contended that the order dated September 4, 1981, is liable to be set aside inasmuch as the execution application was time barred because the respondents did not deposit Rs. 9,803 within a period of 12 years from the date of the passing of the decree on September 8, 1966, and deposit of the amount on August 13, 1981, having been made after the expiry of 12 years from the date of the passing of the decree would not render the execution application within time.

7. The learned counsel for the respondents has argued that this case will be governed by Art. 136 of the Limitation Act, 1963, which provides for a limitation of 12 years from the date the decree becomes enforceable. The decree dated Sept. 8, 1966, could be enforced on payment of Rs. 9,803. This amount was deposited on August 13, 1981. The decree dated Sept. 8, 1966, therefore, became enforceable on August 13, 1981. The limitation of 12 years under Art. 136 of the Limitation Act would start with effect from August 13, 1981. Reliance has been placed on *Abdul Rashid v. Sri Sitaramji Maharaj Brajman*, AIR 1974 All 275 (FB).

8. It is conceded (and rightly) by the learned counsel for the parties that the limitation in this case will be 12 years in Article 136 of the Limitation Act, 1963. The limitation for the purposes of this Article shall commence when the decree dated Sept. 8, 1966, becomes enforceable. The point for consideration is as to when did the decree dated Sept. 8, 1966, become enforceable. According to the learned counsel for the respondents this decree became enforceable on Aug. 13, 1981, when the amount was deposited in Court whereas the contention of the learned counsel for the petitioners is that the decree was enforceable right from the date it was passed inasmuch as

it was within the control of the respondents to deposit the amount and to seek possession of the land forthwith.

9. In *Gopal Sattu v. Dnyanu Maruti*, AIR 1938 Bom 367, it was held that where there is a decree for possession on the payment of a sum on a future date, the provisions of Article 182 cannot have any application. Article 181 is the Article applicable to such a case. Plaintiff's right to enforce the decree arises when the sum is payable. The execution of most decrees necessitates the possession of a certain amount of money, and it is impossible to say that a decree is not executable because the plaintiff has not got the money necessary to enable him to execute it. In *Dada v. Ganpatrao*, AIR 1931 Nag 54, it was held that when a decree for possession is passed on condition of payment of a certain sum by the decree-holder, the starting point for limitation for execution of the decree is the date of the decree and not the date of payment by the decree-holder. The decree-holder cannot obtain extension of limitation by deferring payment. In *Ouseph Abraham v. Varki Varki*, AIR 1952 Trav-Co 78, it was held that where under the decree the plaintiffs get the right to redeem the properties only on payment of the mortgage amount and the value of improvements, the period of limitation for recovery of possession of the properties does not run from the date of deposit of those amounts. In *Yeshwant Deorao v. Walchand Ramchand*, AIR 1951 SC 16, it was held that where a decree provides that the decree-holder should pay the deficit court-fee on the decretal amount before its execution the decree is not a conditional one in the sense that some extraneous event is to happen on the fulfilment of which alone it can be executed. The payment of court-fees on the amount found due is entirely in the power of the decree-holder and there is nothing to prevent him from paying it then and there. Thus it is a decree capable of execution from the very date it is passed. In *Amar Nath v. Mul Raj*, 77 Pun LR 540: (AIR 1975 Punj 246) (FB) it was held that a decree can only be said to be not enforceable when it is incapable of execution on the date when it is passed, on account of the very terms of the decrees. There must be something inherent in the decree which does not make it enforceable immediately it is passed and postpones its execution to some contin-

gency which is to happen in future and which is beyond the control of the decree-holder.

10. In view of the rule laid down in the authorities mentioned above it is clear that the decree passed in favour of the respondents on Sept. 8, 1966, shall be taken to be enforceable right from the day it was passed unless it was beyond their control to execute it. In the latter case, the decree would become enforceable when it would be within the control of the respondents to execute it. The respondents could execute the decree dated September 8, 1966, on payment of Rs. 9,803. The payment of the amount was within the control of the respondents and it was, therefore, within the control of the respondents to execute the decree dated September 8, 1966, forthwith. Under these circumstances, the decree dated September 8, 1966, enforceable at the instance of the respondents shall be taken to be with effect from the date it was passed.

11. In *Abdul Rashid's case* (AIR 1974 All 275) (FB) (supra) the facts of the case were not identical to the case now under consideration. The learned Judges, however, expressed the view that a decree for possession on payment of certain sum was incapable of execution unless the payment was made and the decree-holder was, therefore, entitled to execute the decree within three years of the date when he made the payment under Art. 182 of the Limitation Act, 1908. The view expressed in this authority runs counter to the Full Bench authority of this Court (*Amar Nath's case*) (AIR 1975 Punj 246) and is also at variance with the observations made by the Supreme Court in *Yeshwant Deorao's case* (AIR 1951 SC 16) (supra).

12. In view of discussion above, I hold that the decree dated Sept. 8, 1966, was enforceable by the respondents right from the date it was passed inasmuch as it was within their control to deposit Rs. 9,803 and seek possession of the land. The limitation of 12 years under Article 136 to execute this decree would, therefore, commence with effect from September 8, 1966, and not from Aug. 13, 1981, when the respondents deposited the amount in Court.

13. The learned counsel for the respondents has contended that the execution application was filed on Aug. 23, 1978, that is, within a period of 12 years

with effect from Sept. 8, 1966. The respondents had sought the possession of the land in execution of the decree on payment of Rs. 9,803 to the petitioners. The executing Court directed the respondents to deposit the amount on or before Aug. 18, 1981, vide order dated July 30, 1981. The amount was deposited on Aug. 13, 1981. The deposit would relate back to the date when the execution application was filed. The late deposit of Rs. 9,803 on August 13, 1981, is, therefore, not fatal for the respondents. Reliance has been placed on *S. Kharak Singh v. Harbhajan Singh*, 1978 Cur LJ (Civ) 470. I am not impressed by this contention. The decree dated Sept. 8, 1966, passed in favour of the respondents was conditional. The respondents could take possession of the land from the petitioners on payment of Rs. 9,803. In other words, the respondents could not execute the decree without deposit of Rs. 9,803 in Court or without making the payment of that amount to the petitioners. The respondents did not deposit the amount in Court when they filed the execution application on Aug. 23, 1978. This amount was also not paid to the petitioners. Under these circumstances, the execution proceedings to execute the decree dated Sept. 8, 1966, shall be deemed to have been initiated when the amount was deposited in Court on Aug. 13, 1981 for payment to the petitioners. The deposit having been made after a lapse of 12 years with effect from Sept. 8, 1966, the execution proceedings cannot be taken to have been initiated within the period of limitation. In *Kharak Singh's* case (supra), the Court passed a decree on March 12, 1964, for possession by specific performance in favour of the decree-holder on payment of Rs. 300. No time was fixed for depositing the amount. It was held that the limitation for executing the decree was 12 years. The decree-holder was entitled to deposit the amount within the period of limitation and execute the decree. The executing Court, after considering the evidence led by the parties, came to the conclusion that the decree-holder had paid Rs. 230 to the judgment-debtor leaving a balance of Rs. 70 towards him. The decree-holder was given time to deposit the balance amount of Rs. 70 up to March 1, 1977. The amount was deposited in accordance with the order of the executing Court. The learned single Judge held that the

decree-holder is entitled to execute the decree. The learned counsel for the respondents has contended that it must be inferred from the ratio of *Kharak Singh's* case (supra) that the amount deposited after the period of limitation had expired would relate back to the date when the execution application was filed. In my opinion, no such inference can be raised. It has been clearly held in this authority that the decree-holder was entitled to deposit the amount within the period of limitation and execute the decree. Under the peculiar circumstances of that case, the executing Court came to the conclusion that the decree-holder had paid Rs. 230 to the judgment-debtor leaving a balance of Rs. 70. The executing Court allowed the decree-holder to deposit the balance amount of Rs. 70 up to March 1, 1977. Even assuming that the balance amount of Rs. 70 was deposited after the expiry of 12 years with effect from March 12, 1964, it would not be correct to infer that the total amount of Rs. 9,803 deposited by the respondents on August 13, 1981, shall relate back to August 23, 1978, when they filed the execution application.

14. In the result, I hold that in view of the fact that the respondents did not deposit Rs. 9,803 within a period of 12 years with effect from Sept. 8, 1966, the execution application filed by them is liable to be dismissed as time barred. I, therefore, accept the revision, set aside the order of the executing Court dated Sept. 4, 1980, and further dismiss the execution application filed by the respondents as time barred. The parties are left to bear their own costs.

Petition allowed.

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S. S. SANDHAWALIA, C. J. AND
D. S. TEWATIA, J.

Surakshat Singh, Petitioner v. State of Punjab and others, Respondents.

L.P.A. No. 86 of 1979, D/- 18-3-1982.*

Punjab Land Reforms Act (10 of 1973), Ss. 26 (1), 4, 7 — Punjab Land Reforms Rules (1973), Rr. 8, 9, 10 — Rules are intra vires the provisions of the Act.

*Against judgment and order of A. S. Bains in C.W.P. No. 2372 of 1976, D/- 23-2-1979.

DZ/DZ/B774/82/SSG

Rules 8, 9 and 10 of the Rules are intra vires the provisions of the Act and, therefore, clearly valid. (Para 22)

The primary purpose of the Act is to have the permissible and surplus area of a landowner determined which, in turn, is made dependent upon the determination or classes and categories of land that a landowner is possessed of. Therefore, the State Government is competent to frame such rules as may help in identifying the various categories of land and fixing the comparative values thereof. (Para 6)

The land falling under cls. (a) and (b) would be of a quality other than the one which is mentioned in cl. (d) of sub-s. (2) of S. 4 of the Act, that is, if the land is one which answers to the description of the land mentioned in cl. (d), read with sub-rules (iv) and (v) of R. 8 of the Rules, then even though it is commanded by an irrigation source capable of supplying water for one crop or two crops, the land would not fall under cl. (a) or (b), as the case may be, and would be treated as falling under cl. (d) of sub-s. (2) of S. 4 of the Act. (Paras 8, 10)

If a landowner's holding comprises of land wholly of one category or the other, then of course no difficulty arises in computing the permissible area, but where the holding of a landowner is a mixed bag comprising of various categories of land, then it becomes necessary to know the comparative value of each category of land so that one category of land can be converted into the other category of land. R. 8, therefore, which fixed the comparative value of all the categories of land, was intended to facilitate the said task and, therefore, clearly subserves the purposes of the Act. Hence, its formulation is clearly within the competence of the State Government by virtue of the provisions of S. 26 of the Act. (Para 11)

Only the land with character and quality other than the one mentioned in cl. (d) of sub-sec. (2) of S. 4 of the Act would be taken into consideration when applying the formula mentioned in sub-r. (1) and (2) of R. 9 of the Rules. To determine the same in a precise manner regarding every crop and every holding with reference to the source of irrigation may not be always feasible, hence the rule-making authority has devised, under sub-rule (1) of R. 9, a formula which appears to make sufficient allow-

ance for variations in that regard and treats the area so arrived at out of the total holding as the area of 'A' quality capable of assured irrigation for growing two normal crops therein and the rest to be treated as Barani, even though the same fell within the command of the given source of irrigation. Hence, it would be seen that sub-rule (1) of R. 9 clearly subserves the purpose of clause (a) of sub-sec. (2) of Sec. 4 and is, therefore, valid being clearly within the competence of the State Government to make the same. (Paras 13, 14)

Sub-rule (2) of R. 9 of the Rules is intended by the rule-making authority to subserve the purpose of clause (b) of sub-sec. (2) of S. 4 of the Act. Hence, sub-rule (2) of R. 9 is also clearly valid and within the competence of the State Government. R. 10 is also useful and meaningful in carrying out the purposes of cl. (d) of sub-s. (2) of S. 4 of the Act. (Paras 15, 17, 18)

The irrigation intensity of 'Shah Nahar' has been correctly fixed by the Government—it being a technical matter and the Government having the assistance of technical experts on its command. Therefore, the insertion of item No. 9 in Schedule 'A' to the Rules is clearly within the competence of the State Government. (Para 21)

K. P. Bhandari with Suresh Amba and Rajiv Bhalla, for Petitioner; M. J. S. Sethi, Addl. Advocate General, for Respondents.

D. S. TEWATIA, J.:—The questions of law that arise for consideration in these Letters Patent Appeals Nos. 80 to 88 of 1979 at the instance of the appellants—landowners in the context of the enforcement of the Punjab Land Reforms Act, 1973, hereinafter referred to as the Act, can be formulated thus:

(1) Whether Rules 8, 9 and 10 of the Punjab Land Reforms Rules, 1973, are beyond the rule-making power of the State Government?

(2) Whether Rules 8, 9 and 10 of the Punjab Land Reforms Rules, 1973, do not carry out the purposes of the Rules and the Act for computing the permissible area in accordance with the Legislative mandate?

(3) Whether insertion of Item No. 9 in Schedule 'A' to the Punjab Land Reforms Rules, 1973, in the list of canals mentioning its projected intensity of 80 per cent is beyond the powers of the State Government?

The learned single Judge held that the said rules were not only within the rule-making power of the State, but were also meaningfully relevant for carrying out the purposes of the Act, and also further held that the State Government was competent to insert item No. 9 in Schedule 'A' pertaining to Shah Nahar and fixing its intensity at 80 per cent.

2. The relevant provisions of the Act and the Rules deserve noticing at the very outset. S. 4, which prescribes the permissible area of the landowner and is thus crucial in judging in particular as to whether the rules help in carrying out the purposes of the said provision, is in the following terms:

"4. (1) Subject to the provisions of Section 5, no person shall own or, hold land as landowner or mortgagee with possession or tenant or partly in one capacity and partly in another in excess of the permissible area;

(2) 'Permissible area' shall mean in respect of—

(a) land under assured irrigation and capable of yielding at least two crops in a year (hereinafter in this Act referred to as the 'first quality land'), seven hectares; or

(b) land under assured irrigation for only one crop in a year, eleven hectares; or

(c) barani land, 20.5 hectares; or

(d) land of other classes including banjar land, an area to be determined according to the prescribed scale with reference to the intensity of irrigation productivity and soil classification of such classes, having regard to the respective valuation and the permissible area of the classes of land mentioned at (a), (b) and (c) above, subject to the condition that the area so determined shall not exceed 21.8 hectares;

Provided that—

(i) where land consists of two or more classes, the permissible area shall be determined on the basis of relative valuation of such classes of land, subject to the condition that it does not exceed 21.8 hectares;

(6) For the purpose of valuation of land one and quarter hectares of banjar land shall be treated as equivalent in value to one hectares of barani land.

Section 7, which authorises the Collector to determine the permissible area of the landowners, reads:

"7. (1) On the basis of the information given in the declaration furnished under Section 5 or the information obtained under Section 6, as the case may be, and after making such inquiry as he may deem fit, the Collector shall, by an order, determine the permissible area and the surplus area of a landowner or a tenant as the case may be.

Rules 7, 8, 9, 10 and 12 of the Punjab Land Reforms Rules, 1973, hereinafter referred to as the Rules, are in the following terms:

"7. On receipt of form A, the Collector shall, after satisfying himself as to the correctness of the entries made therein, and after giving an opportunity to the landowner, mortgagee with possession or tenant, as the case may be, of being heard and after making such enquiry as he may deem necessary by an order, determine the permissible area and the surplus area of a land owner or mortgagee with possession or the tenant as the case may be. A copy of such order shall be endorsed to the Circle Revenue Officer,

8. The valuation of different classes of land shall be as follows:

(i) Land under assured irrigation and capable of yielding at least two crops in a year — 100 per cent.

(ii) Land under assured irrigation for only one crop in a year— 63.6 per cent.

(iii) Barani land — 34 per cent.

(iv) Sailab, Bet Sailab, Dakar, Roali, Bhud, Chhamb, Thur, Sem, Kallar and Banjar Jadid, not falling under sub-clauses (i), (ii) and (iii)— 34 per cent.

(v) Banjar— 27 per cent.

9. (1) Where land is commanded for irrigation by a perennial canal the area of such land shall be multiplied by half of the irrigation intensity ratio specified against such a canal in Schedule 'A'. The figure thus arrived at shall be treated as the land under assured irrigation and capable of yielding at least two crops in a year and the remaining area of such land shall be treated as Barani land.

(2) Where land is commanded for irrigation by a non-perennial canal, the area of such land shall be multiplied by the irrigation intensity ratio specified against such a canal in Schedule 'A'. The figure thus arrived at shall be treated as the land under assured irrigation for one crop in a year and the remaining

area of such land shall be treated as Barani land;

(3) Where land is commanded for irrigation by a tubewell owned by the Government, the area of such land shall be multiplied by half the irrigation intensity ratio specified against such a tubewell in Schedule 'A'. The figure thus arrived at shall be treated as the land under assured irrigation and capable of yielding at least two crops in a year and the remaining area of such land shall be treated as Barani land.

(4) Where land is irrigated by water drawn from a privately owned tubewell, pumping set, open well or bore, the land under assured irrigation and capable of yielding at least two crops in a year shall be according to the norms specified in Schedule 'B'. The remaining area shall be treated as Barani land.

(5) Where irrigation by canal water or Government owned tubewell is supplemented by water drawn from a privately owned tubewell, pumping set, open well or bore, the area determined in accordance with the provisions of Schedule 'B' shall also be taken into consideration for the purpose of this rule.

(6) Where a tubewell, a pumping set, an open well or a bore has been installed on or before the appointed day in the land described in the Jamabandi prepared immediately before that day as Banjar Jadid or Banjar Qadim, the land determined in accordance with the provisions of Schedule 'B' shall be treated as land under assured irrigation and capable of yielding at least two crops in a year or land under assured irrigation for only one crop in a year depending on whether according to the Khasra-Girdawari record of the year 1970 at least two crops were raised on this land or only one crop was raised.

10. For the purpose of proviso (i) of cl. (d) of sub-sec. (2) of S. 4, the land owned or held by a person shall be valued according to the relative valuation of various classes of land as given in Rules 8 and 9 and the whole of the land shall be converted into the first quality land. After it is so valued and converted, the land in excess of seven hectares of first quality land shall be treated as surplus area. The figure arrived at on the basis of total valuation of all the classes of land shall be treated as land of the class referred to in

cl. (a) of sub-sec. (2) of S. 4 and the permissible area and the surplus area shall be determined accordingly.
Illustration.

12. For the purpose of these rules, the relevant revenue record for determining whether the land is irrigated or unirrigated shall be the entries in Khasra Girdwari record for the year 1970 :

Provided that when the land is acquired by a person on or after the appointed day, in any manner, other than by inheritance, bequest or gift from a person to whom he is an heir, the relevant revenue record for the aforesaid purpose shall be the Khasra Girdwari record prepared immediately before such acquisition."

The determination of the permissible area of a landowner involves, in the first instance, the finding out as to how much land of a given category a landowner is possessed of and it is in this area that formulation of the principles and objective criteria can usefully be left to the Government as the delegate of the legislature if the legislature, expressly or by necessary implication, had delegated the performance of the said task to the authority indicated in the Act.

3. Section 26 (1) is the relevant provision, which envisages delegation of authority to the State Government to make rules for carrying out the purposes of the Act, and is in the following terms :

"26. (1) The State Government may, by notification in the official gazette, make rules for carrying out the purposes of this Act.

(2) * * * * *

One of the points, that was canvassed before us with some persistence by Mr. Bhandari, was that the Rules could be framed only in order to give effect to the mandate given in cl. (d) of sub-section (2) of S. 4 of the Act with regard to the land mentioned in cl. (d) and such rules, therefore, could have no application to the determining of permissible area under cls. (a), (b) and (c) of sub-sec. (2) of S. 4.

4. Whether the rules, which have been impugned help in carrying out the purposes of cls. (a), (b) and (c) of sub-sec. (2) of S. 4 or not would be a matter distinct from the proposition whether application of these rules could be

limited to the carrying out of the purposes of cl. (d) of sub-sec. (2) of S. 4 only.

5. Perusal of S. 26 of the Act would disclose that the legislature has authorised the State Government to make rules for carrying out the purposes of the Act.

6. The primary purpose of the Act is to have the permissible and surplus area of a landowner determined which, in turn, is made dependent upon the determination of classes and categories of land that a landowner is possessed of. Therefore, the State Government is competent to frame such rules as may help in identifying the various categories of land fixing the comparative values thereof. Whether the impugned rules framed by the State Government in this regard are helpful in that regard is a matter that shall be presently examined.

7. Perusal of S. 4 would show that the legislature has classified the land of a landowner, firstly, with reference to the fact as to whether irrigation facility of an assured nature is available to the given land for one crop or two crops or not at all and, secondly, with reference to the quality of land. While land falling under cls. (a), (b) and (c) of sub-sec. (2) of S. 4 of the Act has been distinctly identified with reference to first criterion, the land falling under cl. (d) of sub-sec. (2) of S. 4 of the Act is identified as a distinct category with reference to the second criterion.

8. While examining the quality of land falling under S. 4 (2) (a) and (b) of the Act, the question arises as to what do we mean by a land capable of raising one crop or two crops. Can one say that if a given acre of land, which is capable of yielding only a few kilograms of a given crop sown therein twice a year even when the going is good, that is, when the assured irrigation is available round the year and factors such as natural calamities or other things, which may diminish the yield or may tend to destroy the crop have not interfered with the yield, would fall in the category of land envisaged in S. 4 (2) (a)? In other words, if the quality of the soil is such that it is capable of yielding only so much, then can one say that such a land with assured irrigation round the year would fall under cl. (a) and be treated as of

the best quality or if the assured irrigation facility is for only one crop, then it would fall under cl. (b) and thus be adjudged of the second best quality. Apparently, this could not have been the intention of the legislature and, therefore, in using the expression 'capable of yielding one crop or two crops in a year' under cls. (a) and (b) of sub-section (2) of S. 4 of the Act, the legislature must have meant 'capable of giving normal yield', which a normal land should be capable of yielding with the aid of irrigation, other factors that may diminish or increase the yield, for the moment, being kept out of reckoning.

9. The land falling under cl. (d) of sub-sec. (2) of S. 4 of the Act when read with sub-rules (iv) and (v) of R. 8 of the Rules, would be Sailab, Bet Sailab, Dakar, Rosli, Bhud, Chhamb, Thur, Sem, Kallar, Banjar Jadid and Banjar.

10. 'Banjar Land' as defined in S. 3 (2) of the Act means 'land which has remained uncultivated for a continuous period of not less than four years immediately preceding the date on which the question whether such land is Banjar or not arises'. It carries valuation of 27 per cent, as per sub-rule (iv) of R. 8. Barani land is a land which is not commanded by irrigation source of any kind except rain. It carries 34 per cent valuation as per R. 8 (iii). The land excepting Banjar land which falls under S. 4 (2) (d) of the Act also carries a valuation of 34 per cent, irrespective of the fact as to whether such type of land is commanded or not by irrigation source of the kind envisaged for the land falling under cl. (2) (a) and cl. (2) (b). That means that the legislature did not intend to treat every quality of land, which is assured of irrigation for one crop or two crops, as land falling under S. 4 (2) (a) and (b) respectively. Hence, on the parity of reasoning, the land falling under cls. (a) and (b) would be of a quality other than the one which is mentioned in cl. (d) of sub-sec. (2) of S. 4 of the Act, that is, if the land is one which answers to the description of the land mentioned in cl. (d), read with sub-rules (iv) and (v) of R. 8 of the Rules, then even though it is commanded by an irrigation source capable of supplying water for one crop or for two crops, the land would not fall under cls. (a) or (b), as the case may be, and would be treated as falling under cl. (d) of sub-sec. (2) of S. 4 of the Act.

11. If a landowner's holding comprises of land wholly of one category or the other, then of course no difficulty arises in computing the permissible area, but where the holding of a landowner is a mixed bag comprising of various categories of land, then it becomes necessary to know the comparative value of each category of land so that one category of land can be converted into the other category of land, Rule 8, therefore, which fixed the comparative value of all the categories of land, was intended to facilitate the said task and, therefore, clearly subserves the purposes of the Act. Hence, its formulation is clearly within the competence of the State Government by virtue of the provisions of S. 26 of the Act.

12. Mr. Bhandari, learned counsel for the appellant, argued that sub-rules (1) and (2) of R. 9, as formulated, usurped the jurisdiction of the Collector that he exercised under Sec. 7 of the Act in determining the permissible and surplus areas of a landowner insofar as the assessment of the area of land falling under cls. (a) and (b) of sub-sec. (2) of S. 4 of the Act with the landowner is concerned, in that the Collector shall have to hold the area as derived with the aid of formulae given in sub-rr. (1) and (2) of R. 9 as the area falling under cls. (a) and (b) of sub-sec. (2) of S. 4 of the Act.

13. We do not think there is any merit in this contention, in view of the interpretation that we have put on the provisions of cls. (a), (b) and (d) of sub-sec. (2) of S. 4 of the Act, for we have held that only the land with character and quality other than the one mentioned in cl. (d) of sub-sec. (2) of S. 4 of the Act would be taken into consideration when applying the formulae mentioned in sub-rr. (1) and (2) of R. 9 of the Rules. Hence, the Collector shall have to objectively identify the nature and character of the land and if he finds that the nature and character of a given area of a landowner is distinct from the one mentioned in cl. (d) of sub-sec. (2) of S. 4 and identified by sub-rr. (iv) and (v) of R. 8, then he would have to see as to whether such area is commanded by a perennial canal or non-perennial canal. Such of the area as is commanded by a perennial canal, multiplied by the intensity of the canal according to the formula given in clause (a), would determine the area that would be deem-

ed to be assured of irrigation and capable of raising two crops, and in the case of non-perennial canal the area would be deemed to be an area assured of irrigation and capable of raising one crop, as would be shown when considering these sub-rules of R. 9 hereinafter.

14. So far as R. 9 (1) of the Rules is concerned, it is clearly intended to subserve the purpose of clause (a) of sub-sec. (2) of S. 4 of the Act in that the expression 'assured' used in clauses (a) and (b) was intended to emphasise the fact that it was not enough that irrigation facility was available for one crop or two crops, but the same should also be sufficient to the need of the crop, that is, if a given crop needs eight watering, then water from the given source should be available for all the eight watering, assuming that the entire holding is under the given crop. To determine the same in a precise manner regarding every crop and every holding with reference to the source of irrigation may not be always feasible, hence the rule-making authority has devised, under sub-rule (1) of R. 9, a formula which appears to make sufficient allowance for variations in that regard and treats the area so arrived at out of the total holding as the area of 'A' quality capable of assured irrigation for growing two normal crops therein and the rest to be treated as Barani, even though the same fell within the command of the given source of irrigation. Hence, it would be seen that sub-rule (1) of R. 9 clearly subserves the purpose of cl. (a) of sub-sec. (2) of S. 4 and is, therefore, valid being clearly within the competence of the State Government to make the same.

15. Sub-rule (2) of R. 9 of the Rules is intended by the rule-making authority, as would be presently demonstrated, to subserve the purpose of cl. (b) of sub-sec. (2) of S. 4 of the Act. Explaining the above by an illustration, let us assume that one landowner owns 100 hectares of land, which was of a kind falling under cl. (b) of sub-sec. (2) of S. 4 of the Act and commanded for irrigation by a non-perennial canal of 100 per cent irrigation intensity, then his area, which would answer the description of the category of land mentioned in cl. (b) of sub-sec. (2) of S. 4 would be: $100 \times 100 \div 100 = 100$ hectares.

16. This 100 hectares of land, when converted in terms of first quality land, comes to : $100 \times 63.6 \div 100 = 63.6$ hectares.

17. When regard is had to the mutual ratio of permissible area fixed for land falling under cls. (a) and (b), it works out to be 7:11 hectares, that is, 100 hectares of the category of land falling under cl. (b) is equal to 63.6 hectares of land falling under cl. (a). The same ratio works out, as already shown above, when formula mentioned in sub-rule (2) of R. 9 is applied. Hence, sub-rule (2) of R. 9 is also clearly valid and within the competence of the State Government.

18. As far as R. 10 of the Rules is concerned, it merely provides that if a landowner owns land of various categories, then, with the aid of Rr. 8 and 9, the value of all the categories of land, other than the category falling under cl. (a) of sub-sec. (2) of S. 4 of the Act, shall be expressed in terms of the value of the land falling under cl. (a) of sub-sec. (2) of S. 4 of the Act and then permissible area and surplus area shall be determined accordingly. For example, a landowner owns 2 hectares of 'A' category of land and 100 hectares of Banjar land and if he wishes to retain his entire 'A' quality land, then his 100 hectares of Banjar land shall be converted into 'A' quality land with the aid of valuation fixed by R. 8 and to this 2 hectares of 'A' category would be added and then out of the total area so arrived at, 7 hectares would be declared as permissible area and the rest as surplus. However, if he was to select his entire permissible area from his 100 hectares of Banjar land, then R. 10 would have no application, for in that case by virtue of cl. (d), he would be given by way of permissible area only 21.8 hectares out of 100 hectares and the rest of the Banjar land along with 2 hectares of 'A' category of land would, be declared surplus with him. As would be seen from the above, R. 10 is useful and meaningful in carrying out the purposes of cl. (d) of sub-sec. (2) of S. 4 of the Act.

19. Now coming to the addition of 'Shah Nahar' as Item No. 9 in Sch. 'A' to the Rules with assessed irrigation intensity of 80 per cent, the point raised on behalf of the appellant is that if irrigation intensity of perennial canal like Bhakra canal is assessed at 62 per cent,

how is it that irrigation intensity of a non-perennial canal is assessed at 80 per cent, when, admittedly, there are no headworks for the purpose of measuring the irrigation intensity of 'Shah Nahar'.

20. In the written statement filed on behalf of the respondents, the stand taken is that 'Shah Nahar' project was completed before the enforcement of the Act and that its projected intensity was 80 per cent. It was averred that for the purpose of either judging or fixing irrigation intensity of a given canal, it is not necessary that there should be headworks on the given canal.

21. The learned counsel for the appellant, however, has not been able to show in any manner whatsoever that the irrigation intensity of 'Shah Nahar' could not be 80 per cent. So we must take it that the irrigation intensity of 'Shah Nahar' has been correctly fixed by the Government — it being a technical matter and the Government having the assistance of technical experts on its command. Therefore, the insertion of Item No. 9 in Schedule 'A' to the Rules is clearly within the competence of the State Government.

22. In view of the interpretation that we have put upon Section 4 of the Act, Rr. 8, 9 and 10 of the Rules are *intra vires* the provisions of the Act and, therefore, clearly valid.

23. For the reasons aforementioned, finding no merit in these appeals (L. P. As. Nos. 80 to 88 of 1979) we dismiss the same, but with no order as to costs.

S. S. SANDHAWALIA, C. J.:— I agree.

Appeals dismissed.

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S. S. SANDHAWALIA, C. J.

AND J. V. GUPTA, J.

Kartar Singh and others, Petitioners v. State of Punjab and others, Respondents.

Civil Writ Petn. No. 4423 of 1981 D/- 30-3-1982.

(A) Punjab Co-operative Societies Act (25 of 1961), S. 27 (6) — Directory in nature. 1964 Cur LJ 157 and 1977 Cur LJ (Civ.) 249, Overruled.

Section 27 (6) is directory in nature. 1964 Cur LJ 157; 1977 Cur LJ (Civ.) 249, Overruled; AIR 1957 SC 912; AIR 1961 SC 200; AIR 1976 Punj & Har 69 (FB)

DZ/EZ/B767/82/CWM

and AIR 1979 Punj & Har 61 (FB), Rel. on; AIR 1970 SC 992 and 1970 Co-op. Tri Dic 190, Distinguished.

(Paras 6, 9, 11, 12, 13, 21)

No inflexible rule can be laid down that a mere non-compliance of S. 27 (6) would ipso facto vitiate the action under S. 27 (1). Indeed, if any grave prejudice to the parties or a miscarriage of justice arises because of its non-compliance either to the Committee or any of its members, the Court in a particular case would not be precluded from taking notice thereof and providing adequate relief. (Para 22)

(B) Precedents — Observations in judgment — Binding effect.

A decision is only an authority for what it actually decides and its ratio, and not every observation found therein nor what logically follows from the various observations made in it. It is not a profitable task to extract a sentence here and there from a judgment and to build upon it. (1901) AC 495 (HL), AIR 1968 SC 647, Rel. on. (Para 17)

Cases Referred : Chronological Paras

AIR 1979 Punj & Har 61 (FB)	14
1977 Cur LJ (Civ) 249 : 1977 Pun LJ 210	4, 19, 20
AIR 1976 Punj & Har 69 (FB)	6
AIR 1970 SC 992	17
1970 Co-operative Tribunal Decisions 190	18
AIR 1968 SC 647	17
1964 Cur LJ 157 (Punj)	4, 19, 20
AIR 1961 SC 200	16
AIR 1957 SC 912 : 1957 All LJ 921	16
AIR 1955 SC 233	15
AIR 1945 FC 67 : 1945 FCR 99	16
AIR 1917 PC 142 : (1917) AC 170 : 116 LT 162	16
(1901) AC 495 : 70 LJPC 76 : 85 LT 289 (HL), Quinn v. Leathem	17

H. S. Mattewal, for Petitioners; M. J. S. Sethi, Addl. Advocate General, Punjab, for the State; M. S. Bedi, for Respondent No. 4.

S. S. SANDHAWALIA, C. J.:— Whether the provisions of sub-sec. (6) of S. 27 of the Punjab Co-operative Societies Act, 1961, are mandatory or directory in nature is the spinal issue which has necessitated the admission of this writ petition for a hearing by the Division Bench.

2. The facts are not in dispute and lie in a narrow compass. The petitioners were elected members of the Managing Committee of the Thacha Co-operative

Agricultural Service Society (hereinafter referred to as the Society) in the year 1979 and by virtue of S. 26 (1) (b) of the Punjab Co-operative Societies Act (hereinafter called the Act) their term of office was to be for a period of three years. It is averred on behalf of the petitioners that they were functioning satisfactorily when they were shocked to receive a 'show cause notice' issued by respondent No. 3 under S. 27 of the Act. Certain allegations of bias have been made against respondent No. 2, the Assistant Registrar, Co-operative Societies, Tarn Taran, to which detailed reference is not necessary and it suffices to mention that ultimately the matter was transferred to the Assistant Registrar, Co-operative Societies, Amritsar. It is then alleged that the Assistant Registrar without having served a notice on the Managing Committee or its members passed the impugned order of removal under Sec. 27 (1) vide Annexure P. 1 dated the 27th of April, 1981. Aggrieved by the same the petitioners preferred an appeal before the Deputy Registrar who finally heard and dismissed the same on the 21st of Aug. 1981 vide order Annexure P. 3. The petitioners then preferred the present writ petition wherein the particular grievance made is that there had been no consultation by the Registrar with the financing Bank in accordance with S. 27 (6) and therefore, the action of the authorities under the Act stood vitiated. Ancillary grounds of lack of notice and bias etc., were also raised.

3. In the return filed by respondent No. 2 Shri Ravinder Kumar, Assistant Registrar, it was highlighted that the petitioners were taking contradictory stands themselves with regard to the 'show cause notice' served upon them. It was pointed out that in para 2 of the petition it had been averred that the petitioners were shocked to receive the 'show cause notice' whilst in the later paragraphs it was sought to be alleged that no 'show cause notice' was served on them. It has been repeatedly reiterated with reference to the despatch numbers of the communications addressed to the petitioners that a 'show cause notice' with reminders was duly served on the petitioners but no reply thereto was sent. The allegations of bias were categorically denied as wrong and false and deliberately concocted. With regard to the consultation with the fin-

ancing Bank, namely, the Amritsar Co-operative Bank Ltd., Amritsar, it is the stand of the respondents that the allegations in the 'show cause notice' were communicated to the said Bank but since no reply at all was sent by the said financing institution it was presumed that the Bank had no objection to the removal of the Managing Committee, and as such due compliance of S. 27 (6) had also been made.

4. As at the motion stage, so before us, the main contention projected on behalf of the petitioners is the non-compliance with what is alleged to be the mandatory provision of S. 27 (6). Particular reliance for this stand is placed on the single Bench decision of this Court in *Ajit Singh v. State of Punjab*, 1964 Cur LJ 157 which has been later followed in *Jagir Singh v. Deputy Registrar, Co-operative Societies, Amritsar*, 1977 Cur LJ (Civ) 249.

5. Inevitably the mode of, or the effect of the non-compliance with the provisions of sub-sec. (6) of S. 27 would revolve around the language of the provisions and it is, therefore, apt to read S. 27 of the Act at the very outset—

"S. 27. (1) If, in the opinion of the Registrar, a committee or any member of a committee persistently makes default or is negligent in the performance of the duties imposed on it or him by this Act or the rules or bye-laws made thereunder, or commits any act which is prejudicial to the interests of the society or its members, or makes default in the implementation of production or development programmes undertaken by the co-operative society, the Registrar may, after giving the committee or the member, as the case may be, a reasonable opportunity to state its or his objections, if any, by order in writing—

(a) remove committee, and appoint a Government servant as an administrator, to manage the affairs of the society for a period not exceeding one year as may be specified in the order;

(b) remove the members and get the vacancy filled up for the remaining period of the outgoing member, according to the provisions of this Act and rules and bye-laws made thereunder.

(2) Where the Registrar, while proceeding to take action under sub-sec. (1) is of opinion that suspension of the committee or member during the period of proceedings is necessary in the interest

of the co-operative society, he may suspend the committee or member, as the case may be, and where the committee is suspended, make such arrangements as he thinks proper for the management of the affairs of the Society till the proceedings are completed;

Provided that if the committee or member so suspended is not removed, it or he shall be reinstated and the period of suspension shall count towards its or his term.

(3) The administrator so appointed shall, subject to the control of the Registrar and to such instructions as he may from time to time give, have powers to perform all or any of the functions of the committee or of any officer of the society and take all such action as may be required in the interest of the society;

(4) The Registrar may fix the remuneration payable to the person appointed as administrator and the amount of such remuneration and other costs, if any, incurred in the management of the society shall be payable from its funds.

(5) The administrator shall, before the expiry of his term of office arrange for the constitution of a new committee in accordance with the provisions of this Act and rules and bye-laws framed thereunder.

(6) Before taking any action under sub-sec. (1) in respect of a co-operative society, the Registrar shall consult the financing bank to which the society is indebted.

(7) A member who is removed under sub-sec. (1) may be disqualified for being elected to any committee for such period not exceeding three years as the Registrar may fix."

6. Before I proceed to a relatively deeper analysis of the aforesaid provision it deserves recalling that by now it is well-settled that no absolute or doctrinaire rule can be laid down for determining the mandatory or the directory nature of a provision. The answer to the question invariably turns upon the language and the larger purpose of the statute itself, the importance and the significance of the particular provision; the procedural or the substantive nature thereof; whether any penalty or inflexible consequence is provided for its non-compliance, as also other considerations which cannot be exhaustively catalogued. These were authoritatively epitomised by the Full Bench in

Guru Nanak University v. Dr. (Mrs.) Iqbal Kaur Bandhu, AIR 1976 Punj & Har 69 as under (at p. 81):—

".....The various rules laid down for determining when a statute might be considered as mandatory or directory are indeed only aids for ascertaining the true intention of the framers thereof which is the crucial determining factor and the same must ultimately depend on its peculiar context."

7. Now proceeding within the parameters of the aforesaid canons of construction it appears to me unnecessary to delve into the larger scheme of the whole Act itself. It suffices to mention that S. 27, as its very heading and the detailed provisions of its seven sub-sections indicate is primarily intended to confer the power of removal and suspension of the Managing Committee of a Society or any member thereof on the Registrar. This substantive power of removal and suspension is conferred specifically by sub-secs. (1) and (2) thereof. Though there is no hermetically sealed division yet by and large the remaining five sub-sections are somewhat procedural in nature. These pertained to the consequential appointment and the powers of the Administrator, his remuneration, and his duty to arrange for the constitution of a new committee before the expiry of his term. It is further provided that a member so removed under sub-sec. (1) may be disqualified for being elected to the committee for a period not exceeding three years as the Registrar may fix. Lastly the material provision with which we are primarily concerned provides that before taking any action for removal the Registrar shall consult the financing bank to which the Society is indebted.

8. As has already been noticed, S. 27 is a detailed and exhaustive one and it cannot be generally said that every provision therein, whether procedural or substantive, must be held to be mandatory so as to render any and every infraction of its numerous provisions as fatal. What calls for pointed notice is that the substantive power of removal and suspension is contained in sub-sections (1) and (2) and the remaining sub-sections are of lesser significance and of consequential and procedural nature. It can fairly be said that sub-sec. (6) falls in this latter category.

9. Coming to a closer examination of sub-sec. (1) of S. 27 (to which sub-sec.

tion (6) is a procedural gloss), it is manifest that the power of removal is vested in the Registrar. However, it is not wholly unguided and his opinion and decision to remove the committee or any member thereof has to be rested on the surer foundation of the undermentioned criteria:—

(i) Persistent defaults in the performance of the statutory duties under the Act and the Rules;

(ii) Persistent negligence in such performance;

(iii) Commission of any act which is prejudicial to the interest of the society or its members and

(iv) Default in the implementation of the production and development programmes.

If in the opinion of the Registrar any of the aforesaid four conditions is satisfied he is entitled to invoke his power to remove the committee or a member but this is to be only done after giving either of them a reasonable opportunity to object thereto. After considering such objections if the Registrar is satisfied he can by an order, in writing, remove the committee or any member thereof. It would thus be plain that the core provision herein is sub-sec. (1) conferring the power and the manner of its exercise for removing the committee or its members. Even the power of suspension under sub-sec. (2) is relatively subservient and consequential to the exercise of the power under Section 1. It can, therefore, be safely assumed that the substantive and the significant provision is sub-sec. (1) whilst sub-sec. (6) is merely subsidiary and ancillary thereto.

10. Now adverting to sub-sec. (6) it would appear that its provisions would not inflexibly be applicable always. They are attracted only where a Co-operative Society is in fact indebted to a financing bank. In a case in which such a society may not be so indebted at all it is obvious that sub-sec. (6) would not come into play at all. Equally one may visualise that apart from a total absence of indebtedness there may be only a marginal one. Supposing a Society merely owes a paltry amount to a financing bank, would this fact make the financing institution so vitally interested in the issue, or the opinion of the Bank become so vital that the basic exercise of power under S. 27 (1) should stand vitiated, thereby. The answer would prima facie appear to be in the negative.

11. Again as the earlier analysis of S. 27 (1) has disclosed, it is the opinion of the Registrar and the fulfilment of any one of the four conditions as also the right of hearing afforded to the committee or its members which are the primary considerations for the exercise of the power of removal. In a particular and indeed in most of these cases the financing bank may not at all come into the picture with regard thereto. For instance, its opinion with regard to the persistent default in the performance of statutory duty or negligence with regard thereto in many cases may hardly be relevant at all to the committee's transactions with the bank and in other cases may be only marginally so. Indeed an example may be taken of the present case itself. A bare look at the five allegations under consideration in Annexure P. 1 would indicate that these have not the least relevance to the indebtedness or to the financial transactions inter se betwixt the Society and its financing bank.

12. As I view it, sub-sec. (6) seems to be intended more to safeguard the interest of the financing bank rather than to give it any overall control or veto power over the exercise of jurisdiction by the Registrar under sub-sec. (1). The apparent intention of the statute is that before the managing committee of the indebted society is removed lock, stock and barrel or even one of its members is dismembered the financing institution should be aware of the same to represent its point of view. Indeed in a particular case it would be for the bank to come forward and make some grievance of not being consulted if its interests are adversely affected by the exercise or non-exercise of powers under Section 27 (1). The Managing Committee or a member thereof cannot be seriously aggrieved by the non-consultation or otherwise of the financing bank whose opinion in many cases may well be adverse to the functioning of the Managing Committee or one of its members.

13. It has then to be noticed that all that Section 27 (6) provides is consultation with the financing bank. It is well-settled that consultation does not necessarily mean concurrence. The opinion of the bank would not necessarily be binding on the Registrar. Equally neither sub-sec. (6) nor any other provision in the Act provides for any penal consequences for non-consultation or

non-compliance with the provision. It does not either provide for any inflexible legal result that would flow therefrom. One of the criterion for judging the question of a mandatory nature of the provision is where the Act itself provides a penalty or inflexible consequence for its infraction. Herein that is plainly lacking. I, therefore, do not see this provision as empowering the bank to sit in judgment over the opinion of the Registrar or to override or veto the same. To repeat it appears to be more directed as a safeguard for the financial interests of the bank in its debtor society than vice versa.

14. Ancillary considerations also appear to be a pointer to the view that consultation with the financing bank is not the sine qua non for the action under S. 27 (1). It does not seem to be in dispute that the power of suspension under sub-sec. (2) is an equally vital exercise adversely affecting the Committee or its members. Nevertheless it was the common case that neither sub-section (6) nor any other provision enjoins such consultation with the financing bank prior to the exercise of the power of suspension. The Full Bench in Gurcharan Singh v. State of Haryana, AIR 1979 Punj & Har 61, whilst construing the analogous, if not the identical, provision of S. 27 of the Act as applicable in Haryana has ruled that under the larger perspective of an emergent or urgent need for suspension no opportunity for show cause for the exercise of such a power would be necessary. Inevitably the provisions of sub-sec. (6) would not be attracted at all in this context.

15. Learned counsel for the petitioners did place reliance on the use of the word 'shall' in sub-sec. (6). On this premises alone it was sought to be contended that the provision be held to be mandatory. This stand need not detain us for long. It is now well settled that a provision in form mandatory might in substance be directory (See AIR 1955 SC 233). Having viewed the matter in the larger perspective above and in its proper context the mere use of the word 'shall' in sub-sec. (6) is in no way conclusive.

16. Now authority is also not lacking for the view I am inclined to take on principle and the particular provisions of Section 27 and its context. Even in a constitutional provision, consultation couched in a mandatory form has in ef-

fect been held to be directory. In *State of Uttar Pradesh v. Manbodhan Lal*, AIR 1957 SC 912, their Lordships whilst construing Art. 320 (3) (c) held that despite the imperative language, consultation with the Public Service Commission was not the essence of the matter and was merely directory. After elaborately discussing the principles for determining whether a provision would be mandatory or directory in nature and placing particular reliance on *Montreal Street Rly. Co. v. Normandin*, 1917 AC 170 : (AIR 1917 PC 142); and, *Biswanath Khemka v. King-Emperor*, 1945 FCR 99 : (AIR 1945 FC 67), their Lordships concluded as follows:—

"In view of these considerations, it must be held that the provisions of Art. 320 (3) (c) are not mandatory and that non-compliance with those provisions, does not afford a cause of action to the respondent in a Court of law....."

The aforesaid view was then followed and reiterated in *L. Hazari Mal Kuthiala v. Income-tax Officer, Special Circle, Ambala Cantt.*, AIR 1961 SC 200, in the context of S. 5 (5) of the Patiala Income-tax Act, expressly providing for consultation, with the following finding (at p. 203):—

".....The power which the Commissioner had, was entrusted to him, and there was only a duty to consult the Central Board of Revenue. The failure to confirm to the duty did not rob the Commissioner of the power which he exercised, and the exercise of the power cannot therefore, be questioned by the assessee on the ground of failure to consult the Central Board of Revenue, provision regarding which must be regarded as laying down administrative control and as being directory."

The aforesaid line of reasoning is, therefore, equally and indeed more strongly attracted in the present context of the action of the Registrar which is on a much lower plane than in the aforequoted cases.

17. In fairness to Mr. H. S. Mattewal, the learned counsel for the petitioner, reference may be made to Joint Registrar of Co-operative Societies, Madras v. P. S. Rajagopal Naidu, Govindarajulu, AIR 1970 SC 992, on which some reliance was sought to be placed by him. I am, however, unable to see how the said case advances the stand of the petitioner and indeed a closer analysis

would show a contrary effect. Therein, the Joint Registrar acting under S. 72 of the Madras Co-operative Societies Act, 1916, had suspended the Committee of a Co-operative Society. The learned single Judge of the Madras High Court quashed the order of the Registrar primarily for the violation of Ss. 64, 65 and 66 of the Act. This, in turn, was upheld by a Full Bench of the Madras High Court. Their Lordships of the Supreme Court, however, on an appeal preferred by the Joint Registrar, Co-operative Societies allowed the same and reversed the judgments of the Full Bench and the learned single Judge and upheld the suspension of the Committee by the Joint Registrar. It was observed as follows (at p. 996):—

".....We do not consider that that would be the correct approach in construing S. 72 which is meant for superseding the Committee as a whole when its working discloses such irregularities or improprieties as would justify its supersession. Normally it would be expected that only that Committee would be superseded whose functioning has been found to be highly defective. The object of supersession apparently is to appoint a Special Officer or a managing committee in order to set the working of the society right. It is not difficult to envisage a situation where maladministration by a committee has so adversely affected the functioning of the society that it is essential in the interests of the society itself to give temporarily the control of its affairs to a neutral authority....."

It deserves highlighting that the provisions of Sec. 72 (1) of the Madras Co-operative Societies Act and those of S. 27 of the Act, which we are called upon to construe, though having some similarity, are not in *pari materia*. An analysis of the judgment in *P. S. Rajagopal Naidu, Govindarajulu's case* (AIR 1970 SC 992) (*supra*) would disclose that the issue whether consultation with the financing bank was mandatory or directory, was not even remotely before their Lordships nor any such finding has even remotely been arrived at. The whole question was whether the provisions of Ss. 64, 65 and 66 of the Act were attracted to the exercise of the power under S. 72. There is only a passing reference by their Lordships that before acting under S. 72 (1) there is no other requirement prescribed by the Legisla-

ture except that of consultation with the financing bank under sub-sec. (6). In this context, one has to recall the celebrated dictum of Lord Halsbury in *Quinn v. Leatham* (1901) AC 495, that a decision is only an authority for what it actually decides and its ratio, and not every observation found therein nor what logically follows from the various observations made in it. Following the same it was authoritatively observed in *State of Orissa v. Sudhansu Sekhar Misra*, AIR 1968 SC 647, that it is not a profitable task to extract a sentence here and there from a judgment and to build upon it.

18. Equally, Mr. Matwewal's reliance on *Radheshyam Sharma v. Govt. of M. P.* through C. K. Jaiswal, 1970 Co-operative Tribunal Decisions 190, is of no assistance to him. Therein, what fell for construction was Sec. 53 of the *Madhya Pradesh Co-operative Societies Act*. A reading of the said Section makes it plain that far from being in pari materia with S. 27, its language and content are significantly different. I have already adverted to the various subsections of S. 27 for arriving at a conclusion that sub-sec. (6) thereof is not mandatory. Identical considerations indeed may well not apply to S. 53 of the *Madhya Pradesh Co-operative Societies Act*. What, however, calls for notice is that the analogous provision therein has been made only with regard to Co-operative Banks and not with regard to ordinary Co-operative Societies. The language thereof is clearly more emphatic and meaningfully different from what we are called upon to construe and is in the following terms:—

"Provided that in case of a Co-operative Bank, the order of supersession shall not be passed without previous consultation with the Reserve Bank."

In view of the above and added reasons disclosed by the analysis of the judgment in *Radheshyam Sharma's case* (supra), the same appears to be wholly distinguishable.

19. Inevitably, one must now turn to the single Bench judgments of this Court in *Ajit Singh v. State of Punjab*, 1964 Cur LJ 157, and, *Jagir Singh v. Deputy Registrar Co-operative Societies, Amritsar*, 1977 Cur LJ (Civ) 249 (supra). A close perusal of the judgment in *Ajit Singh* and others case (Supra) discloses that the primary point projected therein

was as to the nature and the pre-requisites of consultation. Whether the same was mandatory or directory seems neither to have been canvassed nor adjudicated upon. The learned single Judge, therefore, had wholly directed his attention to the nature of 'consultation' envisaged by the statute and not with regard to the necessity or the mandatory nature thereof. Nevertheless, in this context, certain observations have been made which are open to the construction that it was obligatory for the Registrar to consult the financing institution to which the Society is indebted and in the absence of such consultation the action under S. 27 (1) would be vitiated per se. With the greatest respect, I am unable to subscribe to this view for the exhaustive reasons recorded above. This judgment must, therefore, be overruled on this specific point.

20. *Jagir Singh's case* (1977 Cur LJ (Civ) 249) (supra) seems to have merely followed the reasoning in the aforementioned case of *Ajit Singh's case* (1964 Cur LJ 157) (supra). However, a casual observation has been made therein that consultation with the financing institution is mandatory before any action against it can be taken. No independent reasoning has been made nor does the issue seem to have been at all debated before the learned single Judge. For the reasons recorded earlier and as a necessary consequence of overruling *Ajit Singh case* (supra), on this point, it is inevitable that *Jagir Singh's case* (supra) has also to be and is hereby overruled.

21. The answer to the question posed at the outset therefore is that S. 27 (6) is directory in nature.

22. However, having held as above, one must sound a strong note of caution in this context. Merely because I am inclined to the view that the provisions of S. 27 (6) are directory, it does not mean that the Registrar and his delegates can ignore the same with impunity. The provision has a meaning and content and normally it is both desirable and apt that the Registrar should make resort thereto. All that I am inclined to hold is that no inflexible rule can be laid down that a mere non-compliance of S. 27 (6) would ipso facto vitiate the action under S. 27 (1) of the Act. Indeed, if any grave prejudice to the parties or a miscarriage of justice arises because of its non-compliance either to the Com-

mittee or any of its members, the Court in a particular case would not be precluded from taking notice thereof and providing adequate relief.

23. Repelled on his main assault, learned counsel for the petitioners had then attempted some flanking attacks. It was sought to be argued that no notice had been given to the Committee as provided under S. 27 (1) of the Act. This has only to be noticed and rejected. What gives the lie direct to such a stand is, first, the averments in para two of the petition itself stating that the Managing Committee was shocked to receive the show cause notice issued by the Deputy Registrar Co-operative Societies, Amritsar, under Section 27 of the Act. Further in paras 2, 4 and 6 (ii) of the return filed on behalf of the respondents, it has been categorically averred that not only a notice was issued but was also duly served. Reference has been made to the number and date of the communication whereby the notice had been dispatched and indeed this finds specific mention in the impugned order Annexure P/1 itself. On the present pleadings, it has, therefore, to be held that not only the petitioners were duly served with a notice and were aware of the same, but they further chose to ignore it and did not care to file the reply within time. The authorities thus had little option but to proceed as they did.

24. As an argument of despair, learned counsel for the petitioners even attempted to press the sketchy allegations of mala fide. Herein what calls for notice is that Shri Verinder Kumar, Assistant Registrar was not personally impleaded as a respondent to the petition. Apart from this infirmity, the allegations were nevertheless in terms denied on affidavit by Sh. Verinder Kumar in para 6, sub-para (iv) of the return. No replication even has been filed to this specific denial. The allegations of mala fides, therefore, has to be rejected.

25. Lastly, as a matter of abundant caution, it may be noticed that there has been no deliberate infraction of Section 27 (6) of the Act in the present case. Learned counsel for the respondent, on the basis of the record had taken the firm stand that a copy of the show cause notice was duly sent to the financing bank, namely, The Amritsar Central Co-

operative Bank Ltd. and it was requested to send its reply within 15 days. It was the case of the respondents that no such reply was sent and it was, therefore, presumed that the bank had no objection to the proposed action. Even the impugned order, Annexure P/1 shows that a copy of the order passed was again forwarded to the Amritsar Central Co-operative Bank Ltd. for necessary action.

26. In the light of the aforesaid reasons, the writ petition is without merit and is hereby dismissed. In view of some conflict of precedent, the parties are left to bear their own costs.

J. V. GUPTA, J.:— I agree.

Petition dismissed.

AIR 1982 PUNJAB AND HARYANA 369

J. M. TANDON, J.

Inder Devi and others, Petitioners v. Surjit Kaur and others, Respondents.

Civil Writ No. 257 of 1981, D/- 25-2-1982.

(A) Punjab Gram Panchayat Act (4 of 1953), Ss. 13-B, 13-C, 13-G — Election petition filed by unsuccessful candidate and a member of the Sabha — Petition not pressed by the former could be continued by the latter.

Merely because the unsuccessful candidate, who along with a member of the Sabha had filed the election petition, did not press the petition would not be rendered incompetent. The same could be proceeded with by the other petitioner he being a member of the Sabha.

(Para 2)

(B) Punjab Gram Panchayat Act (4 of 1953), Ss. 13-B, 13-C — One election petition challenging the election of Panch and Sarpanch when possible.

Where the election of the Sarpanch was challenged on the ground that the person who was elected as Panch and which election was also liable to be set aside had participated in the election of the Sarpanch, both the elections could be challenged in a single election petition. The question whether the election of the Panch was liable to be set aside should also be gone into for deciding the validity of the election of the Sarpanch. The matters are so mixed and inter-related that they should be treated as forming one cause of action. 1981 Rev

DZ/EZ/B541/82/TVN/SSG-H

LR 20, Followed. AIR 1966 Punj 344, Distinguished. (Para 3)

(C) Punjab Gram Panchayat Election Rules (1960), R. 6 (1) Proviso — Person himself being candidate is barred from proposing another — Nomination of the person proposed becomes invalid — Proposer's candidature is not affected.

Under proviso to sub-rule (1) of R. 6 a candidate for election as a Sarpanch cannot propose or second the name of any other candidate. Contravention of the rule adversely affects the nomination of the person whose name is proposed. The candidature of the proposer is not affected. (Para 5)

(D) Punjab Gram Panchayat Act (4 of 1953), Ss. 13-00 and 6 (4) — Three women candidates contesting — While setting aside the election of one, the Prescribed Authority could declare another candidate as elected — The mere presence of a third woman candidate could not compel the holding of a fresh election among them all.

In the election to the post of Panch three women candidates contested. Disposing of an election petition the Prescribed Authority set aside the election of one who had secured 14 votes and declared elected another who had secured 12 votes. The third candidate had secured only 5 votes. In the circumstances the contention that in the presence of a third woman candidate who had secured 5 votes the Prescribed Authority was not competent to have declared the one who had secured 12 votes as elected and that a fresh election among the women candidates ought to have been held was rejected. The action of the Authority was justified by S. 13-00 read with Section 6 (4) of the Act. (Para 6)

(E) Constitution of India, Art. 14 — Since a declaration made under S. 13-00 Punjab Gram Panchayat Act could be challenged in an election petition the provision was not ultra vires Art. 14 of the Constitution. (Punjab Gram Panchayat Act (4 of 1953), S. 13-00). (Para 8)

(F) Punjab Gram Panchayat Act (4 of 1953), S. 6 — Findings of fact by the Prescribed Authority not open to challenge in writ petition. (Constitution of India, Art. 226).

The findings of fact which the Prescribed Authority under the Punjab Gram Panchayat Act was competent to record could not be challenged in writ proceedings. Further, in this case the

details of the improprieties alleged, it was observed, which were not given in the election petition were not raised either before the Prescribed Authority or before the Appellate Authority.

(Para 7)

Cases Referred: Chronological Paras

1981 Rev LR 20: 1980 Pun LJ 658 3

AIR 1966 Punj 344 3

J. R. Mittal with Pawan Bawa, for Petitioners; Pawan Kumar Bansal, for Respondents; A. S. Sandhu, Addl. Advocate General, for the State.

ORDER:— The election of the Gram Panchayat of village Naruana, Tehsil and District Bhatinda, were held on August 17, 1978. Seven men and two women were to be elected as Panches. Balbir Kaur, Inder Devi petitioner, Surjit Kaur respondent and Gurdev Kaur unsuccessfully contested the election. Balbir Kaur secured 23 votes, Inder Devi 14, Surjit Kaur 12 and Gurdev Kaur 5. Balbir Kaur and Inder Devi were declared elected as Panches under sub-section (4) of Section 6 of the Punjab Gram Panchayat Act, 1952, (hereafter the Act). On the same day Sadhu Singh petitioner was declared elected as Sarpanch of the Gram Panchayat by the Presiding Officer. Surjit Kaur and Hakam Singh respondents filed an election petition challenging the election of Inder Devi petitioner as a Panch and that of Sadhu Singh petitioner as a Sarpanch. The Prescribed Authority vide order dated March 7, 1980, (Annexure P. 1) set aside the election of Inder Devi as Panch and that of Sadhu Singh as Sarpanch. The appeal filed by Inder Devi and Sadhu Singh against the order of the Prescribed Authority was dismissed by Additional District Judge, Bhatinda, vide order dated December 20, 1980, (Annexure P. 2). The petitioners have assailed the orders Annexures P. 1 and P. 2 in the present writ petition.

2. The learned counsel for the petitioners has argued that during the pendency of the election petition Surjit Kaur has submitted an affidavit dated January 8, 1980 stating therein that she had not filed the election petition with the result that the Prescribed Authority vide order dated January 28, 1980, (Annexure P. 4) ordered that her name be struck off. The learned counsel has further argued that in view of the fact that Surjit Kaur had not pressed the election petition the election of Inder Devi as

Panch could not be set aside. The contention is without merit. Even assuming that Surjit Kaur did not press the election petition the same could be maintained by Hakam Singh alone who was admittedly a member of the Sabha. Under these circumstances, the order setting aside the election of Inder Devi Panch cannot be quashed merely because Surjit Kaur did not press her election petition.

3. The learned counsel for the petitioners has argued that Surjit Kaur and Hakam Singh could not challenge the election of Inder Devi as Panch and that of Sadhu Singh as Sarpanch in one petition. It was necessary that their election should have been challenged by filing separate election petitions. The impugned orders are liable to be quashed on this ground. This contention is also without merit. Surjit Kaur and Hakam Singh challenged the election of Sadhu Singh Sarpanch also on the ground that Inder Devi whose election was liable to be set aside had participated in the election of Sarpanch. It was, therefore, necessary to find out whether the election of Inder Devi as Panch was valid or was liable to be set aside and if her election was invalid what is the effect of her participation in the election of Sarpanch. The two causes of action — one relating to the election of Inder Devi as Panch and the other to the election of Sadhu Singh Sarpanch are so inextricably mixed up and inter-related that they must be treated as forming one composite cause of action. In a similar situation which arose in *Mahan Singh v. Executive Magistrate Ist Class, Jagraon*, 1981 Rev LR 20, it was held that a single election petition challenging the election of Sarpanch and Panchas is maintainable. The learned counsel for the petitioners has placed reliance on *Amrik Singh Waryam Singh v. B. S. Malik*, AIR 1963 Punj 344, in support of his contention that one election petition could not be filed by Surjit Kaur and Hakam Singh. This authority was discussed and distinguished in *Mahan Singh's case (supra)*. It was held that in *Amrik Singh Waryam Singh v. B. S. Malik*, AIR 1966 Punj 344 the election of the Sarpanch was not dependent on the election of the Panchas at all. For the same reason the ratio of *Amrik Singh Waryam Singh v. B. S. Malik*, AIR 1966 Punj 344 cannot be made ap-

plicable to the instant case. I, therefore, hold that Surjit Kaur and Hakam Singh could file a joint petition challenging the election of Inder Devi as Panch and that of Sadhu Singh as Sarpanch.

4. Inder Devi was proposed by Mehar Singh, who himself was a candidate for being elected as a Panch. Rule 6 of the Punjab Gram Panchayat Election Rules, 1960, reads:—

"6. Nomination of candidates:—

(1) Any person who is not disqualified under sub-sec. (5) of S. 6 of the Act may be nominated as a candidate for election provided that on the date, time and place fixed under R. 3, he or his proposer delivers in person to the Returning Officer a nomination paper completed in the prescribed form.

Provided further that no person shall propose or second more than one candidate and the candidate himself shall not propose or second the name of any other candidate.

(2) & (3)

5. Mehar Singh, being himself a candidate for the election of Panch could not propose the name of Inder Devi. The Prescribed Authority has set aside the election of Inder Devi on the ground that her nomination was defective and was improperly accepted. The learned counsel for the petitioners has argued that under proviso to sub-rule (1) of R. 6 reproduced above it was Mehar Singh (being a candidate himself) who was debarred from proposing the name of Inder Devi as a candidate for election as Panch. The proposal of the name of Inder Devi by Mehar Singh may cause damage to the candidature of the latter but will not adversely affect the former. I do not agree with this contention. The proviso to sub-rule (1) to R. 6 is clear that a candidate for election as Sarpanch cannot propose or second the name of any other candidate. Mehar Singh was admittedly a candidate for election as a Panch. He could not propose the name of Inder Devi as a candidate for her election as a Panch. The nomination of Inder Devi was defective and was improperly accepted. The election of Inder Devi as Panch has rightly been set aside on this ground.

6. The learned counsel for the petitioner has contended that the Prescribed Authority wrongly declared Surjit Kaur as elected after setting aside the election of Inder Devi. The argument proceeds that in view of the fact that Gurdev

Kaur had also contested the election and had secured 5 votes, the election for a woman Panch should have been conducted afresh. I am not impressed by this contention. The Prescribed Authority was competent to declare Surjit Kaur elected after setting aside the election of Inder Devi under S. 13-OO read with S. 6 (4) of the Act.

7. The election of Sadhu Singh as Sarpanch was challenged on the ground that Inder Devi has participated in the election of Sarpanch and also on the ground that the Presiding Officer had helped Sadhu Singh out of the way by making him Sarpanch. The Prescribed Authority found that no proceedings were recorded regarding election of Sarpanch and the Presiding Officer did not give an opportunity to anyone of the remaining Panchas to file nomination papers. The learned counsel for the petitioners has argued that the findings recorded by the Prescribed Authority are not correct and further the details regarding the alleged impropriety committed by the Presiding Officer were not given in the election petition. I do not agree with this contention. The findings of fact which the Presiding Authority was competent to record cannot be assailed in writ proceedings. The objection that the details of the improprieties had not been given in the election petition were neither raised before the Prescribed Authority nor before the Appellate Authority. The petitioners cannot assail the impugned orders in the writ petition on this ground.

8. The last contention of the learned counsel for the petitioners is that Section 13-OO of the Act is ultra vires Article 14 of the Constitution inasmuch as the declaration made thereunder cannot be challenged in an election petition. There is no force in this contention as well. S. 13-OO reads:—

"13-OO. Grounds for which a candidate other than the returned candidate may be declared to have been elected:—

(1) A petitioner may in addition to claiming a declaration that the election of all or any of the returned candidate is void, claim a further declaration that he himself or any other candidate has been duly elected.

(2) If a petitioner has claimed an additional declaration specified in sub-section (1) and the Prescribed Authority is of opinion that in fact the petitioner or

any other candidate received a majority of valid votes, it shall after declaring the election of the returned candidate to be void, declare the petitioner or such other candidate, as the case may be, to have been duly elected."

9. There is nothing to suggest that a declaration made under sub-sec. (1) of S. 13-OO cannot be challenged in an election petition. In view of this it is difficult to hold that the provision contained thereunder is unconstitutional.

10. In the result, the writ petition fails and is dismissed with no order as to costs.

Petition dismissed.

AIR 1982 PUNJAB AND HARYANA 372 FULL BENCH*

S. S. SANDHAWALIA, C. J.,
I. S. TIWANA AND
M. M. PUNCHHI, JJ.

Vinod Kumar Sethi and others, Petitioners v. State of Punjab and another, Respondents.

Criminal Misc. No. 4022-M of 1981,
D/- 30-3-1982.

(A) Criminal F. C. (2 of 1974), S. 482 — Inherent jurisdiction — Exercise of, for quashing FIR and consequent investigation — Permissible.

There is no blanket bar against the quashing of a first information report and the consequent investigation (even before a charge-sheet is filed in Court). 1970 Cur LJ 720 (Punj), Approved. AIR 1974 SC 1146; AIR 1977 SC 2229; AIR 1980 SC 326 and AIR 1938 Mad 128, Distinguished. AIR 1968 SC 647 and AIR 1945 PC 18, Rel. on. (Para 12)

Though the High Court would have the inherent jurisdiction to quash the investigative process in a proper case, it does not mean that this power is to be exercised indiscriminately. The requisite pre-conditions for the exercise of the power must be satisfied. Without being exhaustive these may be briefly summarised as follows:

(i) when the first information report, even if accepted as true, discloses no reasonable suspicion of the commission of a cognizable offence;

*Decided by Full Bench on order of reference made by S. S. Sandhawalia, C. J. and M. M. Punchhi, J., on 30-10-1981.

BZ/GZ/C78/82/CWM

(ii) when the materials subsequently collected in the course of an investigation further disclose no such cognizable offence at all;

(iii) when the continuation of such investigation would amount to an abuse of power by the police thus necessitating interference in the ends of justice; and

(iv) that even if the first information report or its subsequent investigation purports to raise a suspicion of a cognizable offence, the High Court can still quash if it is convinced that the power of investigation has been exercised mala fide. (Paras 12, 13 and 20)

(B) Hindu Law — Streedhan — Dowry and traditional presents given to wife at the time of marriage — Right of exclusive ownership over such property.

The law, as it stands, today, visualises a complete and full ownership of her individual property by a Hindu wife and in this context the factum of marriage is of little or no relevance and she can own and possess property in the same manner as a Hindu male. (Para 22A)

It is purely a question of fact whether the dowry or the traditional presents given to her, were to be individually owned by her or had been gifted to the husband alone or jointly to the couple. One finds nothing in the ordinary dictionary meaning of the 'dowry' and even in the ancient concept of Hindu Law with regard to the traditional presents given at the wedding which can possibly bar the exclusive ownership of the bride in such property. Once it is found as a fact that these articles of dowry were so given to her individually and in her own right, then mere factum of marriage would not alter any such property right and divest her of ownership either totally or partially. (Para 24)

What may be kept in mind is that the dowry and the traditional presents given to a bride in a Hindu wedding may usually be put in three categories as under:—

(i) Property intended for exclusive use of the bride, e.g., her personal jewellery and wearing apparel etc.,

(ii) Articles of dowry which may be for common use and enjoyment in the matrimonial home.

(iii) Articles given as presents to the husband or the parents-in-law and other members of his family. (Para 28)

As regards the third category those presents and gifts intended for the hus-

band or his relations after delivery would pass into their ownership and may well cease to be the property of the bride. This would be so also as the traditional presents etc. given by the husband and parents-in-law to the bride at or about the time of wedding would pass into her ownership. Similarly as regards the first category of articles meant for the exclusive use of the bride, she would retain her pristine ownership therein irrespective of her entry and presence in the matrimonial home or that of her parents-in-law. As regards category (ii) it is purely a question of fact whether the articles of common use and enjoyment were given and intended to be the exclusive property of the bride or otherwise. Mere joint enjoyment thereof does not necessarily divest a Hindu wife of her exclusive ownership or to make it joint property by the mere factum of such user. The break-down of the marriage or the splitting up of the matrimonial home would inevitably involve the revocation of such leave and licence by the wife thus resuscitating her right to exclusive possession. (Para 28)

There is nothing in the codification of Hindu Law which in any way abolishes the concept of Stridhana or the right of a Hindu wife to exclusive individual ownership. Indeed the resultant effect of such enactments is to put the Hindu female wholly at par with the Hindu male, if not at a higher pedestal with regard to individual ownership of the property. (Para 35)

(C) Hindu Marriage Act (25 of 1955), S. 27 — Applicability — Not applicable to articles of dowry given to wife exclusively.

The express words of S. 27 refer to property which may belong jointly to both the husband and the wife. It nowhere says that all the wife's property belongs jointly to the couple or that Stridhana is abolished and she cannot be the exclusive owner thereof. The statute expressly recognises that property which is exclusively owned by the wife is not within the ambit of Sec. 27 and it is concerned only with that property presented at or about the time of the marriage, and belonging jointly to the couple. Once it is held as a matter of fact that certain articles of dowry were given to be exclusively owned by the wife then S. 27 can make not the least difference to this vested right of ownership. (Para 30)

(D) Civil P. C. (5 of 1908), O. 32A — Scope — Concept of Streedhan not affected.

The recently inserted provision of O. 32A does not adversely affect the substantive right of a Hindu wife to own and possess property in her own right. These provisions are pristinely procedural and cannot even remotely impinge on the concept of Stridhana and the absolute ownership of property by Hindu women. (Para 31)

(E) Hindu Succession Act (30 of 1956), S. 14 — Scope — Right of absolute ownership of Hindu women over her Streedhan.

The provisions of S. 14 indeed show the concern and the object of the law to remove all fetters on the ownership of property by a Hindu female and confer absolute ownership on her with regard thereto. It deserves recalling that prior to the codification of the law there was the well known concept of 'limited ownership known as a 'Hindu Woman's Estate'. The provisions of S. 14 virtually abolishes those limitations thereby making a Hindu female an absolute owner of her property and indeed putting her on a higher pedestal than a Hindu male who may well be subject to the limitations of a Hindu Coparcenary. (Para 33)

(F) Dowry Prohibition Act (28 of 1961), S. 2 — Voluntary and affectionate giving of dowry and traditional presents — Not covered by Act.

The Dowry Prohibition Act does not, in any way, bar the traditional giving of presents at or about the time of the wedding, which may be willing and affectionate gifts by parents and close relations of the bride to her. Such presents or dowry given by the parents is, therefore, not at all within the definition of the statute. Consequently, dowry as commonly understood is something different and alien to the peculiar definition thereof in the Act. A voluntary and affectionate giving of dowry and traditional presents would thus be plainly out of the ambit of the particular definition under the Act and once that is so the rest of the provisions thereof would be equally inapplicable. Consequently the argument that the applicability of the special provisions of the Dowry Prohibition Act would exclude the general provisions of the Indian Penal Code would not even arise and in any case has no validity. (Para 38)

(G) Dowry Prohibition Act (28 of 1961), S. 2 — Penal Code (1860), S. 406 — Offences under the Act and under S. 406, I. P. C. — Cannot stand together on same set of facts.

A plain reading of the definition of dowry under the Act would show that it means any property given directly or indirectly as a consideration for the marriage of the said parties. Now once that is so, dowry of this kind is in fact a quid pro quo for the marriage itself. Inevitably it would follow that whatever is given as consideration for the marriage itself cannot possibly be deemed in the eye of law as an entrustment or passing of dominion over property. The necessary result, therefore, is that the same set of facts allegedly constituting an offence under the Dowry Prohibition Act cannot possibly come within the ambit of S. 406, I. P. C. This would be plainly a contradiction in terms. One offence is rested on property forming the consideration for the marriage as such, whilst the other visualises the entrustment and passing of dominion over property individually owned. The offences under the Dowry Prohibition Act and under S. 406, I. P. C. thus cannot stand together on the same set of facts.

(Para 39)

(H) Penal Code (45 of 1860), S. 406 — Entrustment — Charge of criminal breach of trust by wife against her husband and his close relations — Maintainability. (1963) 65 Pun LR 667 and 1979 Cri LJ 493 (Punj & Har), Overruled.

The very concept of the matrimonial home connotes a jointness of possession and custody by the spouses even with regard to the moveable properties exclusively owned by each of them. It is, therefore, inapt to view the same in view of the conjugal relationship as involving any entrustment or passing of dominion over property day-to-day by the husband to the wife or vice versa. Consequently, barring a special written agreement to the contrary, no question of any entrustment or dominion over property would normally arise during coverture or its imminent break-up. Therefore, the very essential prerequisites and the care ingredients of the offence under S. 406 would be lacking in a charge of criminal breach of trust of property by one spouse against the other. Inevitably, therefore, the purported allegations of breach of trust between husband and wife so long as the conju-

gal relationship lasts and the matrimonial home subsists, cannot constitute an offence under S. 406 subject to any special written agreement. Equally, as against the close relations of the husband, no facile presumption of entrustment and dominion over the dowry can be raised prima facie and this inevitably has to be by a subsequent conscious act of volition which must be specifically alleged and conclusively established by proof. (1963) 65 Pun LR 667 and 1979 Cri LJ 493 (Punj & Har), Overruled.

(Para 56)

Cases Referred : Chronological Paras

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	29, 30, 34, 55
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M. C. Bhandare, Sr. Advocate (M/s. K. S. Thapar, K. G. Bhagat, M. L. Sharma and Miss S. E. Taunque, with him), for Petitioners; M. J. S. Sethi, Additional Advocate General, for the State; A. S. Rupal, for Respondent No. 2.

S. S. SANDHAWALIA, C. J.:— Do the bonds of matrimony inhibit a prosecution for breach of trust betwixt the spouses inter se, and in particular with regard to the wife's dowry, is the spinal issue which has necessitated the reference of these twelve cases for an authoritative decision by the Full Bench.

Allied thereto is the equally (if not more) significant question — whether the High Court has the power in its inherent jurisdiction to quash the police investigative process before it reaches a Court of law for trial.

2. The matrix of facts may be noticed from Criminal Misc. No. 4022 of 1981 *Vinod Kumar Sethi v. State of Punjab* and others. The petitioners therein are the husband, the mother-in-law and the father-in-law of respondent No. 2 Smt. Veena Rani. The marriage of Smt. Veena Rani respondent to *Vinod Kumar Sethi* petitioner took place at Bhatinda on the 28th of January, 1979, according to Hindu Vedic rites. It is plain that the marriage did not subsist and on the 18th of April, 1980. Veena Rani respondent addressed an application to the Senior Superintendent of Police, Bhatinda. Therein she alleged that at the time of her marriage she had received substantial presents of ornaments, valuable clothes, furniture and other household articles besides Rs. 21,000/- from her parents and relations as also from her husband and mother-in-law as dowry and in consideration of the marriage. She claimed that all these items of property over which she had absolute control had become her Stridhana. It was further stated that as a dutiful wife and as daughter-in-law she reposed full faith in her husband and her parents-in-law and entrusted all the properties aforesaid to them as detailed in annexures 'A' and 'B' to the application. It was then alleged that after the marriage, all the three petitioners started mal-treating her for extracting more dowry from her parents and made repeated demands from time to time to this effect. When these were not satisfied she was expelled from the house in her wearing apparel and deprived of all the articles of her dowry around January, 1981. Thereafter she made demands for the return of the aforesaid property which allegedly had been entrusted to the petitioners but refused to do so. On these facts it is alleged that the three petitioners in conspiracy with each other were misappropriating her dowry and converting it to their own use in breach of the entrustment made to them. On the basis of the application aforesaid, a first information report was registered at Police Station Kotwali, Bhatinda, under S. 406, I. P. C., and for other offences.

3. According to the petitioners during the course of the investigation of the aforesaid first information report the three petitioners were arrested on the 2nd of July, 1981, and locked up in the Police Station for 24 hours and their remand was taken for four days after which they were released on bail. It is further alleged that all of them were tortured to the maximum extent and the respondent with the help of the police demanded Rs. 1,00,000/- (One-Lakh) but the petitioners could only arrange Rs. 50,000/- which were given to the police. The police party was also handed over gold weighing 30 tolas. After investigation, challan was filed in the Court of the Judicial Magistrate, Bhatinda, and the petitioners then preferred the petition seeking the quashing of the whole proceedings as a blatant abuse of the process of the Court.

4. A similar set of petitions came up before my learned brother Punchhi, J., sitting singly who by his lucid order of the 6th of March, 1981, referred the cases for an authoritative decision in view of the larger issues involved. Later other petitions raising the identical issues and claiming the same relief of the quashing of the proceedings were also directed to be listed before the Full Bench.

5. It is the admitted position that in a number of these criminal miscellaneous petitions, the matter is as yet only at the investigative stage in pursuance of the registered first information reports and no final report under S. 173 of the Code of Criminal Procedure has been filed in any Court of law. In these cases a strenuous preliminary objection at the very threshold has been pressed on behalf of the respondent-State of Punjab. Mr. Mohinderjit Singh Sethi, the learned Addl. Advocate General took up the firm stand that the High Court had no jurisdiction to quash a first information report and to halt the investigation (pursuant thereto) in its tracks. In essence the contention was that till the stage of filing a challan in a Court of law is arrived, the arm of the law under S. 482 of the Code is not long enough to reach the statutory investigative right of the police. In nut-shell the argument is that the inherent jurisdiction to quash arises only when the proceedings enter the precincts of the Court of law and not earlier. Particular reliance in this context was placed on

the observations of the final Court in *Jehan Singh v. Delhi Administration*, AIR 1974 SC 1146; *Kurukshetra University v. State of Haryana*, AIR 1977 SC 2229 and *State of Bihar v. J. A. C. Sandanha*, AIR 1980 SC 326.

6. There is no gainsaying the fact that the question raised by the learned Additional Advocate General is of obvious significance and not altogether free from difficulty because a penumbral area does seem to exist on the point. However, within this jurisdiction it would be unnecessary to examine the matter afresh on first principles because it is not altogether *res integra*. The identical point had earlier arisen before a Division Bench, to which I was a party in *Saral Beopar Association v. State of Haryana*, 1970 Cur LJ 720, and the specific question for determination framed by me in the order of reference was in the following terms:—

"Is the High Court under Sec. 561-A, Criminal Procedure Code, empowered in an appropriate case to interfere and quash criminal proceedings during the pendency of an investigation by the police and before a report under S. 173, Criminal Procedure Code, has been filed in a Court of competent jurisdiction?" The Division Bench after a broad conspectus of first principles, the relevant statute, and the precedent then existing, rendered a somewhat halting answer to the issue in the following terms:—

"*** In their view of the matter, the broad proposition that the Court can in no case interfere with the investigation of the case does not appear to be justified. On reference to the various provisions contained in the Code of Criminal Procedure relating to the investigation into criminal offences, it will be seen that the investigation is not entirely independent of the Court but is to some extent, though limited, under the supervision of Magistrate, who can be approached not only by the investigating officer but also by the accused to issue necessary process and pass orders in aid of proper and fair investigation of the case. There can, however, be no doubt that, as ruled by their Lordships of the Supreme Court and earlier by the Privy Council in *Khawaja Nazir Ahmad's case* (AIR 1945 PC 18) (*supra*), the power of investigation so far as it vests exclusively in the police or investigating agency is not to be interfered with by the Courts, and the investigating agency

should be left to carry on investigation without any interference. This however, clearly postulates that the investigation so long as it is in accordance with the provisions of law cannot be interfered with and it does not give immunity to investigation which is not in consonance with the relevant provisions of law governing the particular case or is in breach of them."

However, on the particular facts of the case it was held that the first information report did disclose a cognizable offence which the police was entitled to investigate and the relief of quashing the investigation was consequently declined. It is thus plain that on the ratio of Saral Beopar Association's case (supra) there is no blanket bar against the quashing of proceeding at the investigative stage. Therefore the real question now is whether the aforesaid view has been eroded by the subsequent decisions or observations of the final Court.

7. Now primary reliance on behalf of the respondent-State was on Jehan Singh's case (AIR 1974 SC 1146) (supra) and in particular to the following observations in the penultimate paragraph thereof (para 17):—

"For the foregoing reasons, we would hold that the petitions under S. 561-A were liable to be dismissed as premature and incompetent. On this short ground, we would dismiss this appeal."

On the basis of the aforesaid observations it was sought to be contended that a claim for quashing before the charge-sheet is filed under S. 175 of the Code of Criminal Procedure would be both incompetent and premature.

8. I am inclined to the view that the stand is not well-conceived. A closer analysis of the judgment in Jehan Singh's case would disclose that it does not lay down any absolute and inflexible bar against the quashing of a first information report prior to the filing of a charge-sheet. Were it to be so, then the only question calling for enquiry would be the factual one whether the charge-sheet had been filed in Court or not and nothing else. Far from doing so the Bench in Jehan Singh's case expressly noticed that the real issue was whether the allegations in the first information report, if assumed to be correct, did or did not constitute the offence of theft or its attempt. Their Lordships thereafter closely weighed the

contents of the first information report and came to the conclusion that the facts therein, if accepted, would disclose the commission of a cognizable offence. It was after arriving at this finding that the Court refused to quash the proceedings and held the petition as premature and incompetent. Perhaps the aforequoted observations in the penultimate paragraph of the report, if read in total and abstruse isolation, can be twisted to mean as if an application for quashing the proceedings is either incompetent or premature till the challan is filed but as observed in *Quinn v. Leathem* (1901) AC 495 and approved in *State of Orissa v. Sudhansu Sekhâr Misra*, AIR 1968 SC 647, it is not a profitable task to extract a sentence here and there from a judgment and to build upon it. The true ratio of Jehan Singh's case, as I look at it is that in a case where the first information report does disclose a cognizable offence the Court would be extremely loth to interfere with the investigation pursuant thereto.

9. What I have said above applies equally to the following observations in *Kurukshetra University v. State of Haryana*, AIR 1977 SC 2229, on which heavy reliance was also sought to be placed on behalf of the respondent-State (para 2):

"It surprises us in the extreme that the High Court thought that in the exercise of its inherent powers under S. 482 of the Code of Criminal Procedure, it could quash a First Information Report. The police had not even commenced investigation into the complaint filed by the Warden of the University and no proceeding at all was pending in any court in pursuance of the F. I. R. It ought to be realised that inherent powers do not confer an arbitrary jurisdiction on the High Court to act according to whim or caprice. That statutory power has to be exercised sparingly, with circumspection and in the rarest of rare cases."

On the aforesaid premises the learned Additional Advocate General had canvassed that these observations spell out a total ban on the quashing of a police investigation till the matter reaches a Court of law. I, however, regret my inability to construe these observations in any such abstruse light. It is significant to recall that their Lordships in terms found that the first information report disclosed a cognisable offence and therefore, the police could not refuse to

act on the complaint lodged by the University. Further the police had not even commenced investigation when the proceedings were quashed by the High Court. In fact the ultimate conclusion that the statutory power has to be exercised sparingly, with circumspection and in the rarest of rare cases in a context where the matter had as yet not reached the Court is indicative of the fact that the final Court did not totally and mathematically rule out quashing at the investigation stage.

10. Our attention was then drawn to the recent judgment in *State of Bihar v. J. A. C. Saldanha*, AIR 1980 SC 326, wherein Desai, J., speaking for the Bench noticed the well-defined and well-demarcated function in the field of crime detection, and its subsequent adjudication, betwixt the police and the Magistrate. After referring to *Khwaja Nazir Ahmad's case* (AIR 1945 PC 18) (supra), it was observed that the power of the police to investigate into a cognizable offence is ordinarily not to be interfered with by the judiciary. This judgment also nowhere lays down any absolute interdict against the wholesome and supervisory power of the judicial process over an investigation which may be wholly unwarranted in law and a clear abuse of process.

11. Before parting with the aforesaid precedent, it must be pointedly noticed that the common streak which runs through all of them is the approval or the affirmative of the much quoted passage of Lord Porter rendering the opinion of the Judicial Committee in *Khwaja Nazir Ahmad's case* (supra). What, however, seems to have been missed is the fact that the Privy Council spelt out no absolute rule of barring the jurisdiction of the High Court altogether at the investigative stage as is manifest from the notable exception carved out as under:—

".....No doubt, if no cognizable offence is disclosed and still more if no offence of any kind is disclosed, the police would have no authority to undertake an investigation and for this reason *Newsam, J.* may well have decided rightly in AIR 1938 Mad 129. But that is not this case."

It deserves highlighting that in *Khwaja Nazir Ahmad's case* (supra), the first information report clearly spelt out an offence under S. 409, I. P. C. and possibly also one against S. 420, I.P.C. Clear-

ly enough, the case was not one where the investigation did not raise a reasonable suspicion of the commission of a cognizable offence. The case, in re: *Tirumali Mudaliar*, AIR 1938 Madras 128, approvingly referred to by their Lordships pertained to a private complaint filed in the court of a Magistrate and is thus not directly in aid of the point at issue. Nevertheless, *Newsam, J.* whilst quashing the complaint had observed as follows:—

".....Since prevention is always better than cure, the obligation to prevent specious and spiteful criminal prosecutions for actions which, though strictly dishonourable, yet do not amount to crimes, is one that must never be shirked....."

12. From the analysis of the aforesaid precedents it would appear that the subsequent decisions of the final Court have not overridden the ratio in *Saral Beopar Association's case* (1970 Cur LJ 720) (Punj) (supra). I am, therefore, unable to find that either the statutory provisions or the binding precedents in any way place a blanket bar against the quashing of proceedings by the High Court in its inherent jurisdiction at the investigative stage or to place the later process beyond the pale of judicial scrutiny.

13. Having opined as above, I must strike the strongest note of caution in this context. Though I have held that the High Court would have the inherent jurisdiction to quash the investigative process in a proper case, it does not mean that this power is to be exercised indiscriminately. The affirmance of such a power is one thing but using it like the proverbial 'bull in a China shop' is altogether another. It calls for a strong reminder that even where the proceedings have reached the Court by way of a charge-sheet or in the case of the existence of a complaint before it well defined limitations for quashing the same were authoritatively spelt out in *R. P. Kapur v. State of Punjab*, AIR 1960 SC 866. It is broadly within the parameter spelt out thereby (though they are not absolutely exhaustive) that the power to quash proceeding has to be exercised even with regard to cases pending in the Court. It follows that even a more stringent criterion would apply in quashing a first information report and the subsequent police investigation before a charge-sheet is filed. One

must strongly hearken to the warning in Khwaja Nazir Ahmad's case (AIR 1945 PC 18) (supra) that in India the police have a statutory right to investigate cognizable offences under the Code and the judiciary should not interfere with the police in matters which are within their province and into which the law imposes upon them the duty of an enquiry.

14. What then one may ask are the very pre-requisites for entering the arena for quashing a first information report and the investigation pursuant thereto even before a charge-sheet is put in Court? Inevitably reference must first be made to the statutory provisions of the Code. Section 154 provides for the information in cognizable cases whilst the succeeding S. 155 pertains to such information in non-cognizable cases and bars a police officer from investigating therein without the order of a Magistrate. Section 156 gives a statutory right to the police officer to investigate cognizable offences within their jurisdiction whilst the procedure for such investigation is spelt out as under:—

"Section 157 (1). If, from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under S. 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the State Government may, by general or special order, prescribe in this behalf to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender;

Provided that....."

15. The meaningful words in the above provision are underlined and it would follow therefrom that a reasonable suspicion about the commission of a cognizable offence in the mind of a police officer is the pre-requisite for entering into an investigation. To repeat the statutory sanction or the very sine qua non for a lawful investigation by the police under Sections 156 and 157 is the reasonable suspicion of a cognizable offence. Therefore, if the information with a police officer as recorded does not dis-

close any cognizable offence whatsoever then the statutory mandate for investigation would be lacking and non-existent. It, however, bears repetition that the phraseology of 'reason to suspect the commission of an offence' has to be construed liberally in favour of the investigating agency. Both on principle and on the relevant provisions of the Code. I am inclined to hold that where the recorded first information report, when accepted as true, still discloses no cognizable offence whatsoever then this would attract the inherent jurisdiction of the High Court.

16. However, one cannot jump to the conclusion that merely because the first information report does not disclose a cognizable offence, it must necessarily be quashed along with the consequential investigation. What has to be sharply borne in mind is the oft-repeated adage that the first information report is not an encyclopaedia of the investigation into a criminal offence. Nor is it a inflexible pre-condition for entering into an investigation. It has been authoritatively pointed out in Emperor v. Khawaja Nazir Ahmad, AIR 1945 PC 18, as follows:—

".....But, in any case, the receipt and recording of an information report is not a condition precedent to the setting in motion of a criminal investigation. No doubt in the great majority of cases, criminal prosecutions are undertaken as a result of information received and recorded in this way but their Lordships see no reason why the police, if in possession through their own knowledge or by means of credible though informal intelligence which genuinely leads them to the belief that a cognisable offence has been committed, should not of their own motion undertake an investigation into the trust of the matters alleged....."

Apart from the above, sometimes, the first information report may be recorded on the basis of very brief and inadequate facts. It may be so done either for the paucity of precise information on the point and the urgency of commencing investigation, or some times even by the inapt or if one may say so inefficient recording of the information by a very junior police officer. It has been held that there would be no bar to its foundation being no other than a cryptic and telephonic information. Therefore, the solitary factor that what

has been recorded as the first information report, does not come squarely within the ambit of a cognizable offence, does not straightway warrant the quashing of the proceedings. If its subsequent investigation clearly discloses material pointing to the commission of a serious cognizable offence, the police cannot be halted in their tracks. To put it in other words, the first information report may sometimes be no more than the tip of an iceberg which on a deeper probe would lead to the discovery of a huge mass of gravely incriminating facts. This aspect was rightly highlighted by the Bench in *Saral Beopar Association's case* (1970 Cur LJ 720) (Punj) (supra), in the following words:—

".....A different view would lead to startling results. Take the case where the police finds a dead-body on the road without any obvious mark of injury on it. Nobody knows how the deceased had met his end. The police is informed merely about the presence of the dead body or a police official just comes across it. Can it be contended with any seriousness that in such a case if a police official starts investigation to find out whether any offence has been committed in respect of the deceased, such investigation can be stopped or should not be allowed to proceed merely because the information on which it commences does not disclose a cognizable offence. It would be only after some investigation is conducted that the police will be in a position to find out whether it is a case of natural death, suicide or culpable homicide or murder. If the contention, that unless the police is able to satisfy the Court that it is in possession of information about the commission of a cognizable offence, it cannot proceed to investigate, is accepted it would lead to the conclusion that in a case like the one that has been cited above, the Court must step in and stop the investigation. This, in my opinion is not warranted by the provisions of Section 561-A, Criminal Procedure Code, nor by any other provision of the Code....."

17. It necessarily follows from the above that if the first information report discloses no cognizable offence whatsoever, it would give the court jurisdiction for entering into an enquiry for quashing the proceedings. However, this is no warrant for holding that either because a defective first information re-

port has been recorded or at the time of commencing the investigation, the information was cryptic, yet the subsequent investigation must be quashed irrespective of all other considerations. Indeed, the true test appears to be that when challenged the investigation agency, even on the basis of all the material collected by it, is unable to show that there is reason to suspect the commission of a cognizable offence, it would be then and then alone that the inherent jurisdiction can warrant the quashing of the investigation itself, being a patent harassment to the accused. It deserves highlighting that the core of the jurisdiction herein is the satisfaction of the court that it amounts to a clear abuse of power by the police. Therefore, it would be an overly technical and indeed an erroneous assumption to hold that if the first information report discloses no cognizable offence, the investigation must be quashed even though meanwhile enough incriminating material has been collected by the police agency to point to the commission of a cognizable crime. In such a situation, the court is entitled and indeed bound to examine such material, if necessary, though always keeping the salutary rule in mind that the police has a statutory right to investigate and the judicial process should not be overly zealous to interfere into this complementary statutory power. It must, however, be made clear that the examination of the material, in this context, is not to be confused with the appraising of evidence at a trial or the sufficiency thereof. The High Court cannot embark on an enquiry as to whether the evidence collected in the case is reliable or not. Reference in this connection may be made to *S. P. Jaiswal v. The State and another** where Kapur, J. adverted to the material collected in the course of investigation including the police diary for exercising the power to quash proceedings under S. 561-A, Criminal Procedure Code. It must, however, be borne in mind that that was a case where the proceedings had reached the court, though they were at a relatively preliminary stage of a charge-sheet filed.

18. From the aforesaid discussion, it emerges that the statutory right of the police to commence investigation is rested on the reasonable suspicion of the

*Citation not found in certified copy —
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commission of a cognizable offence. The foundations thereof are rooted in Sections 154, 156 and 157 of the Criminal Procedure Code and one cannot presume any unfettered power in the hands of the police to launch on an investigation independently of the aforesaid provisions. Consequently, the information in the possession of the police or as recorded in the first information report, must prima facie be a pointer to the commission of a cognizable offence. Once that condition is satisfied, the courts must as a general rule abstain from interfering in the investigative process, and the rule in Khwaja Nazir Ahmed's case (AIR 1945 PC 18) (supra) would be at once attracted to such a situation. There is an obvious danger that stopping an investigation in this context, would be far from promoting the ends of justice and may inhibit the police from bringing serious criminals to book.

19. The question nevertheless remains — whether the hands of the court are totally tied where the first information report purports to disclose the commission of a cognizable offence? It bears repetition that generally speaking in such a case, the court must not trench upon the lawful power of the police to investigate into cognizable offences. Nevertheless, even in such a case, if it can be established beyond all doubt that the investigation is mala fide and amounts to a pure harassment and abuse of the statutory process, the court is not totally barred from interfering. It was apparently a situation of this kind where a first information report was registered against the Addl. District Magistrate, Gorakhpur, alleging serious cognizable offences against him, in *S. N. Sharma v. Bipan Kumar Tiwari*, AIR 1970 SC 786. Though their Lordships held that Section 159 of the Code vested no power in a Magistrate to stop the investigation yet the situation was not wholly without remedy. It was observed as under (para 7):—

"..... It appears to us that, though the Code of Criminal Procedure gives to the police unfettered power to investigate all cases where they suspect that a cognizable offence has been committed, in appropriate cases an aggrieved person can always seek a remedy by invoking the power of the High Court under Art. 226 of the Constitution under which, if the High Court could be convinced that the power of investigation has been exercised

by a police officer mala fide, the High Court can always issue a writ of mandamus restraining the police officer from misusing his legal powers....."

I, however, see no reason why the identical relief cannot be accorded in the exercise of the inherent powers under Section 482 of the Criminal Procedure Code. Indeed, the language of this provision is of a wider amplitude. This has been authoritatively so held in *State of Karnataka v. L. Muniswamy*, (1977) 2 SCC 699: (AIR 1977 SC 1489 at p. 1492), in the following words:—

"..... In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction."

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And again,

"..... Considerations justifying the exercise of inherent powers for securing the ends of justice naturally vary from case to case and a jurisdiction as wholesome as the one conferred by Section 482 ought not to be encased within the strait-jacket of a rigid formula."

20. To conclude, I see no blanket bar against the quashing of a first information report and the consequent investigation (even before a charge-sheet is filed in Court), provided that the requisite pre-conditions formulated above

for the exercise of the power stand satisfied. Without being exhaustive, those may be briefly summarised as under:—

(i) when the first information report, even if accepted as true, discloses no reasonable suspicion of the commission of a cognizable offence;

(ii) when the materials subsequently collected in the course of an investigation further disclose no such cognizable offence at all;

(iii) when the continuation of such investigation would amount to an abuse of power by the police thus necessitating interference in the ends of justice; and

(iv) that even if the first information report or its subsequent investigation purports to raise a suspicion of a cognizable offence, the High Court can still quash if it is convinced that the power of investigation has been exercised mala fide.

21. Having thus crossed the procedural hurdle raised at the very threshold (regarding prosecutions which as yet are at the investigative stage) one can now proceed to examine the primary and substantial issue. The present set of cases presents a sad spectacle of a house divided against itself, not merely in the biblical but in the literal sense, where wives are ranged against their husbands in acrimonious criminal prosecutions. The challenge on behalf of the husbands and their relations is focussed basically against the charge of breach of trust under Section 406 of the Indian Penal Code, levelled against them. Now the core of the argument on behalf of the petitioners is that the very concept of any entrustment or passing dominion over her property by the wife to the husband does not arise at all so long as the marriage subsists. The contention is that the very nature of the conjugal relationship itself would negative any such stand. On this premise it is contended that the basic pre-requisite of the entrustment of property or dominion over property being lacking and non-existent, no offence under Section 406, Indian Penal Code, can possibly be made out. Therefore it was argued that even accepting the complaints and the first information reports as true they do not and indeed cannot disclose a cognizable offence under Section 406. The petitioners, therefore, seek the quashing of the proceedings forthwith rather than being

obliged to go through the tortuous mill of a police investigation or the consequent criminal trial.

22. At the very outset, I would wish to notice and highlight that all these cases arise from the Hindu marriages and have been specifically argued on the premises of the applicability of Hindu Law, both codified or otherwise. It is, therefore, apt to first take up and adjudicate on the somewhat extreme stand sought to be projected on behalf of the petitioners by Mr. K. S. Thapar, that a Hindu wife by the very factum of her marriage cannot own or possess property separately from her husband during the subsistence of the marriage. The tenor of this argument, in essence, is that the property of the wife is that of her husband or, in any case, it can only be jointly owned by her with her husband. Resting on this stance the argument is that a wife's dowry would equally be either her husband's property or at the highest jointly owned by both. In nutshell, the stand is that the Hindu wife cannot own anything separately and individually during coverture.

22-A. It appears to me that the afore-said contention merits only to be noticed and rejected and it is unnecessary to extend the compliment of an elaborate and exhaustive refutation thereto. It seems untenable and indeed odd in the extreme to contend that in the late twentieth century; a Hindu wife is not capable of holding any property separately from her husband. Acceding to such a proposition would be harking back to the dark ages when the wife herself was considered to be a chattel and property of her husband and inevitably could not own any property herself and certainly not against her lord and master. These are archaic notions having only historical and academic interest in the development of Hindu Law at the dawn of time and seems to me as having little or no relevance to this law as it stands today. Neither principle nor authority could be cited at the bar for this extreme proposition initially canvassed on behalf of the petitioners. The stand is untenable on principle and equally on the tenets of Hindu Law and if any authority were at all needed to the contrary, it is available even more than a century earlier in the Division Bench judgment of the Madras High Court in *Ramasami Padeiyatchi v. Virasami Padeiyatchi*,

(1866-1868) 3 Mad HCR 272, observing categorically as follows:—

"The correctness of the Civil Judge's decision, therefore, depends upon the affirmance of the broad proposition — that every thing acquired by a woman during coverture is the property of her husband.

We regard that proposition as unfounded in Hindu Law; and the contrary of it to be unquestionably true. It seems pretty clear that the passage of Mr. Justice Strange's Manual (Sec. 146), quoted by the Munsif as the ground of his original decision, cannot, without very numerous qualifications, be regarded as the law laid down by the Smriti Chandrika. It is rather the law propounded by an objector, from whom the author dissents."

It must, therefore, be unreservedly stated that the law, as it stands today, visualises a complete and full ownership of her individual property by a Hindu wife and in this context the factum of marriage is of little or no relevance and she can own and possess property in the same manner as a Hindu male.

23. In fairness to Mr. Thaper, I would notice that when faced with an impregnable wall of principle and precedent against his stand that a Hindu wife could own no property whatsoever during coverture separately from her husband, he shrank from the brink of this extreme stance and conceded that a Hindu wife could own property in her own right. However, lowering his rights a little, he watered down the contention to submit that dowry, as commonly understood, and the traditional presents given at the time of the marriage were not the Stridhana of the bride. It was submitted that dowry or these traditional presents were necessarily intended to be and in law must be deemed as the joint property of husband and wife. The last throw in this context raised in the alternative was that even if dowry and traditional presents at the marriage were Stridhana, they ceased to be so, the moment she entered the house of her husband or the parents-in-law and would become joint property thereafter.

24. I am afraid that the aforesaid contention of the learned counsel and its corollary have equally no legs to stand on. Once it is held that a Hindu wife can own property in her own right, then it is purely a question of fact whe-

ther the dowry or the traditional presents given to her, were to be individually owned by her or had been gifted to the husband alone or jointly to the couple. One finds nothing in the ordinary dictionary meaning of the 'dowry' and even in the ancient concept of Hindu Law with regard to the traditional presents given at the wedding which can possibly bar the exclusive ownership of the bride in such property. For instance jewellery meant for the personal wearing of the bride, wedding apparel made to her measures specifically, cash amounts put into a fixed deposit in a bank expressly in her name, or a motor car presented to her and duly registered in her name; are obvious examples of dowry raising the strongest, if not conclusive presumption, of her separate ownership in these articles. Once it is found as a fact that these articles of dowry were so given to her individually and in her own right, then I am unable to see how the mere factum of marriage would alter any such property right and divest her of ownership either totally or partially.

25. Now apart from the principle, the most ancient texts of Hindu Law have always been categorical that dowry, as commonly understood, was Stridhana and thus in the exclusive ownership of the bride. It is unnecessary to go individually to the original sources and the following summarization in the authoritative work of Mulla on Hindu Law suffices notice:—

"Stridhana according to the Smritis, that is, the sacred writings of Rishis or Sages of antiquity:— Manu enumerates six kinds of Stridhana:—

1. Gifts made before the nuptial fire, explained by Katyayana to mean gifts made at the time of marriage before the fire which is the witness of the nuptial (adhyagni).

2. Gifts made at the bridal procession, that is, says Katyayana, while the bride is being led from the residence of her parents to that of her husband (pada-vandanika).

3. Gifts made in token of love, that is, says Katyayana, those made through affection by her father-in-law and mother-in-law (pritidatta), and those made at the time of her making obeisance at the feet of elders (Padavandanika).

4. Gifts made by father.

5. Gifts made by the mother.

6. Gifts made by a brother.

All the commentators are agreed that the above is not an exhaustive enumeration of *stridhana*.

To the above list Vishnu adds—

1. Gifts made by a husband to his wife on supersession, that is, on the occasion of his taking another wife (*adhipedānika*).

2. Gifts, subsequent, that is, says *Katyayana* those made after marriage by her husband's relations or her parent's relations (*anwadhayaka*).

3. *Sulka*, or marriage-fee, a term which is used in different senses in different schools.

4. Gifts from sons and relations.

Vishnu does not make any specific mention of gifts made at the bridal procession."

It would be manifest from the above that from times immemorial Hindu law has recognised the individual ownership of the wife with regard to the aforementioned articles of dowry and traditional presents given at the time of wedding. Continued recognition of this fact and the individual ownership of the Hindu wife with regard thereto is manifest from the well-settled rule that *Stridhana* cannot be attached for the debts of her husband. Equally well-acknowledged is it that the husband has no right of alienation to that which is the *Stridhana* of his wife. These facets highlight the clear-cut recognition by the oldest treatises of Hindu law with regard to individual ownership of her separate property by a Hindu wife. It is, therefore, wholly idle to contend today that articles of dowry and traditional presents given at the time of the wedding cannot be the individual property of a Hindu wife.

26. Now once it is so held that articles of dowry and traditional presents given at the wedding are owned by the bride individually in her own right, then one fails to see how by the mere fact of her bringing the same into her husband's or parents-in-law's household, would forthwith divest her of the ownership thereof. Separate and individual right to property of the wife therein cannot vanish into thin air the moment the threshold of the matrimonial home is crossed. To say that at that point of time she would cease to own such property altogether and the title therein would

pass to her husband or in any case she would lose half of her right therein and become merely a joint owner of the same, with the family of her husband, does not appear to me as even remotely unwarranted either by the statute, principles or logic. No such marriage hazard against the wife can be implied in law. Once she owns property exclusively, she would continue to hold and own it as such despite marriage and coverture and the factum of entering the matrimonial home. The second part of Mr. Thapar's argument, therefore, is equally unsustainable.

27. Now in fairness to the learned counsel for the petitioner, a special limb of the aforesaid general argument must also be noticed. Herein, it was broadly argued that those articles in the dowry and traditional presents which are intended for common use and enjoyment by the couple can never be the exclusive property of the wife. In essence the submission was that by their very nature such articles of common use and enjoyment cannot be the exclusive property of the wife, e.g., furniture for the living and the dining room, kitchen-ware, beds etc., would be property which by the very factum of marriage and being in the matrimonial home would be deemed to be jointly owned. On this premise, no question of any entrustment of those articles to the husband or his relations would possibly arise.

28. I am afraid that even this line of distinction sought to be drawn with regard to the articles of dowry which are for the common use and enjoyment by the couple also cannot be accepted as a general proposition. Though at the initial flush the argument has a tinge of plausibility, a closer analysis would reveal its fallacy. What may be kept in mind is that the dowry and the traditional presents given to a bride in a Hindu wedding may usually be put in three categories as under:—

(i) Property intended for exclusive use of the bride, e.g., her personal jewellery and wearing apparel etc.,

(ii) Articles of dowry which may be for common use and enjoyment in the matrimonial home;

(iii) Articles given as presents to the husband or the parents-in-law and other members of his family.

Obviously as regards the third category those presents and gifts intended for the husband or his relations after deli-

very would pass into their ownership and may well cease to be the property of the bride. This would be so also as the traditional presents etc. given by the husband and parents-in-law to the bride at or about the time of wedding would pass into her ownership. Similarly as regards the first category of articles meant for the exclusive use of the bride, she would retain her pristine ownership therein irrespective of her entry and presence in the matrimonial home or that of her parents-in-law. As regards category (ii) it is purely a question of fact whether the articles of common use and enjoyment were given and intended to be the exclusive property of the bride or otherwise. I am inclined to the view that the normal presumption would be that the ownership in such like articles would vest in the Hindu wife unless it can be clearly established to the contrary that these were given expressly for the joint ownership of the couple. Dowry of this nature would be commonly used and enjoyed with the implied leave and licence of the wife. Mere joint enjoyment thereof does not necessarily divest a Hindu wife of her exclusive ownership or to make it joint property by the mere factum of such user. This seems to be so on general principles of law. An individual owner of property, apart from a Hindu wife, may well allow the use of the property jointly by others. But that by itself cannot divest him of the ownership or make a licensee a joint owner forthwith. I, therefore, see no reason how a Hindu wife is to be treated invidiously and on a different plane from any other owner of property in this context. Indeed the nature of article, whether meant for exclusive or common use, seems hardly relevant to the question of ownership therein. It was rightly contended on behalf of the respondent-State that mere joint user and enjoyment cannot make the husband a joint owner of the property if it originally belonged to the wife strictly. The valid submission herein was that joint user of enjoyment herein must be deemed to be with the express and implied leave and licence of the owner, namely, the wife and the moment she revokes such a leave or licence then any such claim to joint use and enjoyment would obviously come to an end. The break down of the marriage or the splitting up of the matrimonial

home would inevitably involve the revocation of such leave and licence by the wife thus resuscitating her right to exclusive possession.

29. Reiterating the stand taken on behalf of the petitioners in Bhai Sher Jang Singh's case (1978-80 Pun LR 737: 1979 Cri LJ 493) (supra) and assiduously assailing its ratio, Mr. Thapar had contended that whatsoever may have been the position earlier, the codification of Hindu Law had totally eroded the concept of Stridhana. It was contended that, in particular, after the enactment of the Hindu Succession Act and the Hindu Marriage Act, the exclusive property of the Hindu wife stands virtually abolished and is now the joint property not only of the couple, but in fact that of the joint Hindu family to which the husband may belong. Particular reliance was sought to be placed on Section 27 of the Hindu Marriage Act and the procedural provisions of Order 32-A of the Code of Civil Procedure, recently inserted by the Amending Act of 1976, with regard to the suits relating to matters concerning the family.

30. As I am inclined to agree with and affirm the ratio in Bhai Sher Jang Singh's case (supra) on this specific point, it is unnecessary to refute the afore-said contention with any great elaboration. Suffice it to mention that the identical argument had been expressly noticed by the Bench and elaborately refuted therein. Nor am I able to see how Section 27 of the Hindu Marriage Act even remotely advances the case of the petitioners. It is in the following terms:

"S. 27. In any proceeding under this Act, the Court may make such provisions in the decree as it deems just and proper with respect to any property presented, at or about the time of marriage, which may belong jointly to both the husband and the wife."

The plain words of the section far from aiding the stand of the petitioners in fact tend to undermine the same. The express words of the provision refer to property 'which may belong jointly to both the husband and the wife'. It nowhere says that all the wife's property belongs jointly to the couple or that Stridhana is abolished and she cannot be the exclusive owner thereof. Indeed, in using the above terminology, the statute expressly recognises that property

which is exclusively owned by the wife is not within the ambit of Section 27 of the Hindu Marriage Act and it is concerned only with that property presented at or about the time of the marriage, and belonging jointly to the couple. I have already adverted to this aspect that certain articles of dowry can as a matter of fact be established to be not only jointly owned by the couple, but even as exclusively presented to the husband or his relations. Once it is held as a matter of fact that certain articles of dowry were given to be exclusively owned by the wife then Section 27 can make not the least difference to this vested right of ownership. Equally no other provision in the Hindu Marriage Act could be pointed out which erodes the concept of Stridhana or in any way incapacitates the Hindu wife to hold property as an exclusive owner.

31. Nor can I see how the recently inserted provision of Order 32-A in the Code of Civil Procedure would adversely affect the substantive right of a Hindu wife to own and possess property in her own right. A bare reference to the provisions of Order 32-A would show that Rule 6 thereof defines family for the purposes of the Order and it is provided that the provisions thereof shall apply to all proceedings relating to matters concerning such family. Rules 2 to 5 of this Order are essentially procedural in nature empowering the Court to hold the proceedings in camera and imposing a duty on it to make efforts for settlement and to enquire into facts and secure the services of a welfare expert for its assistance. It is more than manifest that these provisions are pristinely procedural and cannot even remotely impinge on the concept of Stridhana and the absolute ownership of property by Hindu women.

32. Our attention was also drawn to the provisions of the Hindu Succession Act in this context. However, I am unable to find anything in the thirty-one sections of this Act which can even remotely advance the stand taken on behalf of the petitioners and indeed it appears to me that Section 14 of the said Act points conclusively to the contrary. The provisions thereof merit notice in extenso:—

"14. (1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act,

shall be held by her as full owner thereof and not as a limited owner.

Explanation:— In this sub-section, 'property' includes both movable and immovable property acquired by a female Hindu by inheritance or device, or at a partition, or in lieu of maintenance or arrears of maintenance, by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act.

(2) Nothing contained in sub-sec. (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property."

33. This provision declares in no uncertain terms that the property of a female Hindu is to be her absolute property and what is of no particular relevance here is that the explanation pointedly refers to any property given before, at or after her marriage and further any property held by her as Stridhana has been brought within the ambit of her absolute ownership. To contend in face of this provision that Hindu women cannot be absolute owners of their property or are not so with regard to dowry or stridhana appears indeed to be the proverbial crying for the moon. The aforequoted provisions of Section 14 indeed show the concern and the object of the law to remove all fetters on the ownership of property by a Hindu female and confer absolute ownership on her with regard thereto. It deserves recalling that prior to the codification of the law there was the well-known concept of limited ownership known as a 'Hindu Woman's Estate'. The provisions of Section 14 virtually abolishes those limitations thereby making a Hindu female an absolute owner of her property and indeed putting her on a higher pedestal than a Hindu male who may well be subject to the limitations of a Hindu coparcenary.

34. In fairness to Mr. Thapar his assiduous challenge to the correctness of

the ratio in *Bhai Sher Jang Singh v. Smt. Virinder Kaur*, (1978) 80 Pun LR 737: (1979 Cri LJ 493) must be noticed. It was sought to be contended that there was no adequate rationale behind the conclusion arrived at by the Division Bench therein and it was impelled only by sentimental reasons of avoiding hardship against illiterate and helpless wives in this country. I am, however, unable to subscribe to any such criticism and indeed find no flaw in the reasoning underlying the ratio on this point in *Bhai Sher Jang's* case. Added to this reasoning, Sharma J.'s observations which took into consideration the subservient status of the wives in the country and the general illiteracy with particular reference to female illiteracy are not only well called for and well-merited but indeed deserve affirmance at our hands.

35. To conclude on this aspect, I find nothing in the codification of Hindu Law which in any way abolishes the concept of *Stridhana* or the right of a Hindu wife to exclusive individual ownership. Indeed the resultant effect of such enactments is to put the Hindu female wholly at par with the Hindu male, if not at a higher pedestal with regard to individual ownership of the property.

36. Much ado was then raised about the provisions of the Dowry Prohibition Act, 1961 as originally enacted and later amended within the States of Punjab and Haryana (vide Punjab Act No. 26 of 1976 and Haryana Act No. 38 of 1978). Counsel referred to the definition of dowry in Section 2 thereof and the provisions of Sections 3 to 6 for raising a twin contention. It was argued that dowry falls within the ambit of the definition of the provisions of a special Act and therefore would exclude the offences under the general provisions of the Indian Penal Code. In the alternative it was contended that the definition of the dowry under the aforesaid Act would exclude entrustment of property which is a pre-requisite of the offence under Section 406 of the Indian Penal Code.

37. To deal with the aforesaid contention, it becomes necessary to notice the provisions of Section 2 of the Dowry Prohibition Act (the Haryana amendment makes only marginal changes therein whilst the Punjab Act has left the same untouched):—

"2. Definition of dowry In this Act, 'dowry' means any property or valuable

security given or agreed to be given either directly or indirectly—

(a) by one party to a marriage to the other party to the marriage; or

(b) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person;

at or before or after the marriage as consideration for the marriage of the said parties, but does not include dower or *mehr* in the case of persons to whom the Muslim Personal Law (Shariat) applies.

Explanation I:— For the removal of doubts, it is hereby declared that any presents made at the time of a marriage to either party to the marriage in the form of cash, ornaments, clothes or other articles, shall not be deemed to be dowry within the meaning of this section, unless they are made as consideration for the marriage of the said parties.

Explanation II:— The expression 'valuable security' has the same meaning as in Section 80 of the Indian Penal Code.

A plain reading of the provisions makes it manifest that the aforesaid definition is a specialised one directed to a particular purpose. The core of the matter here is that dowry must be as a consideration for the marriage of the parties and Explanation (1) again highlights that the presents made at the time of the marriage would come within the net only if they are made as consideration for such a marriage. It has, therefore, to be borne in mind that this statute was particularly directed to the prohibiting of the giving and taking of dowry by an extortionate means as a prime consideration for the marriage itself. The provisions of the Act itself and the under-mentioned statement of its objects and reasons would disclose that it had been enacted in order to strike at this particular social evil:—

"The object of this Bill is to prohibit the evil practice of giving and taking of dowry. This question has been engaging the attention of the Government for some time past, and one of the methods by which this problem, which is essentially a social one, was sought to be tackled was by the conferment of improved property rights on women by the Hindu Succession Act, 1956. It is, however, felt that a law which makes

the practice punishable and at the same time ensures that any dowry, if given, does enure for the benefit of the wife will go a long way to educating public opinion and to the eradication of this evil. There has also been a persistent demand for such a law both in and outside Parliament. Hence, the present Bill. It, however, takes care to exclude presents in the form of clothes, ornaments, etc. which are customary at marriages, provided the value thereof does not exceed Rs. 2,000. Such a provision appears to be necessary to make the law workable."

The Dowry Prohibition Act goes to the farthest limit of creating criminal offences in order to prescribe the giving or taking of dowry as a consideration for marriage or demanding or abetting the same. What this statute intended to eradicate was this kind of corruption and commercialisation of the concept of dowry. The definition under the Act was, therefore, designed for and moulded to the peculiar object of nipping this extortionate evil in the bud. This special definition, therefore, has no relevance to the word 'dowry' as understood in common parlance and its ordinary dictionary meaning to which reference has been made earlier.

38. It calls for pointed notice that the Dowry Prohibition Act does not, in any way, bar the traditional giving of presents at or about the time of the wedding, which may be willing and affectionate gifts by parents and close relations of the bride to her. Such presents or dowry given by the parents is, therefore, not at all within the definition of the aforesaid statute. Indeed, this traditional giving of presents at or about the time of wedding is an accepted practice which finds mention in the oldest of Hindu scriptures and is continued today with a greater zeal. Consequently, dowry as commonly understood is something different and alien to the peculiar definition thereof in the Dowry Prohibition Act. A voluntary and affectionate giving of dowry and traditional presents would thus be plainly out of the ambit of the particular definition under the Act and once that is so the rest of the provisions thereof would be equally inapplicable. Consequently the argument that the applicability of the special provisions of the Dowry Prohibition Act would exclude the general provisions of the

Indian Penal Code would not even arise and in any case has no validity.

39. This matter can also be viewed from another angle. Herein what we are primarily concerned is the commission of the offence under Section 406 of the Indian Penal Code. The whole exercise is directed to determine whether the requisites thereof are satisfied and the allegations, even if accepted as true would disclose any offence thereunder. To go to the definition in an altogether different statute of the Dowry Prohibition Act in this context, therefore, is not only inapt but may be grossly misleading. The settled and indeed the hallowed rule of construction in this context has been succinctly laid by their Lordships in *Laurence Arthur Adamson v. Melbourne and Metropolitan Board of Works*, AIR 1929 PC 181, as under:—

"It is always unsatisfactory and generally unsafe to seek the meaning of words used in an Act in the definition clauses of another statute dealing with matters more or less cognate, even when enacted by the same legislature and much more so when resort is had to the enactments of other legislatures."

The aforesaid rule was again reiterated tersely in *Jainarayan Ramkisan v. Motiram Gangaram*, AIR 1949 Nag 34 as follows:—

"It is a well-known rule of construction that it is not permissible in interpreting one Act to travel beyond it and to apply definitions (except in the General Clauses Act) of other Act."

However, the alternative contention that where property falls within the definition of Section 2 of the Dowry Prohibition Act then it cannot come within the ambit of entrustment envisaged under Section 406 of the Indian Penal Code, has plainly a modicum of merit. A plain reading of the definition of dowry under the aforesaid statute would show that it means any property given directly or indirectly as a consideration for the marriage of the said parties. Now once that is so, dowry of this kind is in fact a quid pro quo for the marriage itself. Inevitably it would follow that whatever is given as consideration for the marriage itself cannot possibly be deemed in the eye of law as an entrustment or passing of dominion over property. To recall the familiar analogy of the Law of Contract — the consideration is the price for the promise and, therefore, such property cannot be deemed

even remotely to have been entrusted or dominion passed over it to the other. The necessary result, therefore, is that the same set of facts allegedly constituting an offence under the Dowry Prohibition Act cannot possibly come within the ambit of Section 406, Indian Penal Code. This would be plainly a contradiction in terms. As pointed out above, one offence is rested on property forming the consideration for the marriage as such, whilst the other visualises the entrustment and passing of dominion over property individually owned. The offences under the Dowry Prohibition Act and under Section 406, I.P.C. thus cannot stand together on the same set of facts.

40. Now having held as above that a Hindu wife can exclusively own and hold property including her dowry and traditional presents given at the wedding, the decks are cleared for tackling the core question posed at the very outset. What indeed is the true legal relationship of the husband and wife qua the property individually owned by each within the four walls of the matrimonial home? Does the wife stand entrusted with the property belonging to her husband individually and vice versa the husband stands entrusted with such property vesting in the exclusive ownership of the wife? It is the answer to this question which in essence would determine the attraction and applicability of Section 405, I. P. C. betwixt the spouses. At the outset I would wish to notice that the learned counsel for the parties did not present this issue before us in the light in which I now proceed to examine the same.

41. It bears repetition that the question herein has to be examined against the backdrop of the matrimonial home. What truly is the concept and essence thereof had come up for exhaustive consideration earlier before a Full Bench in *Kailash Vati v. Ayodhya Parkash*, ILR (1977) 1 Punj & Har 642 in the context of Hindu Law itself. It is, therefore, apt to refer to the authoritative enunciation therein:—

"To my mind, the idea of the matrimonial home appears to lie at the very centre of the concept of marriage in all civilised societies. It is indeed around it that generally the marriage tie revolves. The home epitomizes the finer nuances of the marital status. The

bundle of indefinable rights and duties which bind the husband and the wife can perhaps be best understood only in the context of their living together in the marital home. The significance of the conjugal home in the marriage tie is indeed so patent that it would perhaps be wasteful to elaborate the same at any great length. Indeed, the marital status and the conjugal home have been almost used as interchangeable terms."

and

"To summarise, I have attempted to show by reference to Anglo-American Jurisprudence that the concept of the marital home lies at the very centre of the idea of marriage in all civilised societies. Perhaps from primeval times when human beings lived sheltered in subterranean caves to the modern day when many live perched in flats in high rise apartments within the megapolis, the husband and the wife have always hankered for a place which may be their very own and which they may call a home. The innumerable mutual obligations and rights which stem from the living together of man and wife are undoubtedly beyond any precise definition and stand epitomized by the concept of the matrimonial home."

In the light of the above it would be farcical to assume that despite the factum of a marriage and a common matrimonial home the two spouses would stand in a kind of a formal relationship where each is entrusted with or has been passed dominion over the exclusive property of the other. Rather it appears to me that the conjugal relationship and the existence of a matrimonial home automatically obviates any such hyper-technicalities of an entrustment or dominion over property. It seems inapt to conceive the relationship as a day-to-day entrustment of the property of the husband to the custody of the wife or vice versa of the property of the wife to the husband. The matrimonial home so long as it subsists presumes a jointness of custody and possession by the spouses of their individual as also of their joint properties which cannot be divided by any metaphorical line. In a homely metaphor in the context of the modern commercialised world it has been said that the marriage relationship is not one of "I and You limited" but that of "We limited". Whilst the law undoubtedly now clearly recognises the individual ownership of property by the husband

and wife, the necessary assumption in law, therefore, would be that during the existence or even the imminent break up of the matrimonial home the concept of jointness of possession therein seems to be a paramount one. The inevitable presumption during the existence or the imminent break up of the matrimonial home therefore is one of joint possession of the spouses which might perhaps be dislodged by the special terms of a written contract. However, to be precise this presumption of joint possession of properties within the matrimonial home can subsist only as long as the matrimonial home subsists or on the immediate break up thereof.

42-43. The aforesaid position seems to be well borne out by a homely example which was rightly advanced by Mr. Bhandare on behalf of the petitioners. It was submitted that where a husband entrusts a specific amount to a wife for paying the school fees of their children but in a shopping spree she converts the same into sarees for herself, would she thereby become liable to breach of trust under Section 406, Indian Penal Code? The answer would obviously appear to be in the negative. Similarly where a husband misuses or even appropriates any property exclusively belonging to her wife within the matrimonial home he hardly comes within the ambit of criminality under Section 406, Indian Penal Code. Usually if not invariably where the husband is the bread winner he brings home the month's wages and hands them over to the wife to be spent on the family. Would it be possible to say that if she uses the same for herself and even against the consent of her husband she would be committing a criminal breach of trust? Obviously the answer would appear to be in the negative.

44. One may now turn precisely to the language of the Code itself, Sec. 405 is in the following terms:—

"405. Criminal Breach of trust: Whoever being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged or of any legal contract, express, or implied, which he has made touching the discharge of such trust, or wilfully suffers any other per-

son so to do, commits criminal breach of trust."

It is well-settled that from a legal contract, or violation of directions of law, the entrustment of property or dominion over property are the pre-requisites for the applicability of the aforesaid provision. Once it is held as above, that property within the matrimonial home is in the joint possession and custody (despite rights of the individual ownership therein) then these very pre-requisites of entrustment or dominion over property cannot be easily satisfied betwixt the spouses inter se. It is indeed well-settled that the very concept of the jointness of possession and custody would rule out the entrustment or dominion over property betwixt such joint custodians. In line with the concept of joint ownership where the possession of one joint owner is deemed to be the possession of all, the analogy is to be extended that the existence of the property within the matrimonial home raises a presumption that both the husband and the wife are in possession thereof jointly and not that each one has entrusted his exclusive property to the custody of the other. Subscribing to the latter view would be both overly hyper-technical and subversive of the very concept of marriage, the matrimonial home and the inevitable mutual trust which conjugality necessarily involves.

45. It is obviously because of the aforesaid legal position and this inarticulate premise underlying the same that the learned counsel for the State and the complainants were unable to cite even a single case of conviction for criminal breach of trust betwixt husband and wife. Even when pointedly asked, counsel conceded that despite the diligent research neither under the Indian Penal Code, nor under the analogous provisions of English law could they lay their hands for over a century and a half on any case where such a conviction had been upheld. This paucity, rather the total absence of precedent, indirectly buttresses the view. I have expressed above on principle and the statutory provisions. An analogy in this context may well be drawn from the Law of Partnership. However, at the very outset I would notice that the position is not identical because partnership envisages a joint or co-ownership of partnership property whereas in a conjugal relationship, as shown above,

the spouses may well be the individual and exclusive owners of their respective properties. Nevertheless, a marked similarity herein is that in partnership, co-ownership necessarily connotes a jointness of possession of partnership properties whilst the same position inheres in the matrimonial home where the spouses are deemed to be jointly in possession and custody. Now, barring some ancient notes of discordance, it seems to be now well accepted that a partner cannot be held guilty of criminal breach of trust qua partnership property except by virtue of a special agreement either written or conclusively established. This had always been so in English law until it was specifically altered by statute 31 and 32 Victoria c. 116 and it is now governed by the special provisions of the same and subsequent legislation. In India, however, in the absence of any statutory change, the legal position would continue to be the same. This came up for pointed consideration before a Full Bench of five Judges in *Bhuban Mohan Das v. Surendra Mohan Das*, AIR 1951 Cal 69. The relief sought therein of quashing the proceedings under S. 406, Indian Penal Code, betwixt partners, was granted whilst holding that a charge under S. 406, Indian Penal Code, cannot be framed against a person who, according to the complainant, is a partner with him and is accused of the offence in respect of property belonging to them as partners. P. B. Mukharji, in his concurring judgment observed as under (para 46):—

"The question here is of much broader application and of a more fundamental nature. Its fundamental nature is this that the very conception of partnership precludes possibility of entrustment or dominion of the partnership property by one partner as against the other and, therefore, precludes any possible operation of the crime under Section 406, Penal Code, of criminal breach of trust by one partner against the other in respect of the partnership property." The aforesaid view has been expressly referred to and approved by their Lordships in *Velji Raghavji v. State of Maharashtra*, AIR 1965 SC 1433, with the following added observations (at pp. 1435-36):—

"...Every partner has dominion over property by reason of the fact that he is a partner. This is a kind of dominion which every owner of property has

over his property. But it is not dominion of this kind which satisfies the requirements of S. 405. In order to establish 'entrustment of dominion' over property to an accused person, the mere existence of that person's dominion over property is not enough. It must be further shown that his dominion was the result of entrustment. Therefore, as rightly pointed out by Harris, C. J., the prosecution must establish that dominion over the assets or a particular asset of the partnership was, by a special agreement between the parties, entrusted to the accused person. If in the absence of such a special agreement a partner receives money belonging to the partnership he cannot be said to have received it in a fiduciary capacity or in other words cannot be held to have been 'entrusted' with dominion over partnership properties."

If that is so in the partnership relation, it appears to me that it would be more so in the conjugal relationship with regard to the property within the matrimonial home.

46. It is unnecessary to quote profusely from Indian authorities and reference in this connection may be made to *Bhupendra Nath Sinha v. Girdhari Lal Nagar*, AIR 1933 Cal 582; *Man Mohan Das v. Mohendra Bhowal*, AIR 1948 Cal 292; *Priyanshu Ranjan Datta v. Hirendra Kumar Mitra*, ILR (1949) Cal 454; and *Jaikrishna v. Crown*, AIR 1950 Nag 99. The broad rationale underlying the view that a partner cannot be prosecuted by another partner for criminal breach of trust, in respect of partnership property, is a twin one. The nature, character and incident of partnership property are such that during the subsistence of partnership, there cannot be, except by special agreement, any entrustment or dominion etc. within the ambit of Section 405, Indian Penal Code. Secondly, partnership property is not always specifically ascertainable and sometimes so equivocal and problematic in nature (until dissolution of partnership or rendition of accounts) that it is not susceptible of being used in a manner which can bring into play S. 405, Indian Penal Code. Now as I said above, there is undoubtedly a point of distinction in so far as partnership property is deemed to be in joint ownership in law. Even keeping that sharp distinction, in mind, it appears to me that this larger rationale is equally

attracted to the conjugal relationship. The nature, character and the incident of property within the matrimonial home, so long as the marriage subsists, seem to be such that except by a special written agreement, no entrustment or dominion etc. of the individual property of the spouses to each other can be presumed. Equally, herein the specific and ascertainable property of each spouse within the matrimonial home can be so equivocal and problematic so as to oust the requisite mens rea with consequent criminality with regard thereto until the title to such property is clearly and specifically established. If the civil remedy seems to be adequate betwixt partners, during the subsistence of partnership there is no reason why it would not equally be so betwixt spouses in an existing matrimonial home during the subsistence of the conjugal relationship. As already referred to, apart from the civil remedy under the general law, added provisions exist in this context under S. 27 of the Hindu Marriage Act buttressed by the procedural provisions of O. 32-A of the Code of Civil Procedure.

47. In view of the above, it would be equally untenable to hold that either the desertion or the expulsion of one of the spouses from the matrimonial home would result in entrusting dominion over the property belonging to the other so as to bring the case within the ambit of this pre-requisite under S. 405, Indian Penal Code. The joint custody and possession once established would thereafter exclude either express entrustment or the passing of dominion over the property. It was rightly argued that if an irate husband or wife walks out from the matrimonial home in a huff, this cannot constitute an entrustment or dominion over the property to the other. Consequently, unless a special written agreement to the contrary can be established, the strongest presumption arises that during the existence and immediately after the crumbling of the matrimonial home, there was in essence, a joint possession and custody of the property of the spouses therein, including dowry and traditional presents, which would preclude the essentials of entrustment or dominion over the property which form the cornerstone of criminality under S. 405, Indian Penal Code.

48. However, the concept of joint custody and possession of their indivi-

dual properties by the spouses, in the matrimonial home cannot be elongated ad infinitum. Particularly in focus herein is the question of the relations of the husband or other persons living jointly in the matrimonial home which is not unusual in Hindu families. Whilst a presumption in law may well be drawn about the joint custody and possession of the couple of their respective properties within the marital homestead, there appears to be no warrant to extend it to every other occupant thereof. The rule flows from the peculiar nature of the conjugal relationship and the incidents of the matrimonial home and neither on principle nor precedent can it be extended further to others, or indiscriminately to the whole joint family to which the husband may happen to belong. An apt example, in this context, was spelt out by Mr. Sethi, learned Additional Advocate General, Punjab, on behalf of the respondent-State. He cited a hypothetical instance of dowry given to the bride of a serving Army Officer which initially may be taken to the home of the bride's parents-in-law. However, later the couple may wish to take it away to the place of posting of the husband. Could it be said that having been once brought within the joint family home, the possession and control thereof would pass to the undivided family and thus in a way to the karta thereof? Mr. Thapar attempted to take up the extreme position that this would be so and once such a property had been brought into the joint Hindu family home, the possession and control therein would pass jointly to the family and its karta. I see not the least reason to accept such an extreme position which appears to me as untenable on principle, and no authority could be cited in support thereof.

49. Equally the common use and enjoyment of certain articles of dowry and traditional presents, by the other members of a joint family with the leave and licence of a Hindu wife, cannot have the effect of extending the jointness of control and custody of the couple to undefined and unreasonable limits. Consequently, there is no reason to assume that the mere user or enjoyment of the dowry by other members of the household, would have the effect of passing the possession and control thereof jointly to the Hindu Undivided Family as such.

50. In the aforesaid context, pointed reference must be made to the opening word 'whoever' of S. 405 of the Code to highlight that the criminal law does not take ken of any proximity of relationship for the offence of breach of trust. Whoever would include within its ambit the parents-in-law, the brothers-in-law, sisters-in-law (and other close relations of the husband) of a Hindu wife provided that the basic ingredients of entrustment or passing of dominion over her separate individual property stands fully satisfied. Apart from the peculiarity of the conjugal relationship and the consequent sharing of the matrimonial home, the existence of the blood relationship of the parties does not seem to be relevant for the applicability or otherwise of S. 406 of the Code. Since the other members of the Hindu joint family, to which the husband may belong, would not be covered by the presumption of jointness of custody and possession of their individual properties by the spouses alone, they cannot by the mere fact of kinship be excluded from the scope of Ss. 405 and 406 of the Code.

51. Even on larger considerations as well, Mr. Sethi, learned Additional Advocate General, Punjab, had advocated that the speedier and effective remedy of a criminal breach of trust cannot and should not be denied in the somewhat peculiar context of helpless Hindu wives against avaricious parents-in-law or other relations of the husband, who may dishonestly misappropriate or convert for their own use, the dowry or the traditional presents exclusively owned by the bride. In what appeared to me as a somewhat sentimental appeal, learned counsel for the State beseeched the Court to not lose sight of the social evil of extorting dowry which sometimes leads to the sadistic cases of bride-burning where such a greedy lust had remained thwarted or unsatisfied. On these premises it was submitted that denuding such Hindu wives of the rather speedier relief of the criminal law against even the relations of the husband, and throwing them to the tender mercies of the inevitably long drawn out and protracted civil claims with regard to what may essentially be wife's exclusive property, would be virtually rendering them without remedy against a crying social evil.

52. There is a modicum of merit in the aforesaid stand taken on behalf of the respondent-State. Nevertheless,

whilst holding that mere blood relationship of the husband is not ipso facto exclusionary of the criminal law for breach of trust, the matter cannot be pushed to the other extreme of holding that the parents and the members of the joint family of a Hindu husband would be presumed to be entrusted with or dominion over the dowry of the wife by the mere factum of such marriage. As in other fields, so in law, one must shun the falsehood of extremes. The giving of dowry and the traditional presents at or about the time of the wedding, does not in any way raise a presumption that such property is thereby entrusted and put under the dominion of the parents-in-law of the bride or other close relations so as to come within the ambit of those words as used in Ss. 405 and 406 of the Code. Nor would the mere factum of bringing the dowry and such other traditional presents into the family home of the husband by itself constitute such entrustment or passing of dominion to the relations or the other members of the joint family of the husband. The mere living together of the couple in the joint family is not a legal equivalent of entrustment per se of the individual property of the wife to the parents-in-law or the other close relations within the family homestead. Any such entrustment or passing of dominion over the dowry to the relations of the husband, therefore, can only be by a subsequent act of conscious volition. Inevitably this has to be a matter of particular and specific proof on its own set of facts.

53. In the aforesaid context, the three categories referred to in paragraph 28 may well be recalled. Inevitably those articles of the dowry given as presents to the husband or the parents-in-law and other members of his family after having been brought in the joint family and delivered to its recipients may pass into the ownership of the latter far from being entrusted to them as such. Again, with regard to the articles of dowry which may be for common use and enjoyment in the matrimonial home, it is purely a question of fact in each case, whether these were given and intended to be the exclusive property of the bride or otherwise. It cannot, therefore, be prima facie presumed that these are exclusively the ownership of the wife or inevitably entrusted either to the husband or his close relations. As was noticed earlier, if an irate wife in

a tantrum abandons the matrimonial home, such like property does not in the eye of law become entrusted to the parents-in-law or other close relations of the husband. No such gullible presumption of entrustment or passing of the dominion of property can be raised in such a situation to come within the mischief of criminality for breach of trust. Entrustment or dominion over the property has to be unequivocally alleged and conclusively established by proof later.

54. For the sake of clarity of precedent within this Court, a reference must be made to *Jaswant Rai v. Smt. Kamal Rani*, (1963) 65 Pun LR 667. Therein the learned single Judge, in similar circumstances of a complaint by a Hindu wife whilst quashing the proceedings against the five close relations, nevertheless allowed their continuance against the husband and the mother-in-law of the complainant. It is plain, on analysis of the judgment, that the matter was not presented in an exhaustive manner and in the same light as before us, nor were the wide ramifications of the issue debated before the Bench. Consequently, the learned single Judge had no occasion to pronounce thereon. Nevertheless, if this judgment is now read as a warrant for any facile presumptions being raised against the husband or the mother-in-law (as was sought to be done on behalf of the respondent-State), as being per se entrustment or dominion over the dowry of the wife, then the same can no longer be held as good law.

55. The preceding observations apply equally to this aspect of the judgment in *Bhai Sher Jang's case* (1979 Cri LJ 493) (supra). Therein paragraphs 12 and 13 of the report are capable of a strained construction of raising a presumption of entrustment or dominion over the property against the husband and the parents-in-law of the Hindu wife. For the detailed reasons above, with respect, such a view cannot hold the field any longer.

56. To conclude, it necessarily follows from the aforesaid discussion that the very concept of the matrimonial home connotes a jointness of possession and custody by the spouses even with regard to the moveable properties exclusively owned by each of them. It is, therefore, inapt to view the same in view of the conjugal relationship as in-

volving any entrustment or passing of dominion over property day-to-day by the husband to the wife or vice versa. Consequently, barring a special written agreement to the contrary, no question of any entrustment or dominion over property would normally arise during coverture or its imminent break-up. Therefore, the very essential prerequisites and the core ingredients of the offence under S. 406 of the Penal Code would be lacking in a charge of criminal breach of trust of property by one spouse against the other. Inevitably, therefore, the purported allegations of breach of trust betwixt husband and wife so long as the conjugal relationship lasts and the matrimonial home subsists, cannot constitute an offence under Section 406 of the Indian Penal Code, subject to any special written agreement. Equally, as against the close relations of the husband, no facile presumption of entrustment and dominion over the dowry can be raised prima facie and this inevitably has to be by a subsequent conscious act of volition which must be specifically alleged and conclusively established by proof. Lastly, because of the definition in S. 2 of the Dowry Prohibition Act, the offences under the said Act cannot come within the ambit of S. 406 of the Indian Penal Code as these cannot stand together on the same set of facts.

57. Hence, the answer posed at the very outset is rendered in the affirmative. The bonds of matrimony, therefore, bar the spectre of the criminal breach of trust qua the property of the spouses at the very threshold of the matrimonial home. It cannot enter its hallowed precincts except through the back door of a special written contract to the contrary with regard to such property.

58. In the light of the aforesaid principles one may now turn to the terra-firma of facts which have been already briefly delineated in paragraphs 2 and 3 of this judgment. In pursuance of the 1st information report lodged by respondent No. 2 *Smt. Veena Rani*, the police authorities arrested the petitioners on the 1st of July, 1981, and they were remanded to police custody for four days. As already noticed, the stand of the petitioners is that they were tortured to the maximum during this period and extortionate demands were made upon them in pursuance whereof they had to shell out Rs. 50,000/- in cash

and 30 tolas of gold to the police. However, according to the investigating agency the three petitioners made disclosure statements under S. 27 of the Evidence Act leading to the recovery of the alleged articles of dowry. Curiously enough the case is that a sum of Rs. 24,750/- in cash and about 27 tolas of gold were also recovered which were identified to be the same which had been given to respondent No. 2 at the time of her marriage. In accordance with the view expressed in the earlier part of this judgment, we had called upon the respondent-State with regard to any subsequent collection of materials in pursuance of the first information report. In this context the basic reliance of the learned Additional Advocate General, Mr. Sethi was on the written statement in the form of an affidavit filed by Shri Bhagat Ram, Sub-Inspector, S. H. O. of Police Station Kotwali, Bhatinda, dated the 16th of August, 1981. Therein the stand of the investigation is that an offence is jointly made out against the three petitioners under Section 406 read with S. 34, Indian Penal Code, and a synopsis of the steps taken during the course of the investigation till it was stayed under the orders of the Court is given in the affidavit.

59. Adverting now to the first information report what first catches the eye is para 2 thereof in the following terms:—

"That at the time of my marriage I received substantial presents of ornaments, valuable clothes, furniture and other house-hold articles besides Rupees 21,000/- from my parents, relations, my husband and mother-in-law as consideration of the marriage."

It would be plain from the above that on respondent No. 2's own showing substantial parts of the alleged dowry are said to have been given by the relations of her husband and mother-in-law. It is equally with regard to these that the charge of entrustment is laid at the door of the husband and his relations as also her mother-in-law. These allegations, however, look even more incongruous in the context of the underquoted allegation in paragraph 5 of the complaint to the effect that the alleged entrustment was done on the very day of the wedding itself.

60. Apart from the above, the rather ambivalent allegations of entrustment to

the husband and the parents-in-law jointly are then contained in paragraphs 4, 5 and 6 of the first information report as under:—

"4. That as dutiful wife and daughter-in-law I had reposed full faith in my husband and in my parents-in-laws and entrusted all the properties aforesaid to them as mentioned in Annexures A and B.

5. That the above mentioned articles as shown in Annexures 'A' and 'B' were entrusted at Bhatinda to accused persons in the presence of Sarvshri Jas Raj, Bhagla, Sham Sunder S/o Ramji Dass, Rajpal and Dr. S. K. Arora on the same day, i.e. 28-1-1979.

6. That immediate after the marriage, all the abovesaid accused started maltreating me for not fulfilling the lust of the accused for more dowry which they were demanding repeatedly from time to time. It was ultimately about 3 months back that all the accused expelled me in my wearing apparels and deprived me of all the articles in Annexures 'A' and 'B'."

61. What would be manifest from the above is that an omnibus and equivocal allegation of entrustment jointly to the husband and his mother and father is suggested. What calls for pointed notice is that the alleged date and time of entrustment is said to be the very day of the wedding itself on the 28th of Jan. 1979. Plainly enough the import of the allegation herein is that the factum of the marriage on that date was tantamount to the entrustment of the dowry to the husband as also the latter's mother and father. No subsequent specific entrustment of any property thereafter is even remotely alleged in the first information report. It is then the complainant's own case that for full two years thereafter from the date of the marriage till her alleged expulsion from the home of her husband and in-laws around January-February 1981, she continued to live in the matrimonial home even though unhappily. It was not disputed before us that the firm case of the prosecution itself is that the alleged articles of dowry were taken from Bhatinda to the matrimonial home at Malout and were allegedly taken in possession from there in July, 1981, by the police.

62. Even accepting the first information report as the gospel truth it would appear that when tested on the anvil of the principles laid earlier the allegations

therein cannot amount to entrustment *stricto sensu* within the meaning of Section 405, Indian Penal Code. As has been said earlier there is a jointness of control and possession of the property of the spouses within the matrimonial home which negates the very concept of entrustment by the husband to the wife or the wife to the husband therein. As has been held above in paragraph 50 the factum of the marriage itself does not in any way raise a presumption that dowry is thereby entrusted to the husband or the parents-in-law or put under their dominion *per se*. It bears repetition that the allegation herein is that the entrustment jointly to the husband and the parents-in-law took place on the wedding day itself. Equally the mere factum of taking the dowry and the traditional presents into the family home of the husband does not and cannot in law constitute entrustment or passing of dominion to either the husband or his close relations. Lastly, the admitted fact of this dowry having been kept in the matrimonial home for well-nigh two years (from the alleged date of entrustment on the wedding day of 28th of January, 1979) which inevitably brings in the strongest presumption of the jointness of possession and control negates the very concept or continuance of any such entrustment. It has been held expressly above that either the irate walking of from the matrimonial home by anyone of the spouses or even his or her alleged expulsion therefrom would not saddle the other with being entrusted with or dominion over the property in the matrimonial home within the meaning of S. 405, Indian Penal Code.

63. It would thus be plain that even accepting the allegations in the first information report as wholly true they would not amount to any entrustment or passing of dominion over the dowry to the husband and his mother and father jointly. Inevitably, therefore, the first information report does not even remotely disclose any offence under Sec. 406 read with S. 34, Indian Penal Code.

64. Once that finding is arrived at this Court is entitled to consider the quashing of the first information report in the light of the principles enunciated in paragraph 20 above. It has already been held that the allegations, considered in

detail above, even at their face value, would not in the eye of law, amount to any entrustment or passing of dominion over property within the ambit of Section 405, Indian Penal Code. Consequently, the first information report would not and cannot indicate any reasonable suspicion of the commission of the cognizable offence of criminal breach of trust punishable under S. 406, Indian Penal Code. Despite the lodging of the aforesaid report on the 18th of April, 1981 and the subsequent investigation of the same, till the matter was stayed by this Court in July, 1981, no material collected by the investigating agency further discloses the commission of any such cognizable offence either. Indeed, the alleged recoveries of property from the matrimonial home itself and the stance taken by the investigating agency in the affidavit of the investigating officer, seem to detract from the allegations originally made rather than in any way add to them. The averments made in this Criminal Miscellaneous Petition, even if not accepted as wholly true, at least indicate clearly that the whole matter is an unseemly aftermath of a broken marriage with its inevitable bitterness and in this context the further continuation of the police investigation cannot, but amount to an abuse of power which eminently calls for interference by this Court in the ends of justice. I am, therefore, of the view that the case is one which clearly calls for the exercise of inherent jurisdiction under Sec. 482, Criminal Procedure Code. Even whilst sharply keeping in mind the somewhat exceptional nature of the exercise of such a power, I am constrained to hold that the Criminal Miscellaneous Application No. 4022-M/1981 must necessarily be allowed and the criminal proceedings initiated against the petitioners be and are hereby quashed.

65. Criminal Miscellaneous Applications Nos. 3884-M, 5119-M, 5309-M, 5791-M, 5860-M of 1980; 1451-M, 1478-M, 1585-M, 1597-M, 2361-M and 3367-M of 1981 however, would go back for decision on merits before a single Bench, in the light of the law enunciated and its application as above.

Order accordingly.

AIR 1982 PUNJAB AND HARYANA 397
FULL BENCH

S. S. SANDHAWALIA, C. J., S. P. GOYAL
AND G. C. MITAL, JJ.

M/s. Subhash Chander, Petitioner v. State of Punjab and others, Respondents.

Civil Writ Petn. No. 854 of 1981, D/- 3-6-1982.

Punjab Land Revenue Act (1887), S. 42 — Vesting of rights to brick-earth — Claim as to — Cannot be decided in writ petition but in Civil Court — High Court cannot direct which of the parties should go to Court for establishing the title. 1980 Rev LR 152 and 1976 Cur LJ (Civil) 498, Overruled.

The rival claims of the parties, Govt. and landowner, over the vesting of brick-earth (minor minerals) are not constricted to adjudication only on the basis of the entries in the wajib-ul-arz of the revenue estate and the claim to rebut the presumptions raised in Sec. 42 of the Act by evidence in a Court of law cannot be summarily ousted. The disputed questions of fact and evidence regarding the vesting of minor minerals, must be established in a Civil Court upon evidence led by the parties and not within the narrow confines of the writ jurisdiction. AIR 1972 Punj & Har 356 (FB), Rel. on; 1980 Rev LR 152 and 1976 Cur LJ (Civil) 498, Overruled. (Para 13)

Cases Referred: Chronological Paras

1980 Pun LJ 204: 1980 Eev LR 152

1, 2, 15
 (1977) Letters Petent Appeal No. 264 of 1974, D/- 5-4-1977 (Punj & Har), State of Haryana v. N. K. Kohli 3

AIR 1976 SC 1393 4

1976 Cur LJ (Civ) 498: 1976 Pun LJ 567

1, 3, 14

AIR 1972 Punj & Har 56 12

AIR 1972 Punj & Har 355 (FB)

3, 9, 14, 15, 16

1971 Rev LR 1: (1970) 1 SCWR 608 10

(1971) 73 Pun LR 159: 1971 Pun LJ 96 11

(1970) Civil Writ No. 2145 of 1969, D/- 2-2-1970 (Punj), Gram Sabha and Gram Panchayat, Kiratpur case 9

AIR 1969 Punj 79 9, 14, 15, 16

ILR (1966) 1 Punj 166 9, 14, 16

H. L. Sibal, Sr. Advocate (M/s. Kuldip Singh, J. K. Sibal, Bhal Singh Malik and Vishal Malik with him), for Petitioner; Anand Swarup, Sr. Advocate with Sanjiv Pabbi and M. J. S. Sethi, Addl. Advocate General, for Respondents.

GZ/GZ/C930/82/BNP/SNV-H

S. S. SANDHAWALIA, C. J.:— Whether the rival claims of the Government and the landowners over the vesting of brick-earth (a minor mineral) must be adjudicated only on the basis of the entries in wajib-ul-arz of the revenue estate is the significant common question which has come to the fore in this set of nine civil writ petitions. Equally in issue is an apparent conflict of authority betwixt two Division Bench judgments reported as State of Haryana v. Mangat Ram, 1976 Cur LJ (Civ) 498 and State of Haryana v. Gram Panchayat, Village Khori Jamalpur, 1980 Punj LJ 204, which, indeed, had necessitated this reference to the Full Bench.

2. Admittedly, the issues of law and fact are identical herein and it, therefore, suffices to advert briefly to the facts in Civil Writ Petn. No. 894 of 1981 (Subhash Chander v. State of Punjab). The petitioner herein carries on the business of manufacture and sale of bricks in his kiln situated in village Ghaggar Sarai, Tehsil Rajpura, after extracting brick-earth from land taken on lease from private owners of the said revenue estate. It is averred that the Sharat-wajib-ul-arz (Annexure P-3) thereof has not specifically reserved brick-earth as vesting in the Government and, therefore, the ownership thereof rests with the landowners. Consequently, the respondent-State not being possessed of any proprietary rights in brick-earth, is not entitled to recover any royalty etc. therefor. Nevertheless, the Mining Officer, Department of Industries of Punjab, Mubarakpur, issued the notice Annexure P-1 certifying that a sum of Rs. 6239.44 was recoverable as arrears of land revenue from the petitioner as royalty for brick-earth. It is further the claim that before the issuance of this notice, no opportunity was afforded to the petitioner to show that brick-earth did not vest in the State and, therefore, no royalty or other charges therefor could be levied. The petitioner preferred an appeal under Rule 54-F of the Punjab Minor Mineral Concession Rules, 1964, before the State Geologist, Department of Industries, Punjab, Chandigarh, who, on the 27th of Feb., 1981, is alleged to have declined to consider any other matter apart from the proof of the deposit of the due amount and straightway rejected the appeal. Aggrieved thereby, the petitioner preferred the writ petition placing basic reliance on Gram Panchayat, Village Khori Jamalpur's case (1980 Pun LJ 204) (supra).

3. In the return filed on behalf of the respondents, the preliminary objection (subsequently strenuously pressed in argument) is

that the petition relates to the title and vesting of minor minerals which involves an intricate dispute on facts and, therefore, cannot be adjudicated in the civil writ jurisdiction. Particular reliance in this context is placed on the Full Bench judgment in *Amar Singh Modi Lal v. State of Haryana*, AIR 1972 Punj and Har 356. It has been averred that, according to the sharat-wajib-ul-arz of village Chalheri, Tehsil Rajpura, District Patiala (Annexure R-1), the right to minerals vests with the State Government when read with Sec. 42 (2) of the Punjab Land Revenue Act, 1887. On the point of alternative remedy, it is pleaded that an appeal under Rule 54-F of the Punjab Minor Mineral Concession Rules, 1964, lies to the State Geologist as well as to the Central Government under Sec. 30 of the Mines and Minerals (Regulation and Development) Act, 1957. On merits, it is averred that the petitioner, in fact, is running his brick-kiln and is extracting brick-earth from land situated in village Chalheri without any lawful authority. Basic reliance was placed on Annexure R-1, the Sharat-wajib-ul-arz of the said revenue estate, the Division Bench judgment of this Court in *Mangat Ram's case* (1976 Cur LJ (Civ) 498) (supra); and Letters Patent Appeal No. 264 of 1974 (*State of Haryana v. N. K. Kohli etc.*), decided on the 5th April, 1977. The basic stand of the respondent-State is reiterated that the right to minor minerals has to be decided on evidence and, as this would involve dispute on facts, it cannot be decided in the writ jurisdiction nor is it for the High Court to direct as to which of the rival parties shall go to the Civil Court to get its title established. Reliance is placed on a number of judgments of this Court that the title to minor minerals primarily vests in the Government.

4. At the very threshold it calls for pointed notice that it seems to be now settled beyond cavil that brick-earth has validly been declared to be a minor mineral by the relevant notification issued under Sec. 3 (e) of the Mines and Minerals (Regulation and Development) Act, 1957. In *Amar Singh Modi Lal's case* (AIR 1972 Punj & Har 356) (FB) (supra), the majority view after an elaborate discussion of principle and precedent had concluded as under (para 51):—

"In the ultimate analysis, therefore, I am of the view that no taint of unconstitutionality attaches to either S. 3 (e) of the Act or to the impugned notification G.S.F. 436 in so far it has declared 'brick-earth' to be a 'minor mineral'."

The aforesaid view in the larger context now seems to have the approval of the final Court itself in *Bhagwan Das v. State of U. P.*, AIR 1976 SC 1393, wherein a somewhat similar contention was raised that sand, gravel, building stone and bajri deposited on the surface of the land by the fluvial action of river Yamuna were not minerals and in any case vested in the private owners of the land. Categorically rejecting such a contention Chandrachud, J. (as the learned Chief Justice then was) observed as follows (para 13):—

"Only one more argument made on behalf of the appellant requires to be noticed. It was urged that the sand and gravel are deposited on the surface of the land, and not under the surface of the soil and therefore they cannot be called minerals and equally so, any operation by which they are collected or gathered cannot properly be called a mining operation. It is in the first place wrong to assume that mines and minerals must always be sub-soil and that there can be no minerals on the surface of the earth. Such an assumption is contrary to informed experience. In any case, the definition of mining operations and minor minerals in Sec. 3 (d) and (e) of the Act of 1957 and Rule 2 (5) and (7) of the Rules of 1963 shows that minerals need not be sub-terranean and that mining operations cover every operation undertaken for the purpose of 'winning' any minor mineral. 'Winning' does not imply a hazardous or perilous activity. The word simply means 'extracting a mineral' and is used generally to indicate any activity by which a mineral is secured. 'Extracting', in turn, means drawing out or obtaining. A tooth is 'extracted' as much as is fruit juice and as much as a mineral. Only, that the effort varies from tooth to tooth, from fruit to fruit, and from mineral to mineral."

In view of the authoritative enunciation aforesaid it must be held that brick-earth comes within the ambit of a mineral which has validly declared to be a 'minor mineral' by the relevant statutory provision.

5. Once it is held as above, the primary lis betwixt the parties is with regard to the vesting of the minor minerals or brick-earth in the different revenue estates with regard to which the writ petitions have been filed. On behalf of the petitioners, apart from the respective entries in the wajib-ul-arz of each village estate, particular reliance was placed on Section 42 of the Punjab Land Revenue Act. Counsel contended that with regard to the settlements after the year 1871 (the en-

tries in the wajib-ul-arz being all post-1871) sub-section (2) of S. 42 raises a presumption that the minerals would vest in the landowners unless it is expressly provided to the contrary. Heavily relying on this provision the submission was that the wajib-ul-arz of the respective villages did not in terms provide that brick-earth would vest in the State. Consequently it was argued that in the absence of any express provision with regard to brick-earth in the revenue entries it must be presumed to vest in the landowners by virtue of Section 42 (2).

6. To appreciate the respective stand of the parties with regard to the presumptions raised by Section 42 it is apt to read its relevant provisions :—

"42. Presumption as to ownership of forests quarries and waste land.— (1) When in any record-of-rights completed before the eighteenth day of Nov., 1371, it is not expressly provided that any forest, quarry, unclaimed, unoccupied, deserted or waste land, spontaneous produce or other accessory interest in land belongs to the landowners, it shall be presumed to belong to the (Government).

(2) When in any record-of-rights completed after that date it is not expressly provided that any forest or quarry or any such land or interest belongs to the (Government) it shall be presumed to belong to the landowners.

(3) The presumption created by sub-section (1) may be rebutted by showing —

(a) from the record or report made by the assessing officer at the time of assessment, or

(b) if the record or report is silent, then from a comparison between the assessment of villages in which there existed, and the assessment of villages of similar character in which there did not exist, any forest or quarry, or any such land or interest,

that the forest, quarry, land or interest was taken into account in the assessment of the land revenue.

(4) Until the presumption is so rebutted, the forest, quarry, land or interest shall be held to belong to the (Government)."

Now a plain reading of sub-sections (1) and (2) aforesaid makes it manifest that the presumption raised thereby is a rebuttable one. Whilst sub-section (1) raises a rebuttable presumption in favour of the Government, the succeeding sub-section raises a similar presumption in favour of the landowners provided that there is no express entry in the record-of-rights. This presumption is raised in identical terms in both the sub-sections.

It is axiomatic that the presumptions aforesaid are not absolute and can be rebutted by evidence. Indeed, this was the common stand of the learned counsel for the parties themselves. However, any doubt on this aspect is conclusively repelled by sub-sections (3) and (4), which provide in terms for the nature of evidence by which the same is to be repelled. It is obvious that as regards the presumption under sub-section (2) no limitation or specific mode for the rebuttal thereof has been provided by the statute and is thus left entirely to the parties.

7. It is in the aforesaid context of the rebuttable presumptions that the firm stand of the learned counsel for the respondents, Mr. Mohinderjit Singh Sethi, the learned Additional Advocate General, Punjab and Mr. Anand Swaroop, that the respondent-State cannot be pinned down to the evidence of wajib-ul-arz only, has to be considered. It was forcefully averred in the pleadings and as well reiterated in arguments that the statute gives them the right to lead evidence to rebut or buttress the presumptions, if any, and both on principle and precedent such a right cannot be denied. Learned counsel were, therefore, vehement in strenuously pressing the objection that the disputed questions of fact and evidence regarding the vesting of minor minerals, must be established in a Civil Court upon evidence led by the parties and not within the narrow confines of the writ jurisdiction.

8. I am of the view that the stand of the respondents herein is impeccable and apart from its soundness on principle the settled weight of precedent within the Court entitles them wholly to sustain the same.

9. Way back in *Khushal Singh v. State of Punjab*, ILR (1966) 1 Punj 166, a similar contention as is being raised on behalf of the present petitioners that the writ Court should construe the wajib-ul-arz alone and grant relief, was repelled categorically by the Division Bench with the following observations :—

"..... In any case it is urged that the relevant entry in the wajib-ul-arz should be one which could show the ownership of existing mines and quarries and not of what would be the position in future. On the meagre data before us it is not possible to pronounce on the exact meaning or effect of this wajib-ul-arz. Nor can this Court, while acting in exercise of its jurisdiction under Article 226 of the Constitution, be called upon to decide a disputed question of fact like this, particularly when even the appli-

cability of the wajib-ul-arz to the sites in question is not admitted.

The question that arises in this respect is as to who could go to a competent Court to have those rival claims between the parties settled and whether there is any other appropriate machinery provided by the Revenue Act or by the Act or the Punjab Rules for determination of these disputes. The jurisdiction of the Civil Courts to decide the rival claims of the parties relating to the ownership of the mineral rights in the land do not appear to be barred by any provision of law. In any case no such provision has been pointed out to us by any of the learned counsel appearing for the parties in this case. Any party aggrieved in any particular circumstances can, therefore, institute a suitable action in Court according to law."

The aforesaid view was then reiterated by an equally exhaustive judgment in *Dr. Shanti Saroop Sharma v. State of Punjab*, AIR 1969 Punj 79, wherein it was concluded as under (para 72):—

"As has been noticed earlier, there has been a serious dispute in all the petitions before us regarding the ownership of the rights in minor minerals found in the land occupied by the petitioners, and that dispute cannot be settled in these proceedings as this Court is not the proper forum for going into such disputed questions of fact under Articles 226 and 227 of the Constitution. The rival claims of the parties to the ownership of the minor minerals in question can be settled by appropriate proceedings in a Court of law."

The final sanction to the above view was accorded by the Full Bench in *Amar Singh Modi Lal's case* (AIR 1972 Punj & Har 356) (supra) as is evident from para 57 of its report. In fact, the Full Bench further and categorically rejected the claim for a lesser relief on behalf of the petitioner that a writ be issued in their favour *prima facie* and the State be directed to establish their claim to minor minerals in a Civil Court and secure its verdict in its favour with the under-mentioned observations:—

"..... With greatest deference to Tuli, J., if the decision in the Gram Sabha and Gram Panchayat, Kiratpur's case, Civil Writ No. 2146 of 1969, D/- 2-2-1970 (Punj & Har), seeks to lay down that a writ may issue without resolving disputed questions of fact and subject to a subsequent decision on merits by the Civil Court, then I would respectfully beg to differ from that view. Nor do I think that it is the province of the Court of writ jurisdiction to tender advice

or direct the litigants before it as to which one of them should go to the Civil Court first or the mode or manner of the legal remedies any one of them may choose to adopt."

10. In fairness, reference must be made to *Om Parkash v. State of Haryana*, 1971 Rev LR 1 (SC), on which some tenuous reliance was sought to be placed on behalf of the petitioner. It would appear from the brief judgment that in the said case the High Court did not even call upon the State to file an affidavit and did not even consider whether the facts raised were complicated or otherwise and summarily dismissed the writ petition (apparently in limine). It was in this context and further on the filing of an affidavit in reply, on behalf of the State, which indeed disclosed no intricate or disputed facts, that their Lordships merely remanded the matter back to the High Court to be dealt with according to law. I am unable to construe the said judgment in view of its peculiar facts as in any way eroding the ratio of the unbroken precedent within this Court, referred to above.

11. Two judgments from which some tenuous support was sought on behalf of the writ petitioner would also deserve mention in this context. In *Chuni Lal v. State of Haryana*, (1971) 73 Pun LR 159, the lis between the parties was the winning of saltpetre from the land vested in the Gram Panchayat under the Punjab Village Common Lands (Regulations) Act, 1961. It deserves highlighting that saltpetre is altogether on a different footing. Learned counsel for the parties had both relied on the authoritative *Douie's Punjab Settlement Manual*, 1899. Thereby it was clearly settled that Government had no claim to saltpetre and it vested in the landowners. Para 193 of the aforesaid Settlement Manual deserves notice in extenso:—

"193. Saltpetre not treated as Government property:—

The question of the rights of Government in saltpetre was raised in 1891 in connection with the settlement of the Hissar district when the Punjab Government held that neither the saltpetre earth nor the educed saltpetre can properly be brought under the term 'spontaneous produce or other accessory interest in land' within the meaning of Section 42 of the Land Revenue Act. It was added that Sir James Lyall believed that 'in practice the Government nowhere in the Punjab claims proprietary right in saltpetre-earth, or a title to a monopoly of the right

of educating saltpetre, though preceding native Governments may have claimed such a title. All that Government claims is the right of regulating or preventing the manufacture. Saltpetre or shore must not be recorded, therefore, as Government property in the village administration paper, and any profits which the landowners derive from it may be taken into account in assessing the land revenue. If for any reason they are left unassessed the fact that Government has not abandoned its right to assess them at some future time should be distinctly noted."

It is manifest from the above that the Government nowhere in the Punjab laid any title to saltpetre which inevitably vested in the owners of the land. Now it was in this context that the Division Bench in Chuni Lal's case (1971-73 Pun LR 159) (supra) after expressly referring to the aforesaid Settlement Manual opined that saltpetre was not even a minor mineral. Further, particular reliance was placed on the express terms of Rr. 3 (2) (x) and 5 (5) of the Punjab Village Common Land (Regulation) Rules, 1964 to hold that thereby saltpetre was clearly vested in the Gram Panchayat. The Bench also summarily rejected the stand taken on behalf of the respondent-State that Section 14-A of the Punjab Village Common Lands (Regulation) Act, 1961 was at all attracted to the case. It seems to be obvious that this decision is wholly distinguishable and cannot even remotely advance the case of the petitioner in the context of a minor mineral, like brick-earth to which the aforesaid considerations and statutory provisions are not at all applicable.

12. For similar, if not identical reasons, the reliance of the learned counsel for the petitioner on Prem Chand v. State of Haryana, AIR 1972 Punj & Har 50, is equally in vain. This again was a case of the exploitation of saltpetre and all the considerations aforementioned are applicable thereto. What is even more is the fact that the learned counsel for the parties therein had expressly rested themselves entirely on the entries in the wajib-ul-arz without laying any claim to lead any other evidence or to rebut the presumption raised by Sec. 42 therewith. The Division Bench expressly noticed that there was no disputed question of fact raised in those writ petitions and that in fact no such objection was pressed at the time of the arguments. Reference to para 23 of the report would indicate that the learned Advocate General on behalf of the respon-

dent-State himself relied only on the entries in the wajib-ul-arz and produced the same before the Bench after seeking an adjournment. I am, therefore, clearly of the view that this case is entirely distinguishable.

13. To conclude on this aspect, it must be held that the rival claims of the parties over the vesting of brick-earth are not constricted to adjudication only on the basis of the entries in the wajib-ul-arz of the revenue estate and the claim to rebut the presumptions raised in Section 42 of the Punjab Land Revenue Act, 1887 by evidence in a Court of law cannot be summarily ousted. The answer to the first question posed at the very outset has, therefore, to be rendered in the negative.

14. Adverting now to the conflict of precedents, one may first chronologically consider the relevant observations in Mangat Ram's case (1976 Cur LJ (Civ) 498) (supra). Therein, in consonance with what has been said above, the Letters Patent Bench observed as follows:—

"..... Now, Secs. 42 (1) and 42 (2) create certain presumptions. These presumptions are naturally rebuttable by other evidence. Therefore, ordinarily the more appropriate forum for determining the question whether it is the Government or the owner of the land that is entitled to the minerals is, in our view, the Civil Court, in a duly instituted suit and not the High Court exercising jurisdiction under Art. 226 of the Constitution. On that ground alone, the writ petition was liable to be dismissed"

Having so held, the learned Judges, however, proceeded to observe (it has to be borne in mind that it was an appeal preferred by the State of Haryana) that the State itself had relied only on the entries of the wajib-ul-arz with the solitary addition that the respondent had taken short-term leases from the Government. On the other hand, the respondent had not relied upon any other evidence whatsoever apart from the entries in the wajib-ul-arz. There being thus no claim or insistence on behalf of any of the parties to lead evidence, their Lordships proceeded to decide the question on the basis of the material before them. On the peculiar facts of that case and the peculiar entries of the wajib-ul-arz, they came to the conclusion that the right to minerals in the said estate was vested in the Government because of the added circumstance that the respondent had himself taken short-term leases from the Government. Manifestly therefore, the case

turned on its peculiar facts and is no authority for any such proposition that the vesting of minerals has to be decided on the basis of entries in the *wajib-ul-arz* alone (dehors a claim to lead evidence with regard to disputed questions of fact) or that these entries would conclusively vest the same in the Government. Indeed, if the brief and passing observations in the said judgment are at all liable to such a construction, then they would be plainly running counter to Amar Singh Modi Lal's case (AIR 1972 Punj & Har 356) (FB) (supra) and the earlier settled line of precedent (Khushal Singh's case, ILR (1966) 1 Punj 166 and Dr. Shanti Saroop's case, AIR 1969 Punj 79) (supra) and do not lay down the law correctly and have to be overruled. Each disputed case of the vesting of minor minerals has, therefore, to be decided on the basis of the evidence led by the parties including, of course, the relevant entries in the revenue record.

15. Coming now to the judgment of the Letters Patent Bench in State of Haryana v. Gram Panchayat, Jamalpur, 1980 Rev LR 152, it is plain from the very brief judgment therein that the issue was hardly agitated seriously before the Bench. I was party to the Bench and would recall that on behalf of the appellant-State, neither principle nor any precedent was seriously pressed in support of its case. Full Bench judgment in Amar Singh Modi Lal's case (AIR 1972 Punj & Har 356) (supra) was neither expressly relied upon nor pointed out to the Bench. For the respondents the case went by default as no appearance was made on their behalf. It was in this context that after noticing the facts, the Bench did not choose to interfere in the judgment of the learned single Judge. However, if those brief observations are to be construed as a warrant for the proposition that despite a serious dispute on facts a writ should be granted or a *prima facie* relief accorded, leaving the parties to have their rights established in the Civil Court, then the same is in head-long conflict with the ratio of the Full Bench in Amar Singh Modi Lal's case (supra) and, therefore, cannot be allowed to hold the field. It is significant that the learned single Judge in the case had purported to follow Dr. Shanti Saroop Sharma (AIR 1969 Punj 79) (supra) ratio in which a writ was expressly refused on the express ground of the disputed questions raised. It is obvious that the law laid down in Dr. Shanti Saroop Sharma (supra) was not rightly applied by the learned single Judge. I have

already noticed that the Full Bench in Amar Singh Modi Lal's case (supra) set itself squarely against the claim of any writ in favour of a party *prima facie* being issued without resolving the disputed questions of fact. For all these reasons, I am constrained to hold that the ultimate result in State of Haryana v. Gram Panchayat, Jamalpur, 1980 Rev LR 152 runs counter to the enunciation of the Full Bench in Amar Singh Modi Lal's case (supra) and is, therefore, overruled.

16. Having held as above, it seems to be plain that in this set of writ petition, a tangled dispute on facts is sought to be raised on behalf of the respondents. The claim to lead evidence to rebut the presumption, if any, under Section 42 has not only been raised but strenuously pressed. I am unable to deny this right to the respondents and even otherwise find it inapt to enter the thicket of controversial facts and the evidence that may have to be led by the parties. Respectfully following the settled line of precedent in this Court in Khushal Singh's case (ILR (1966) 1 Punj 166) and Dr. Shanti Saroop Sharma's case (AIR 1969 Punj 79) and Amar Singh Modi Lal's case (AIR 1972 Punj & Har 356) (FB) (supra), I would dismiss the writ petitions and relegate the petitioners to the remedy of establishing their claims in appropriate proceedings in a revenue or Civil Court as they may be advised.

17. In view of the somewhat intricate issues involved, I leave the parties to bear their own costs.

S. P. GOYAL, J.:— I agree.

G. C. MITAL, J.:— I agree.

Order accordingly.

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M. M. PUNCHHI, J.

Harbans Singh, Petitioner v. The State of Punjab and others, Respondents
Civil Writ Petn. No. 3317 of 1979, D/-25-2-1982.

(A) Punjab Gram Panchayat Act (4 of 1953), S. 13-OO — Candidate declared elected under S. 13-OO — Election petition against him is maintainable — Section 13-OO is not *ultra vires* Art. 14. (i) Constitution of India, Art. 14; (ii) Representation of the People Act (1951), S. 97).

A declaration made under sub-sec. (1) of S. 13-OO declaring elected the election petitioner or some other candidate can

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be challenged in an election petition. There is nothing in the Act to bar the filing and maintenance of such a petition. As such it cannot be said that the provision of Sec. 13-OO is ultra vires of Art. 14 of the Constitution as it fails to provide to the returned candidate a right to file a recriminatory petition when the seat on vacation is claimed by the election petitioner or in other words, that Sec. 13 is deficient of the spirit of S. 97 of the Representation of the People Act, 1951. AIR 1982 Punj & Har 369, Foll. (Paras 8, 10)

Section 13-OO provides that when the election of an elected candidate is challenged as being void, the petitioner can claim a declaration as a consequence that he himself, or any other candidate be declared as duly elected. The declaration to be sought is optional at the instance of the election-petitioner and nowhere has power been conferred on the prescribed authority to declare suo motu any candidate to be duly elected in the event of declaring the election of the returned candidate to be void. The functions of the prescribed authority of declaring the election petitioner, or any other candidate, duly elected as a substitute to the returned candidate, whose election was held void, is wholly statutory and not in overlapping of his functions as a quasi-judicial authority determining election disputes. That power of the prescribed authority is more or less akin or in substitution of the Presiding Officer or the Returning Officer. It makes not the slightest difference that the same prescribed authority may have to determine quasi-judicially another election dispute arising out of a result which he himself declared under S. 13-OO (2) of the Act. These functions of the prescribed authority are distinct and separate, neither do they overlap nor intermingle. (Paras 8, 9)

Even otherwise when the provisions of the Civil P. C. are applicable to election disputes, nothing prohibits the returned candidate to make additional pleas in his written statement that in the event of his election being declared void, the claim of the election-petitioner that he himself be declared elected, or any other candidate be declared elected for the office, should be tried as an election petition on grounds open to an election-petitioner. (Para 10)

(B) Evidence Act (1 of 1872), S. 115 — Plea of waiver or acquiescence — It cannot stand before mandate of statute. (Para 11)

(C) Punjab Gram Panchayat Election Rules (1960), R. 33 — Word "lot" — Interpretation of — Word is used in singular sense. (i) Interpretation of Statutes; (ii) Punjab General Clauses Act (1 of 1898), S. 11).

The word "lot" has been used in R. 33 in the singular sense and carries with it an important qualification that the lot drawn would tantamount to the securing of one additional vote in favour of the candidate in whose favour the lot is drawn. The rule framers have with good sense, put it in the singular sense, as otherwise it would lead to a lot of speculation and confusion leading to squabbles in election disputes. Certainty being one of the essential attributes of laws, the interpretation of the rule which can give rise to looseness and speculation has to be discarded. The Punjab General Clauses Act, though permits that singular in a statute can be read as plural, but this is subjected to the qualification of the context so permitting. Here, the context of the rules specifically puts it at the level of a singular lot or a single additional vote. (Para 11)

Cases Referred : Chronological Paras
AIR 1982 Punj & Har 369 8

R. L. Sharma, for Petitioner; M. S. Rakkar, for Respondent No. 4.

ORDER :— This petition raises rather an interesting election dispute. What is a 'lot' as envisaged under R. 33 of the Punjab Gram Panchayat Election Rules, 1960 (hereinafter called the Rules) is the domain of this petition.

2. The petitioner got elected as a Panch on 21st Aug. 1978 in the Sabha area of village Saroya, Tehsil Garhshankar, District Hoshiarpur. Out of the eight Panchas elected, a Sarpanch had to be elected. The petitioner, as also respondent No. 4, contested for the office. Each of them secured four votes. This resulted in a tie. It was to be settled under R. 33 of the Rules which is in the following terms :—

"33. Procedure in case of tie. If after the counting of votes is completed, an equality of votes is found to exist between any candidates, and the addition of one vote will entitle any of those

candidates to be declared elected, the Presiding Officer or the Returning Officer, as the case may be, shall forthwith decide between those candidates by lot, and proceed as if the candidate on whom the lot falls has received an additional vote."

According to the averment made specifically in the petition, the Returning Officer recorded the statements of both the candidates to an agreement that the lots would be drawn three times and the candidate successful in the majority would get the additional vote. Such consent is statedly signified from the writing (Annexure P1 to the writ petition) which embodies the result on that basis in favour of the petitioner. Seemingly, after the three lots were drawn, the first one went in favour of respondent No. 4 and the succeeding two in favour of the petitioner. He, thus, was declared by the Returning Officer as Sarpanch.

3. Respondent No. 4 filed an election petition before respondent No. 2, the Executive Magistrate, who is the prescribed authority under Rule 42 of the Rules. A challenge was made therein to the manner of drawing of the lot. Emphasis was laid therein that respondent No. 4 was given to understand that the rules prescribed that the lots had to be drawn thrice and he was made to sign in consent thereof on that misunderstanding. Claim was built on his behalf on the strength of the first lot having been decided in his favour. The prescribed authority allowed the election petition by resolving the factual controversy in these words:

"After going through this record thoroughly one point becomes clear that even if the petitioner did not agree with as he has alleged not to draw the lot three times but he subsequently signed on the election proceedings. But main point to be considered here is that whether it is correct and the lot means drawing up the lot only once, then Shri Daljit Singh should be considered as genuinely elected Sarpanch. As I have discussed above, the definition of the lot is that draw has to be made only once But since the Returning Officer was unable to cope with the heavy responsibility thrust upon him, so he bungled the whole issue. Why should a candidate who secured the first lot be made to suffer because the Returning

Officer was ignorant regarding the relevant law. Therefore, I accept this plea of the petitioner and decide this issue in his favour."

4. On his election being set aside by the prescribed authority, the petitioner filed an appeal under S. 13-V of the Punjab Gram Panchayat Act, 1952 (for short, 'the Act'), which lay before the District Judge, Hoshiarpur. It was an exercise in futility. The learned District Judge too endorsed the view of the prescribed authority and came to the view that the word 'lot' used in R. 33 of the Rules was singular in spirit and essence. On the dismissal of the appeal, the petitioner has approached this Court under Art. 226/227 of the Constitution of India to get quashed the impugned orders of the prescribed authority, as also of the appellate authority, so as to activate his electoral success.

5. It is unnecessary to give other facts in detail as nothing hinges on them. Similarly it is unnecessary to detail out the return as to how the facts are highlighted in colour by respondent No. 4. The findings as recorded by the quasi-judicial authorities on the subject provide a sufficient basis for the understanding of the controversy and the decision of this petition.

6. Two questions have been raised by the learned counsel for the petitioner. One is that respondent No. 4, in his election petition had challenged the petitioner's election as the returned candidate and had at the same time sought a declaration for his election as a Sarpanch. He did so since S. 13-OO of the Act so provided. The grouse has been built thereon that no corresponding right has been provided in that section, or even otherwise under the Act, to the returned candidate to file a recriminatory petition for getting declared that the sought for election of the election-petitioner was invalid. The second question posed by the writ petitioner is that the interpretation put by the quasi-judicial authorities on the word 'lot' in R. 33 of the Rules is contrary to the scheme of the Act, canons of interpretation and is violating of the principles of Punjab General Clauses Act. Supportive argument is sought from the fact that respondent No. 4 had submitted to the interpretation employed by the Returning Officer, and having entered the contest and lost, he could not turn

around to make a grievance thereto. In nutshell, waiver or acquiescence has been pleaded to repel the claim of respondent No. 4.

7. Elaborating the first point, learned counsel for the petitioner takes aid of S. 97 of the Representation of the People Act, 1951, wherein there is a provision for filing a recriminatory petition when the seat on vacation is claimed by the election petitioner. It was contended that the wisdom and philosophy of the election process, as evolved by the Parliament, had simultaneously permeate in Gram Panchayat Elections, and since such right had compulsorily to be provided in S. 13-OO of the Act, the same is ultra vires of Art. 14 of the Constitution of India. It is claimed that the election-petitioner under S. 13-OO of the Act was better off than the returned candidate inasmuch as he could blow the seat of the elected candidate to smithereens whereas the elected candidate was supposed to stand mute and suffer the ignominy, and not hit back in recrimination. At the same time, it is asserted that equality is antithetic to arbitrariness, and here was a glaring case of denial of the equality of opportunity or equal protection of laws.

8. The argument, indeed is ingenious and attractive. It seems to have also been raised, though not in so many words, in a case decided by J. M. Tandon, J. on 25th Feb., 1982 in Civil Writ Petn. No. 257 of 1981: (AIR 1982 Punj & Har 369) (Inder Devi v. Surjit Kaur) Tandon, J., has held therein that there was nothing to suggest that a declaration made under sub-sec. (1) of S. 13-OO of the Act cannot be challenged in an election petition and it was difficult to hold that the provision contained thereunder is unconstitutional being violative of Art. 14 of the Constitution on the plea that a declaration made under S. 13-OO of the Act cannot be challenged in an election petition. On precept I agree with what has been held by Tandon, J. A cursory look at the frame of Chapter II-A, providing for disputes regarding elections under the Act, makes it plain that an 'election' means the election of a Sarpanch or Panch and includes the co-option of a Panch (as in Punjab). An election petition is maintainable under S. 13-B of the Act before the prescribed authority. The procedure before the prescribed authority is, as nearly as it can

be, in accordance with the procedure applicable under the Civil P. C., 1908 to the trial of suits. S. 13-O provides for the grounds for setting aside an election. And finally, Ss. 13-T and 13-U give details of 'corrupt practices' for the purposes of the Act. Now it is plain that a challengeable election comes into being only after a declaration of a result pronounced by the Presiding Officer or the Returning Officer, as the case may be. What S. 13-OO provides is that when the election of an elected candidate is challenged as being void, the petitioner can claim a declaration as a consequence that he himself, or any other candidate, be declared as duly elected. The declaration to be sought is optional at the instance of the election-petitioner and is in the nature of things a sequel to the election of the returned candidate being declared void. Nowhere has power been conferred therein on the prescribed authority to declare suo motu any candidate to be duly elected in the event of declaring the election of the returned candidate to be void. Such power of the prescribed authority is more or less akin or in substitution of the Presiding Officer or the Returning Officer as the case may be, as it has only to see whether the election-petitioner, or any other candidate received a majority of valid votes. Once he counts those votes, it is mandatory for him to declare elected the election-petitioner, or such candidate, as the case may be, to have been duly elected. But if the election of the returned candidate is upheld, no such duty is cast on the prescribed authority.

9. The functions of the prescribed authority of declaring the election-petitioner, or any other candidate, duly elected as a substitute to the returned candidate, whose election was held void, is, to my mind, wholly statutory and not in overlapping of his functions as a quasi-judicial authority determining election disputes vis-a-vis candidates declared to be elected. As said before, his duty seemingly is as a substitute and more on the plank of being ministerial. But having declared the election-petitioner, or any other candidate, to be duly elected as a consequence of the returned candidate being made to vacate the seat, the declaration per se can give rise to a cause for the filing of an election petition to challenge the said declared election for grounds provided under the Act and the Rules. It makes

not the slightest difference that the same prescribed authority may have to determine quasi-judicially another election dispute arising out of a result which he himself declared under S. 13-OO (2) of the Act. These functions of the prescribed authority are distinct and separate; neither do they overlap nor intermingle. The petitioner's plea on that account is totally misconceived.

10. Even otherwise when the provisions of the Civil P. C. are applicable to election disputes, nothing prohibits the returned candidate to make additional pleas in his written statement that in the event of his election being declared void, the claim of the election-petitioner that he himself be declared elected, or any other candidate be declared elected, for the office, should be tried as an election petition on grounds open to an election-petitioner. But the added pleas so raised cannot be permitted to stall the result of the first election petition, for it has to be determined in the first instance whether the election of a returned candidate is valid or otherwise. It is only then that such a controversy can be gone into and that too on the formal declaration that the election-petitioner or any other candidate is declared to be elected. This is more a matter of substance rather than of form. But here concededly neither of the two steps was taken by the petitioner before the prescribed authority. Had he taken any such step in the matter, and that had been thwarted, then alone could a grouse be made. Having not taken any such step, the writ petitioner cannot be allowed to raise this question, more in the nature of a declaration that S. 13-OO is violative of Art. 14 or is deficient of the spirit of S. 97 of the Representation of the People Act, 1951. The Legislature is master in its field with regard to legislation. This Court cannot arrogate to itself the functions of the Legislature. Still in the interpretative process, it has been spelt out, with which I am in full agreement, as held by J. M. Tandon, J., that there is nothing to bar the filing and maintenance of an election petition against a candidate declared elected under S. 13-OO of the Act.

11. With regard to the second question it must be mentioned at the outset that the plea of waiver or acquiescence cannot stand before the mandate of the

statute. The mere fact that respondent No. 4 consented to have a draw of three lots and abide by the result of the majority, would not stand in his way to seek protection of the law as it stands. From R. 33 of the Rules, as reproduced above, it becomes patent that the word 'lot' has been used in the singular sense and carries with it an important qualification that the lot drawn would tantamount to the securing of one additional vote in favour of the candidate in whose favour the lot is drawn. So, the singular 'lot' is equated with an additional vote. The expression "singular in nature" is met with another expression "singular in nature". The rule framers have, with good sense, put it in the singular sense, as otherwise it would lead to a lot of speculation and confusion leading to squabbles in election dispute. Conceivably it can be visualised that the candidates, with or without the consultation of the Returning Officer, may not even agree to the number of lots, resulting in a difficult situation. The mandatory language of the rule further is that the drawing of the lot has to be 'forthwith', meaning thereby that it has to be the next immediate step. So, certainly being one of the essential attributes of laws, the interpretation of the rule which can give rise to looseness and speculation has to be discarded, and rather it has to be put on a firm and straight footing. The Punjab General Clauses Act, though permits that singular in a statute can be read as plural, but this is subjected to the qualification of the context so permitting. Here, the context of the rules specifically puts it at the level of a singular lot for a single additional vote. On this ground also, the attack of the petitioner is misplaced and, thus, the argument raised is repelled. Thus, it is held that respondent No. 4 had successfully drawn the first, which has now to be the last, lot in his favour and consequently the election of the petitioner was rightly set aside by the quasi-judicial authorities, viz., respondents Nos. 2 and 3.

12. For the foregoing reasons, there is no merit in this writ petition which fails and is hereby dismissed. No costs.
Petition dismissed.

AIR 1982 PUNJAB & HARYANA 407**FULL BENCH**

S. S. SANDHAWALIA, C. J.,

P. C. JAIN AND S. S. KANG, JJ.

Jai Singh and another, Appellants v. N. A. Subramaniam and another, Respondents.

Letters Patent Appeal No. 281 of 1977 and Cross-Objection No. 16 of 1978, D/- 2-6-1982.*

(A) Motor Vehicles Act (4 of 1939), Sections 110-C and 110-D — Punjab Motor Accidents Claims Tribunal Rules (1964), R. 20 — Powers of Claims Tribunal and Appellate Court — Applicability of provisions of Civil P. C. — Amendment of claim application after expiry of limitation can be allowed — Opportunity to other party to adduce additional evidence to meet the case set up by way of amendment, should generally be given. (Civil P. C. (1908), O. 6, R. 17).

Section 110-C specifically provides that in holding an enquiry on the claim application made before it under S. 110-B, the Claims Tribunal may, subject to any rules that may be made in this behalf, follow such summary procedure as it thinks fit. Thus, it is abundantly clear that the Tribunal is at liberty to follow any procedure that it may choose to evolve for itself so long as the said procedure is not arbitrary, is consistent with the rules of natural justice and does not contravene the positive provisions of law. When such a wide power exists in the Tribunal, then there will absolutely be no justification to restrict the exercise of that power on the ground that the Legislature impliedly intended to do so by not applying all the provisions of the Code. In order to do justice and to achieve the purpose for which it has been constituted, a Tribunal would have inherent powers to apply all or any of the provisions of Civil P. C. on the principles of justice, equity and good conscience. (Para 15)

The provisions of S. 110-C and R. 20 do not either expressly or by necessary implication exclude the applicability of those provisions of the Code to which there is no specific mention, to the proceedings before the Tribunal. (Para 21)

Vast power exists in the Tribunal to determine its own procedure in dealing with a claim application. The Tribunal has all the

trappings of a Court and the proceedings before it closely resemble to the proceedings in a Civil Court. Moreover, it is quite evident that the Legislature purposely did not make all the provisions of the Civil P. C. applicable to the proceedings before the Tribunal, which are of a summary nature, as the whole intent of the Legislature was to ensure a speedy disposal of the claims applications filed by the injured persons or the legal-representatives of the deceased. Under Section 110-C, the Tribunal is empowered to evolve its own procedure and for the purpose of dealing with a claim application it can resort to any provision of the Code of Civil Procedure on the principles of justice, equity and good conscience. In order to do real and substantial justice and order of the Tribunal, which does not contravene the positive provisions of the law and is orderly and consistent with the rules of natural justice, would certainly be legal. In this view of the matter, it can be said that the Claims Tribunal has power to allow amendment of the claims application at any time whether such an application is made within the period of limitation or after the expiry of period of limitation. (Para 22)

However while dealing with the question of amendment on an application made within the period of limitation, i.e. within the period prescribed for filing a claim application, the Tribunal should ordinarily allow the amendment which is necessary for the purpose of deciding the claims application of the injured or the legal-representatives of the deceased. But where an application is made after the expiry of the period of limitation, then the Tribunal must require the party asking for amendment to show sufficient cause and in the event of being satisfied that sufficient cause exists, the Tribunal would be well within its jurisdiction to allow the amendment after the period of limitation. (Para 23)

When the power of allowing an amendment of a claim application exists in the Tribunal, then a fortiori such a power has to be presumed in the appellate Court also which hears appeals against the award of the Claims Tribunal. But the same principles would govern the exercise of the power by the appellate Court for allowing amendment, as are to be borne by the Tribunal. (Para 24)

Further, when a pleading is allowed to be amended, an opportunity should generally be afforded to the opposite side to meet the new case by filing any additional statement or

* Decided by Full Bench on order of reference made by S. S. Sandhawalia, C. J. and Sukhdev Singh Kang, J., D/- 18-9-1980.

letting in such further evidence as may be necessary. (Para 26)

(B) Motor Vehicles Act (4 of 1939), Section 110-B — Award of compensation — Factors to be considered — Claim for injured person's apprehended loss resulting from his inability to set up a private practice or secure other lucrative employment, after his retirement whether a mere speculative possibility and not computable in terms of money. AIR 1978 Punj & Har 166 : 79 Pun L. R. 300, Overruled.

The word 'speculative' means conjectures, guess-work and surmises. When an injured person puts in a claim for his apprehended loss resulting from his inability (or handicap) to set up his private practice or secure other lucrative employment, the same would be based merely on his conjectures or guess-work inasmuch as at that particular time, the problem as to what he might do after retirement, may not at all be present in his mind nor there may be any occasion for taking some such decision. In other words, an employee who is fresher or has still a long time to go in service would, in the ordinary course, not think or contemplate as to what he would do after retirement. Thus, merely this fact that a person in service at the time of accident is possessed of ability, skill and good health, would not entitle him to claim pecuniary benefit arising out of apprehended loss resulting from his inability to set up private practice or secure other lucrative employment, as such a claim would just be based on the guess-work and ipse dixit of the injured. (Para 33)

The estimate of the prospective loss has to be made on a foundation of solid facts. Ability, skill and good health at the time of accident by themselves would not be such solid facts which might permit the grant of compensation for apprehended prospective loss. But this does not mean that in no case an injured person can claim compensation for his apprehended loss resulting from his inability to obtain a job or start his practice after retirement, as there may be cases where besides the aforesaid facts an injured person may as a fact be able to prove and establish that he was actually receiving offers for some good jobs or that for starting his practice he had actually chalked out certain plans and made arrangements in that respect. Then on proof of all those facts coupled with the ability, skill and good health of the employee, it may be possible as well as permissible for the Tribunal to entertain a claim and grant compensation for the prospective loss of income resulting from inability (or handicap)

to set up a private practice or secure lucrative employment. (Para 34)

Therefore generally a claim made by an injured person for his apprehended loss resulting from his inability (or handicap) to set up a private practice or secure other lucrative employment after his retirement, being speculative, would not be maintainable except in those cases, where solid facts have been specifically pleaded and proved. AIR 1978 Puni & Har 166 : 79 Pun LR 300, Overruled. (Para 34)

Cases Referred :	Chronological	Paras
AIR 1981 Mad 144 : 1980 ACJ 298		19
AIR 1979 SC 855		18
AIR 1978 Punj & Har 166 : 79 Pun LR 300		30
AIR 1978 Punj & Har 265		17
AIR 1975 All 422		19
AIR 1964 Punj 235 : 66 Pun LR 156		16
(1957) 59 Pun LR 45		15, 16
(1918) 46 Ind Cas 621 (Cal. — Board of Revenue)		15
(1906) ILR 33 Cal 927 : 3 Cal LJ 67		15
(1896) ILR 20 Bom 281		15
(1833) ILR 5 All 163 (FB)		15

L. M. Suri with R. M. Suri and V. P. Gandhi, for Appellants; T. S. Grewal with Achhra Singh, for Respondents.

PREM CHAND JAIN, J.:— This judgment and order of ours would dispose of L. P. As. Nos. 281, 282, 283 and 284 of 1977 as well as cross-objections No. 16 of 1978 filed in L. P. A. No. 281 of 1977 and cross-objections No. 15 of 1978 filed in L. P. A. No. 284 of 1977, as common questions of law and fact arise in these appeals and cross-objections.

2. In order to appreciate the controversy, certain salient features of the case be noticed:—

3. Colonel N. A. Subramaniam respondent along with Colonel J. S. Khurana and Major Y. Bisaria were going towards the Airport, Chandigarh, in a Military staff car driven by Sepoy-driver P. Mohammad on November 7, 1969, when the staff car met with an accident with a private car No. CH-1104, which was being driven by Sham Singh respondent and was owned by Jai Singh appellant, at the crossing of the roads between Sectors 23 and 24 and the Dakshan Marg. As a result of the accident, Colonel Subramaniam was thrown out and received injuries, so also the other occupants of the car including the driver. All the four injured persons filed claim applications for compensation. The learned Tribunal vide its award dated July 11, 1973, awarded com-

pensation of Rupees one lac to Colonel N. A. Subramaniam, Rs. 2,000/- to Colonel J. S. Khurana, Rs. 1,000/- to Major Y. Bisaria and Rs. 3,000/- to Sepoy P. Mohammad.

4. Dissatisfied with the award, Colonel N. A. Subramaniam filed an appeal in this Court. Similarly, Jai Singh, owner of the car and the General Insurance Company filed two appeals and one revision. All those appeals were heard together by the learned single Judge, who vide his judgment dated May 20, 1977, enhanced the compensation of Colonel N. A. Subramaniam from rupees one lac to rupees three lacs with interest at the rate of 6 per cent. per annum from the date of claim application till its payment and dismissed the other appeals and revision filed by the owner of the car and the Insurance Company.

5. Aggrieved from the judgment of the learned single Judge, the appeals referred to above have been filed under Clause X of the Letters Patent.

6. The appeals and the cross-objections came up for hearing before a Division Bench of this Court. After hearing the arguments and on consideration of the entire matter, the Bench found that some substantial questions of law were involved in the appeals. Consequently, after formulating the following questions, the appeals have been referred to Full Bench for decision.

1. Whether the claim of an injured person holding a pensionable post, for compensation on the ground of apprehended loss resulting from his inability (or handicap) to set up a private practice or secure other lucrative employment even after the retirement (apart from and in addition to his admissible pension), is a mere speculative possibility or a reasonable probability computable in terms of money?

2. Whether a claimant's amendment application seeking an enhanced compensation under the Motor Vehicles Act, after the period of limitation has expired, can be allowed at the appellate stage?

3. If the answer to question No. (2) is in the affirmative, whether the respondent would ordinarily be entitled to adduce evidence and re-cross-examine the opposing witnesses afresh to avoid any prejudice on this score?

This is how we are seized of the matter.

7. The case was argued at great length before us and in view of the arguments advanced on either side by the learned counsel, I feel that it would be necessary to recast

questions No. 2 and 3, as before finding out the power of the Appellate Court to allow amendment in cases filed under the Motor Vehicles Act, 1939 (hereinafter referred to as the 'Act'), it would be essential and necessary to find out the power of the Tribunal in this regard. Consequently, I propose to recast the above questions Nos. 2 and 3 into the following three questions:—

2. Whether a Tribunal under the Act has power to allow amendment of a claims application after the expiry of the period of limitation?

3. In case such a power is conceived in the Tribunal to allow amendment after the period of limitation has expired, will such a power not exist in the Appellate Court hearing appeals against the award passed by the Tribunal?

4. In case the Tribunal or the Appellate Court allows amendment of the claims application, then would the respondent be entitled to ordinarily adduce additional evidence, so as to avoid any prejudice on that score?

8. I would now first deal with question No. 2 as recast. While developing the argument, Mr. Suri, learned counsel did not limit his case only to the power of the Tribunal to allow amendment after the expiry of the period of limitation, but went on to argue that under the Act there is no power at all in the Tribunal to allow amendment of a claims application whether such prayer is made within the period of limitation during which a claims application is required to be filed or after the expiry of the period of limitation. According to the learned counsel, only a few provisions of the Code of Civil Procedure have been made applicable, that the provisions of Order 6 of the Code of Civil Procedure have no applicability to the proceedings under the Act, that whatever power was intended to be given to the Tribunal, has been specifically mentioned in Section 110-C of the Act and that in these circumstances, the Tribunal has no jurisdiction to allow amendment of a claims application at any stage of the proceedings.

9. On the other hand, it was submitted by Mr. T. S. Grewal, learned counsel for the respondents, that the Tribunal in the proceedings taken before him can evolve its own procedure, that that procedure has to be in conformity and in consonance with the procedure laid down for trial of plaints in the Code of Civil Procedure and that if sufficient cause is shown then the Tribunal has an inherent power to allow amendment of a claims application on the principle of justice,

equity and good conscience. It was further argued that under Section 110-C of the Act there is power with the Tribunal to entertain an application beyond the period of limitation if sufficient cause is shown for not filing the application within the period of limitation, that when such a power exists in the Tribunal, then power to allow amendment of a claim application even after the expiry of the period of limitation, but only when sufficient cause is shown, has to be presumed in the Tribunal.

10. Before dealing with the merits of the controversy it would be appropriate to refer to certain relevant provisions of the Act and the Rules.

11. Sections 110 to 110-F and Sec. 111-A of the Act were added to the principal Act of 1939 by the various provisions contained in the Amendment Act (No. 100 of 1956). Section 110 provides for the constitution of a Claims Tribunal and confers jurisdiction on it to adjudicate upon claims of compensation in respect of accident involving death of, or bodily injuries to, persons arising out of the use of motor vehicles. Sec. 110-A provides that an application for compensation arising out of an accident of the nature specified above, may be made by the person who has sustained an injury or by the legal representatives of the deceased where death has resulted from the accident. Sec. 110-B provides that the Claims Tribunal shall, after giving the parties an opportunity of being heard, hold an enquiry into the claims and may make an award determining the amount of compensation which appears to it to be just. Section 110-C of the Act reads as under :—

“110-C. Procedure and powers of Claims Tribunal.— (1) In holding any inquiry under Section 110-B, the Claims Tribunal may, subject to any rules that may be made in this behalf, follow such summary procedure as it thinks fit.

(2) The Claims Tribunal shall have all the powers of a Civil Court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and of compelling the discovery and production of documents and material objects and for such other purposes as may be prescribed; and the Claims Tribunal shall be deemed to be a Civil Court for all the purposes of Section 195 and Chapter XXXV of the Code of Criminal Procedure, 1898.

(2-A) Where in the course of any inquiry, the Claims Tribunal is satisfied that—

(i) there is collusion between the person making the claim and the person against whom the claim is made, or

(ii) the person against whom the claim is made has failed to contest the claim, it may, for reasons to be recorded by it in writing, direct that the insurer who may be liable in respect of such claim, shall be impleaded as a party to the proceeding and the insurer so impleaded shall thereupon have the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made.

(3) Subject to any rules that may be made in this behalf, the Claims Tribunal may for the purpose of adjudicating upon any claim for compensation, choose one or more persons possessing special knowledge of any matter relevant to the inquiry to assist it in holding the inquiry.”

Section 110-D of the Act gives statutory right of appeal to a person aggrieved by an award of Claims Tribunal. Section 110-E provides for recovery from the insurer of compensation money awarded by the Tribunal as arrears of land revenue. Sec. 110-F excludes, where a Claims Tribunal has been constituted for any area, the jurisdiction of the Civil Court to entertain any question relating to any claim for compensation which may be adjudicated upon by the Claims Tribunal for that area and also bars the issue of an injunction in respect of any action taken or to be taken before the Claims Tribunal. Section 111-A of the Act authorises the State Government to make rules for the purpose of carrying into effect the provisions of Sections 110 to 110-E of the Act and, in particular, such rules may provide for, inter alia, the procedure to be followed by a Tribunal, in holding an inquiry under Chapter VIII, and the powers vested in a Civil Court which may be exercised by a Claims Tribunal and in exercise of the power conferred by Section 111-A of the Act, the Punjab Motor Accidents Claims Tribunal Rules, 1964, have been framed.

12. At this stage, reference may also be made to R. 20 to which our attention had pointedly been drawn at the time of hearing :—

“20. (Section 110-C) Code of Civil Procedure to apply in certain cases,—

The following provisions of the First Schedule to the Code of Civil Procedure, 1908, shall so far as may be apply to proceedings before the Claims Tribunal, namely, O. V, Rr. 9 to 13 and 15 to 30; O. IX, O. XIII, Rr. 3 to 10; Order XVI, Rules 2

to 21; Order XVII and Order XXIII, Rr. 1 to 3."

13. Having referred to the relevant provisions I would now deal with the merits of the controversy.

14. On the respective contentions of the learned counsel for the parties, the first question that needs determination is whether the application of the provisions of the Code of Civil Procedure, other than the one to which reference has been made specifically, has been deliberately excluded by the Legislature and the Tribunal is not competent to allow the amendment of the application. The answer has obviously to be in the negative. Under Section 110-C provisions like summoning of witnesses, enforcing their attendance and issuing of commissions for examination of witnesses have specifically been made applicable to the proceedings before the Tribunal, not as exhaustive of its powers but with a view to make the processes issued by the Tribunal regarding the matters referred to above enforceable as processes of the Civil Court. Similarly, by providing in R. 20 that some of the provisions of the Code of Civil Procedure would apply to proceedings before the Claims Tribunal, no such inference can be drawn that the intention of the Legislature was to specifically exclude the applicability of the remaining provisions of the Code to the proceedings before the Claims Tribunal.

15. Section 110-C specifically provides that in holding an enquiry on the claim application made before it under S. 110-B, the Claims Tribunal may, subject to any rules that may be made in this behalf, follow such summary procedure as it thinks fit. Thus, it is abundantly clear that the Tribunal is free to follow any procedure which it considers expedient in the interest of justice. In other words, the Tribunal is at liberty to follow any procedure that it may choose to evolve for itself so long as the said procedure is not arbitrary, is consistent with the rules of natural justice and does not contravene the positive provisions of law. When such a wide power exists in the Tribunal, then there will absolutely be no justification to restrict the exercise of that power on the ground that the Legislature impliedly intended to do so by not applying all the provisions of the Code. In order to do justice and to achieve the purpose for which it has been constituted, a Tribunal would have inherent powers to apply all or any of the provisions of the Code of Civil Procedure, on the principles of justice, equity and good conscience. It is not

that such a situation has arisen under this Act only as even under the East Punjab Urban Rent Restriction Act also, a question had arisen in *Mathra Das v. Om Prakash*, (1957) 59 Pun LR 45 as to what procedure is required to be followed by the Rent Controller. The learned Chief Justice on consideration of the relevant judicial decisions observed thus:—

"I regret I am unable to concur in this contention. A Court of law possesses inherent powers to act *ex debito justitiae*, to do that real and substantial justice for the administration of which it alone exists and to do all things that are reasonably necessary for securing the ends of justice within the scope of its jurisdiction (*D. N. Ray v. Nalin Behari Bose*, (1918) 46 Ind Cas 621 and *Hukumchand Boid v. Kamalanand Singh*, (1906) ILR 33 Cal 927, 931). It must, therefore, proceed on the assumption that every procedure is permissible unless it is shown to be prohibited by the law (*Narasingh Das v. Mangal Dubey*, (1833) ILR 5 All 163 (FB). In respect of matters in regard to which the Code of Civil Procedure has made no provision or has made insufficient provision the Court has an inherent jurisdiction to do the justice between the parties which is warranted under the circumstances and which the necessities of the case require (*Hukumchand Boid's case* (supra). The powers exercised by an administrative tribunal are wider still, for as pointed out by *Sargent C. J. in Ramchandra Narayan v. Draupadi*, (1896) ILR 20 Bom 281, 283, the conduct of proceedings before a Special Judge who is not regulated by any particular procedure must be deemed to be in his own discretion.

After a careful consideration of the several authorities which have been cited before me, I entertain no doubt in my mind that in the absence of a restraining provision a Rent Controller or a District Judge acting under the provisions of the Rent Restriction Act is at liberty to follow any procedure that he may choose to evolve for himself so long as the said procedure is orderly and consistent with the rules of natural justice and so long as it does not contravene the positive provisions of the law. The elementary and fundamental principles of a judicial enquiry should be observed but the more technical forms discarded.

16. When a Tribunal acts as a Court and the proceedings before it closely resemble to the proceedings in a Civil Court then on the doctrine of implied power, it can reasonably be inferred that the Tribunal would have all,

powers which are reasonable and necessary to do that real and substantial justice for the administration of which it alone exists and to do all things that are reasonably necessary for securing the ends of justice within the scope of its jurisdiction. As earlier observed, S. 110-C or R. 20 does not either expressly or by necessary implication exclude the applicability to proceedings before the Tribunal those provisions of the Code, which it does not specifically mention. At the time of the hearing of the arguments an impression was given as if the type of the question with which we are faced, had not cropped up earlier directly. But a deep study of the judicial decisions shows to the contrary. In *New India Assurance Co. Ltd., New Delhi v. Punjab Roadways, Ambala City*, 66 Pun LR 156 : (AIR 1964 Punj 235), a question had arisen whether the provisions of O. 1, R. 10, Code of Civil Procedure, would apply to the proceedings before the Tribunal or not. While answering the said question in affirmative it was observed thus (at p. 239):—

“It is true that the various provisions contained in the Act and the Rules framed thereunder do not apply the Code of Civil Procedure as a whole, or the provisions of O. 1, R. 10 of the Civil Procedure Code specifically to the proceedings before the Tribunal, yet nothing in the Act or the Rules framed under the Act prohibits resort by the Tribunal to the principles embodied in various Rules relating to the conduct of proceedings before a Civil Court. In fact, the provisions like summoning of witnesses; enforcing their attendance and issuing of commission for examination of witnesses have been specifically made applicable to the proceedings before the Tribunal, not as exhaustive of its powers, but with a view to make the processes issued by the Tribunal regarding the matters referred to above enforceable as processes of a Civil Court. With regard to the rest of the matters, which relate to the procedure for dealing with claims application and the enquiry which the Tribunal is to conduct under Section 110-C of the Indian Motor Vehicles Act, the legislature has vested a vast discretion in the Tribunal itself. This is quite apparent from the provisions of sub-sec. (4) of S. 110-C. It specifically provides that in holding any enquiry under S. 110-B on the claim application made before it, the Claims Tribunal may, subject to any rules that may be made in this behalf, follow such summary procedure as it thinks fit. From this it follows that unless there is any prohibition in the rules framed under the Act, the Tribunal is free to follow any procedure which

it considers expedient in the interests of justice. In similar situation, *Bhandari C. J. observed in Mathra Das v. Om Parkash*, (1957) 59 Pun LR 45, that in the absence of a restraining provision a Tribunal is at liberty to follow any procedure that it may choose to evolve for itself so long as the said procedure is orderly and consistent with the rules of natural justice and does not contravene the positive provisions of the law. The section expressly confers powers on the Tribunal to formulate its own procedure and for the purpose of promoting the ends of justice, it could well resort to all the principles of an orderly trial and for that purpose exercise the powers of allowing amendments or substitution so, as to rectify a mistake or to bring on record parties which were necessary or proper. In this view of the matter, the Tribunal acted quite properly in allowing substitution in accordance with the principles embodied in O. 1, R. 10 of the Civil P. C. Since this rule did not in term apply and there is no prohibition in resorting to the principles contained therein, the technicalities of that rule are not to be taken note of by the Tribunal, and it is only the spirit that has to be applied with the object of securing the ends of justice. Thus, I do not find anything wrong in the Tribunal allowing the substitution of the name of *Shrimati Lajwanti* for *Dev Raj* who had wrongly filed the application.”

17. Reference may be made to another Single Bench in *Smt. Darshna Devi v. Sher Singh*, AIR 1978 Punj and Har 265, wherein a question arose whether the claimants who were admittedly paupers could take the benefit of the provisions of O. XXXIII of the Code or not. The Tribunal had rejected the prayer of the claimants and directed them to pay the court-fee. The learned Chief Justice before whom the Civil Revision against the order of the Tribunal had come up for hearing, after considering the relevant provisions and the judicial decisions, observed thus (at p. 267):—

“In so far as this High Court is concerned, therefore, the law appears to be well settled that a Claims Tribunal performing functions under the Motor Vehicles Act has more or less the same status as that of a Court and performs functions similar to it and also that Rule 20 of the Motor Accidents Claims Tribunal Rules does not, either expressly or by necessary implication, exclude the applicability to proceedings before the Claims Tribunal of those provisions of the Code of Civil Procedure which it does not specifically mention and that, on the

other hand, such provisions would be applicable, if they are in consonance with the principles of fairplay and propriety."

18. It would be pertinent to observe that a Special Leave Petition against the aforesaid judgment was filed which was dismissed by their Lordships of the Supreme Court and the view of the learned Chief Justice was upheld as is apparent from the judgment in *State of Haryana v. Smt Darshna Devi*, AIR 1979 SC 855.

19. The next case which needs mention is a Division Bench judgment of Allahabad High Court in *New India Assurance Co. Ltd. v. Smt. Urmila Bahri*, AIR 1975 All 422, wherein again a question arose whether an amendment of the claim application could be allowed after the expiry of the limitation and the amount of damages could be enhanced as a result of the death of the injured claimant. While upholding the power of the Tribunal to allow amendment, the learned Judges observed thus (at p. 423):

"The cause of action for the claim in either side, whether the application is made by the injured or his heirs after death, arises with accident. The application contemplated by Sec. 110-A in either case is only for compensation payable for the injury sustained by the victim during the accident. Hence, once an application has been moved within time for a claim, its amendment can always be made as there is no provision in the Act prohibiting the amendment of the application after the lapse of a particular time.

.....

The fixation of the amount of compensation is the job of the Tribunal and not the applicant. It is more in the nature of evidence of the consequence of the accident than a pleading. But as it is to be the basis for the award of compensation to the heirs, it can be legally introduced in the application as a pleading. No question of bar of limitation arises in such a case. We can see no legal justification in the Tribunal's refusing to permit the introduction of this fact through the amendment of the original application."

20. In the last, reference may be made to a Single Bench judgment of the Madras High Court in *D. Kannan v. Southern Roadways*, 1980 ACJ 298 (AIR 1981 Mad 144), in which again a question about the power of the Tribunal to allow amendment arose. The learned Judge, on consideration of the whole matter, conceived such a power in the

Tribunal. The relevant observations read as under:—

"The Tribunal had expressed the view that it has no power to order amendment of pleadings. It referred to Sec. 110-C (2) of the Motor Vehicles Act, and observed that only certain provisions of the Civil Procedure Code, were applicable to the Motor Accidents Claims Tribunal and the provision enabling amendments to be made to the pleadings was not one of those provisions. The Tribunal, accordingly, held that the petitioner's application did not lie.

I do not agree with the Tribunal's limited view of the extent of its jurisdiction and powers. Section 110-A of the Act enables an injured person to apply to the Tribunal for compensation. The section itself does not provide any particular form of application. Rule 3 of Tamil Nadu Motor Accidents Claims Tribunal Rules, 1961, provides for a form of application in Appendix 2. In Part II of the application form a provision is made in sub-clause (h) for the claimant to enter the figure of compensation claimed for a permanent disability. Neither the Act nor the Rules make provision for amendment of the entries or pleadings made by the claimant in the prescribed form. It must, however, be remembered that mere forms do not conclude the rights of claimants. The basis for the claim application is not the form prescribed, but the provision in Section 110 of the Act which recognises and declares the right of the person injured to apply for payment of compensation before a Claims Tribunal. Adjudication of the claim for compensation is, therefore, the responsibility of the Tribunal. If so much is granted, then every power that is necessary for or ancillary or incidental to the due discharge of that responsibility must be held to inherent in the Tribunal, even if the Act itself does not expressly say so. The power to order amendment must, therefore, be spelt as part of the Tribunal's jurisdiction on the basis of implied or ancillary powers.

There is yet another indication in the Act which shows that the Tribunal must have the requisite power to order amendment of pleadings in appropriate cases. Under the scheme of the Act the Tribunals do not supplant the Civil Courts in one sweep, as the one and only forum for adjudication of compensation claims. On the contrary, the Tribunals come in only when and where they happen to be appointed by State Government by notification for given areas. For the rest, the Civil Courts would continue to

exercise their jurisdiction to hear and determine suits for compensation — suits which torts lawyers describe as running down actions. The Act thus makes for the co-existence of Tribunals and Courts, functioning in their own respective jurisdictional areas. For areas in respect of which the State Government has not constituted Claims Tribunals, civil suits would be the appropriate mode for enforcing claims for compensation. To such suits, before Civil Courts the procedure prescribed under the Civil Procedure Code would apply, without question. In such civil actions or suits, it can hardly be contended that Civil Courts would benefit of any power to order amendment of the pleadings. There might even now be areas in this country which are not covered by the jurisdiction of the Tribunals for the simple reason that none have been constituted. But, even if it were not so, the fact that the Act continues to carry appropriate provisions under which Courts and Tribunals co-exist for adjudication of claims in motor accident cases must condition our view as to the scope of the powers of Courts, on the one hand, and of Claims Tribunals, on the other. It would be a proper basis for construction of any statute that it is administered in a uniform way throughout the territories in which it is in force. If the position were that Tribunals have no power to order amendments of claims because the Civil Procedure Code does not apply and at the same time if it were the position that Civil Courts having jurisdiction to entertain motor accidents claims, have the requisite power to order amendment of pleadings because the Civil Procedure Code empowers them in that behalf, then we would be applying the same law relating to motor vehicles accidents unequally on a distinction which would be highly invidious and without rational basis. The proper way to apply the law would be to construe and administer the statute in such a harmonious fashion that inequality does not result. This need for equality of administration of the law is another reason why the power to order amendments of pleadings must be read into the adjudicatory jurisdiction of the Claims Tribunal, as part of their implied or ancillary powers, even in the absence of an express provision to that effect in the Act.

The power to grant amendment of the pleadings must, in my judgment be regarded as inherent in all Tribunals or authorities which are charged by the law with the duty of enquiring into rights and liabilities of parties and/or of adjusting on their claims

or disputes. Where pleadings play an important part in legal proceedings before Tribunals and other authorities and where they afford the basis for evidence to be called at the enquiry, the power to amend must be necessarily attributed as an indispensable adjunct to their jurisdiction. Pleadings, after all, are matters of composition by literate people. Error cannot be completely avoided from any human endeavour much less in matters of writing or drafting. Tribunals or other professional advisers are by no means to be regarded as perfectionists, nor their pleadings as always error-proof. Amendments of pleadings in claims applications must be as common and frequent if not more as in pleadings in civil suits."

21. Thus, it is quite evident that the provisions of Sec. 110-C and R. 20 do not either expressly or by necessary implication exclude the applicability of those provisions of the Code to which there is no specific mention, to the proceedings before the Tribunal."

22. Once having overcome the difficulty which, according to the learned counsel for the appellants, was created by Section 110-C and Rule 20, there can be no gainsaying that vast power exists in the Tribunal to determine its own procedure in dealing with a claim application. The Tribunal has all the trappings of a Court and the proceedings before it closely resemble to the proceedings in a Civil Court. Moreover, it is quite evident that the Legislature purposely did not make all the provisions of the Code of Civil Procedure applicable to the proceedings before the Tribunal, which are of a summary nature, as the whole intent of the Legislature was to ensure a speedy disposal of the claims applications filed by the injured persons or the legal representatives of the deceased. Under Sec. 110-C, the Tribunal is empowered to evolve its own procedure and for the purpose of dealing with a claim application it can resort to any provision of the Code of Civil Procedure on the principles of justice, equity and good conscience. In order to do real and substantial justice an order of the Tribunal, which does not contravene the positive provisions of the law and is orderly and consistent with the rules of natural justice, would certainly be legal. In this view of the matter, I hold that the Claims Tribunal has power to allow amendment of the claims application at any time whether such an application is made within the period of limitation or after the expiry of period of limitation.

23. After having arrived at the aforesaid conclusion, it has now to be seen as to what

principles should be kept in mind by the Tribunal while dealing with the application for amendment. In my view this matter should not detain us much nor is it necessary to dilate upon it in depth as it would suffice to observe that while dealing with the question of amendment on an application made within the period of limitation, i.e. within the period prescribed for filing a claim application, the Tribunal should ordinarily allow the amendment which is necessary for the purpose of deciding the claim application of the injured or the legal representatives of the deceased. But where an application is made after the expiry of the period of limitation, then the Tribunal must require the party asking for amendment to show sufficient cause and in the event of being satisfied that sufficient cause exists, the Tribunal would be well within its jurisdiction to allow the amendment after the period of limitation.

24. Coming to Question No. 3, suffice it to observe that having held that power of allowing an amendment of a claim application exists in the Tribunal then a fortiori such a power has to be presumed in the Appellate Court also which hears appeals against the award of the Claims Tribunal. But it may again be made clear that the same principles would govern the exercise of the power by the Appellate Court for allowing amendment, as are to be borne by the Tribunal.

25. This brings me to Question No. 4, which raises a controversy whether after allowing amendment, would it be necessary to grant an opportunity to the other party to adduce additional evidence in order to meet the case set up by way of amendment.

26. It may be observed at the outset that when a pleading is allowed to be amended, an opportunity should generally be afforded to the opposite side to meet the new case by filing any additional statement or letting in such further evidence as may be necessary. But there may be cases where such a contingency may not arise at all e.g. a case where no new case is being set up and a higher relief is being claimed on the plea already set up and the evidence led thereon, or a case where on the plea though not specifically taken, the parties have already led evidence during the trial and the amendment is asked for to avoid an objection that without there being a specific plea no amount of evidence can be looked into. But as I have observed earlier, when a pleading is allowed to be amended, an opportunity should gene-

rally be afforded to the opposite side to meet the new case by filing any additional statement or letting in such further evidence as may be necessary. In this view of the matter the question is answered in the affirmative, i.e. that in the event of the allowing of amendment of the claim application, the respondent will ordinarily be entitled to adduce additional evidence in order to meet the case set up by way of amendment.

27. I would now deal with Question No. 1, under which it is required to be decided whether the claim made by an injured person for his apprehended loss resulting from his inability (or handicap) to set up a private practice or secure other lucrative employment, after his retirement is a mere speculative possibility and not computable in terms of money.

28. It was forcefully contended by Mr. Suri, learned counsel for the appellants, that what an injured person would be able to earn after his retirement by setting up his own practice or by obtaining some other employment, cannot be determined in terms of money, as such a determination would not only be improper but highly speculative and that being so, a claim based on mere speculative possibility of pecuniary benefit cannot legally be entertained and has to be rejected. In other words, what was sought to be agitated by the learned counsel was that what a person might do after retirement by itself would not be sufficient to allow an injured person to claim compensation for his apprehended loss resulting from his inability to set up a private practice or secure other lucrative employment.

29. At first sight the contention of the learned counsel looked to be untenable; but a little scrutiny of the same shows that to some extent it is convincing and plausible.

30. At the outset, it may be observed that except a Division Bench judgment of this Court in *P. S. Bhatnagar v. State of Punjab*, 79 Punj LR 300: (AIR 1978 Punj & Har 166), which deals with somewhat an identical question, there is no direct authority one way or the other on the question posed before us. In this situation, the matter would need determination on first impression.

31. A little analysis of the question would show that the cases of only those persons who belong to legal, medical or some other profession and hold a pensionable post, fall within its ambit. It is only in the cases of such persons that the question of starting private practice after retirement would arise. As is evident a claim for compensation on

the ground of apprehended loss resulting from inability or handicap to set up a private practice or secure other lucrative employment has to be based on an assumption that a person who is capable and possesses good health, would not waste his energy and talent by sitting idle and that he would certainly do something after retirement. What had been contended by Mr. Suri, learned counsel, was that merely this fact that a person possesses ability and has maintained good health by itself would not be a valid and firm ground for establishing that after retirement he would be in a position to secure a good job or start his private practice successfully. According to the learned counsel, at best, it can be only a wish of a person in service to do something after retirement, though it be not so in the cases of many who after retirement may only desire to lead a peaceful life. It was also submitted by the learned counsel that those persons who have still many years to go in the service would hardly think of what they would be doing after retirement.

32. On giving my thoughtful consideration to the entire matter, I find considerable force in the contention of the learned counsel for the appellants.

33. The word 'speculative' means conjectures, guess-work and surmises. Now when an injured person puts in a claim for his apprehended loss resulting from his inability (or handicap) to set up his private practice or secure other lucrative employment, the same would be based merely on his conjectures or guess-work inasmuch as at that particular time, the problem as to what he might do after retirement, may not at all be present in his mind nor there may be any occasion for taking some such decision. In other words, an employee who is fresher or has still a long time to go in service would, in the ordinary course, not think or contemplate as to what he would do after retirement. Thus, merely this fact that a person in service at the time of accident is possessed of ability, skill and good health, would not entitle him to claim pecuniary benefit arising out of apprehended loss resulting from his inability to set up private practice or secure other lucrative employment, as such a claim would just be based on the guess-work and ipse dixit of the injured.

34. The estimate of the prospective loss has to be made on a foundation of solid facts. Ability, skill and good health at the time of accident by themselves would not be

such solid facts which might permit the grant of compensation for apprehended prospective loss. But this does not mean that in no case an injured person can claim compensation for his apprehended loss resulting from his inability to obtain a job or start his practice after retirement, as there may be cases where besides the aforesaid facts an injured person may as a fact be able to prove and establish that he was actually receiving offers for some good jobs or that for starting his practice he had actually chalked out certain plans and made arrangements in that respect. Then on proof of all those facts coupled with the ability, skill and good health of the employee, it may be possible as well as permissible for the Tribunal to entertain a claim and grant compensation for the prospective loss of income resulting from inability (or handicap) to set up a private practice or secure lucrative employment. In this view of the matter, I hold that generally a claim made by an injured person for his apprehended loss resulting from his inability (or handicap) to set up a private practice or secure other lucrative employment after his retirement, being speculative, would not be maintainable except in those cases where solid facts as indicated in the earlier part of the judgment, have been specifically pleaded and proved.

35. In order to obviate any difficulty in interpretation of our view, it may be made clear that our reply to the question has applicability only to the claim cases filed by the injured persons themselves and that it has no relevance to the claim petitions filed by the heirs of the deceased. To emphasise, the heirs of a deceased on the basis of our view would not be entitled to claim compensation under the head that the deceased who was in service if had not died, then he would have after retirement earned income by obtaining some lucrative job or by practising his profession.

36. Coming to P. S. Bhatnagar's case (supra), there can be no gainsaying that the view taken therein on this particular aspect is not correct. Accordingly, the same is overruled.

37. Having answered the questions referred to for our decision, the cases would now go to the Division Bench for disposal on merits.

S. S. SANDHAWALIA, C. J.:— I agree.

S. S. KANG, J.:— I also agree.

Answered accordingly.

AIR 1982 PUNJAB AND HARYANA 417

J. V. GUPTA, J.

Sujan Singh, Petitioner v. Shobha Nath and others, Respondents.

Civil Revn. No. 1660 of 1981, D/- 21-7-1982.*

East Punjab Urban Rent Restriction Act (3 of 1949), S. 13 (3) (a) (i) and S. 2 — Suit for ejectment on ground of bona fide requirement of landlord — Rented premises let out for business purpose forming part only of a whole building — Rented premises whether residential or non-residential — Nature has to be decided taking into consideration the building as a whole and not only the premises rented out.

Where a very small portion of the residential building is let out for non-residential purposes, it does not mean that that particular portion has become non-residential so as to disentitle the landlord to seek ejectment of a tenant on the ground of bona fide requirement for his own use and occupation.

(Para 6)

The definition of the word 'building' in Section 2 of the Act is not in terms absolute but is subject to contextual limitations. The very opening part of the said section makes it explicit that the definition is to apply only if there is nothing repugnant in the subject or the context. Consequently, the use of the word 'building' in S. 13 (3) (a) (i) has to be viewed in its particular textual context and not with any inflexible absoluteness of the literal terms of clause (a) of S. 2 of the Act. Therefore, it would be possible to construe the word 'building' as used in S. 13 (3) (a) (i) of the Act to include the integrated larger building as a whole rather than the part thereof demised to a particular tenant alone.

AIR 1982 Punj & Har 245, Followed.

(Para 5)

Cases Referred: Chronological Paras

AIR 1982 Punj & Har 245 : 1982 Cur LJ (Civil) 233 4, 5, 6
1981 Cur LJ (Civil) 500 : (1981) 2 Rent LR 563 (Punj & Har) 4, 5
1980 Cur LJ (Civil) 254 (Punj & Har) 4
(1971) 73 Pun LR 86 : 1970 Ren CR 923 4, 5

AIR 1952 Mad 413 (FB) 4

Raj Kumar Mahajan, for Petitioner; H. L. Sarin, Sr. Advocate (M/s. F. L. Sarin and

*Against order of T. S. Chema, Dist. Judge, Gurdaspur, D/- 18-5-1981.

HZ/HZ/D445/82/GDR

1982. P. & H./27. X G. 37

M. L. Sarin, Advocates with him), for Respondents.

ORDER :— The tenant-petitioner has filed this revision petition against the order of the Appellate Authority, Gurdaspur, dated 18th May, 1981 whereby the order of the Rent Controller dismissing the ejectment application, was set aside and an order of eviction was passed against him. The premises in dispute is a very small place which can more aptly be described as an Almirah constructed in the outer wall of a temple of goddess Devi fully described in site plan Ext. P-1. The landlord is the Manager (Mohitmam) of Mandir Devi in question, whereas the building in which the said Almirah is situate is owned by Devi Mandir. It was alleged in the ejectment application that the Almirah in question was erected for installation of an idol of God Bhairon Ji. As the idol was not available and the Almirah was not to be put to use immediately, the same was let out to the petitioner at the rate of Rs. 35/- per month. Since the premises in dispute is now required for the purpose, it was built, i.e., for installing the Murti of Bhairon Ji, the ejectment was sought of the tenant under the East Punjab Urban Rent Restriction Act, 1949 (hereinafter referred to as the Act), it being required by the landlord for its own use and occupation. The tenant contested the application and pleaded that the premises in question is a shop which, being small in dimensions, looks like an Almirah and since the premises in dispute was let out for non-residential purposes, the building will be said to be a non-residential building and the landlord is not entitled to seek his ejectment on the ground of bona fide requirement for his own use and occupation.

2. On the pleadings of the parties, the Rent Controller framed the following issues:

1. Whether the premises in dispute are a residential building and are bona fide required by the applicant for the use and occupation of the temple, i.e., for the installation of the idol? If so, its effect?

2. Relief.

3. The Rent Controller came to the conclusion that the landlord has failed to prove that the premises in dispute which are in the nature of an Almirah, are being used for the purposes of residence and are residential premises. In other words, it came to the conclusion that the building is a non-residential one and, therefore, the ground of eviction on the basis of personal necessity is not available to the landlord. Consequently, the eviction petition was dismissed. On appeal,

the Appellate Authority reversed this finding of the Rent Controller and came to the conclusion that the premises in question are an integral part of the temple of goddess Devi and there is no denying the fact that the substantial portion of the building of the temple is used as temple and, by no stretch of imagination, the activities of devotees of the temple could be described as a trade or business. This clearly shows that the temple is a residence of the goddess and as such the temple can hardly be described as a non-residential building. That being so, the small portion of the building, which was let out, even though for being used for trade or business purpose, will not make that portion as a non-residential building. It was further held that the demised premises are a residential building and the landlord requires them bona fide for personal use and occupation. As a result of this finding, the order of the Rent Controller was set aside and an order of eviction was passed against the tenant. Dissatisfied with the same, the tenant-petitioner has come up in revision in this Court.

4. The only contention raised on behalf of the petitioner is that since the premises in dispute was let out for business purposes, the building will be termed as a non-residential building as defined in Sec. 2 (d) of the Act. It was further contended that though the rented premises is an integral part of the temple but the definition of the building as given in Sec. 2 (a) of the Act means any building or part of a building let for any purpose. Thus, the argument proceeds that the premises in dispute, though a part of the building, will be termed as non-residential building which has been defined as a building being used solely for the purpose of business or trade. According to the learned counsel, for the purpose of determining the nature of the building, only the premises rented out are to be seen and not the whole building of which it forms the part. In support of his contention, he referred to *Rattan Lal v. Laxmi Devi*, (1971) 73 Pun LR 86; *T. Dakshinamoorthy v. Thulja Bai*, AIR 1952 Mad 413 (FB) and *Jagan Nath v. Sangrur Central Co-operative Bank Ltd.*, Tappa, District Barnala, 1980 Cur LJ (Civil) 254 (Punj & Har). On the other hand, the learned counsel for the landlord-respondent submitted that though 'building' means a part of the building let for any purpose also but it is to be read with the opening words of Section 2 of the Act which provides as under:—

"In this Act, unless there is anything repugnant in the subject or context, ..."

According to the learned counsel, when the nature of the building is to be determined for the purpose of ejection as provided under Section 13 of the Act, then we are to see the building as a whole when the rented premises forms a part of the whole building. In support of this contention, reliance was placed on the Division Bench judgment of this Court reported as *Sardarni Sampuran Kaur v. Sant Singh*, 1982 Cur LJ (Civil) 233 : (AIR 1982 Punj & Har 245), wherein the judgment delivered by me rendered in *Mulkh Raj v. Hari Chand*, 1981 Cur LJ (Civil) 500, was approved.

5. I have heard the learned counsel for the parties at a great length and have also gone through the case law cited at the Bar. Of course, the judgment reported in *Rattan Lal's case* (supra) supports the contention of the learned counsel for the petitioner and since I had taken a different view in *Mulkh Raj's case* (supra) ordinarily in that situation the case should have been referred to a larger Bench. But, since the Division Bench of this Court has approved my view in *Sardarni Sampuran Kaur's case* (supra), I do not find any justification to refer the matter again to a larger Bench. It has been now observed by the Division Bench that what deserves highlighting is the fact that the definition of the word 'building' in S. 2 of the Act is not in terms absolute but is subject to contextual limitations. The very opening part of the said section makes it explicit that the definition is to apply only if there is nothing repugnant in the subject or the context. Consequently, the use of the word 'building' in S. 13 (3) (a) (iii) has to be viewed in its particular textual context and not with any inflexible absoluteness of the literal terms of clause (a) of Sec. 2 of the Act. Therefore, it would be possible to construe the word 'building' as used in S. 13 (3) (a) (iii) of the Act to include the integrated larger building as a whole rather than the part thereof demised to a particular tenant alone.

6. It may be that S. 13 (3) (a) (iii) of the Act relates to a case of any building or rented land which has become unsafe and unfit for human habitation as was the case before the Division Bench of this Court in *Sardarni Sampuran Kaur's case* (AIR 1982 Punj & Har 245) (supra), but I am of the considered opinion that while interpreting clause (a) (i) of S. 13 (3) of the Act, which relates to the residential building, the same consideration would apply and the word 'building' used therein will mean the integrated larger building as a whole rather than a

part thereof demised to a particular tenant alone. It stands to reason that where a very small portion of the residential building is let out for non-residential purposes, it does not mean that that particular portion has become non-residential whereas the other building of which it is an integral part, is residential one. In order to determine the nature of the building, the word 'building' in Sec. 13 (3) (a) will also mean the building as a whole and not a part of a building demised to a particular tenant.

7. As regards the bona fide requirement of the landlord for its own use and occupation, it was not contested in this petition.

8. No other point arises.

9. Consequently, this petition fails and is dismissed. However, the tenant is allowed two months time to vacate the premises in dispute provided all the arrears, if any, up-to-date along with two months' advance rent is deposited with the Rent Controller within three weeks from today and the tenant further undertakes to vacate the premises, in dispute, and hand over the vacant possession of the building in question to the landlord on the expiry of the aforesaid two months' period. No costs.

Petition dismissed.

AIR 1982 PUNJAB AND HARYANA 419

S. S. SANDHAWALIA, C. J. AND
J. M. TANDON, J.

The Union of India and others, Appellants v. Amin Chand, Respondent.

Letters Patent Appeal No. 105 of 1979, D/- 19-5-1982.*

Displaced Persons (Compensation and Rehabilitation) Act (44 of 1954), S. 33 — Suo motu revisional power of Central Government — Can be exercised at any time — No time limit is prescribed. W. P. No. 2143 of 1967, D/- 11-4-1979 (Punj & Har), Reversed. (Para 10)

Cases Referred: Chronological Paras

AIR 1967 Punj 111 (FB) 12

AIR 1966 Punj 111: 68 Pun LR 239 (FB) 13

AIR 1964 Punj 33: 65 Pun LR 1141 (FB) 10

AIR 1963 Punj 255: 65 Pun LR 368 (FB) 13

AIR 1961 SC 1371 11

*Against judgment of J. V. Gupta, J. in Civil Writ Petn. No. 2143 of 1967, D/- 11-4-1979.

H. S. Brar with R. S. Hundle, for Appellants; Bhagirath Dass with Ramesh Chander, for Respondent.

J. M. TANDON, J.:— H. Gulam Mohi-ud-Din was the owner of the site of the cinema house known as Railto Cinema, Amritsar. He leased it out to one Nanak Chand for a period of 15 years under the registered lease-deed dated Nov. 13, 1934. Nanak Chand transferred his leasehold rights to Messrs. Amin Chand Tara Chand respondent. H. Gulam Mohi-ud-Din constructed the cinema building over the site and accepted the respondent as a lessee under the terms and conditions contained in a subsequent lease-deed dt. May 7, 1936. On the migration of H. Gulam Mohi-ud-Din to Pakistan, the rights in the cinema vested in the Custodian as evacuee property. The respondent remained in occupation of the cinema premises till Dec. 31, 1957. According to the respondent, the cinema building suffered damage on account of floods during the lease period and it was subjected to extensive repairs at their cost under intimation to the Custodian authorities. In 1954, the respondent lodged a claim with the District Rent and Managing Officer, Amritsar, claiming Rs. 27,034/-/6 having been spent on the repairs of the cinema building from time to time after the partition of the country and a sum of Rs. 6,687/9/- as cost of replacement of old electric wiring etc. The claim of the respondent was looked into by the Assistant Settlement Commissioner, Jullundur, who, vide his order dated Sept 6, 1957, found that the respondent was entitled to the reimbursement of Rs. 7,481/- on account of repairs. The claim for reimbursement for replacement of old electric wiring etc. was rejected. The respondent feeling dissatisfied with the order of the Assistant Settlement Commissioner preferred an appeal which was decided by the Authorised Chief Settlement Commissioner vide order dated May 17, 1958. The Authorised Chief Settlement Commissioner remanded the case for a fresh decision. The Assistant Settlement Commissioner again decided the case and vide order dated Nov. 23, 1960, allowed Rupees 9,905/12/- as cost of repairs and disallowed the remaining claim. The respondent again feeling dissatisfied with the order of the Assistant Settlement Commissioner preferred an appeal which was decided by another Authorised Chief Settlement Commissioner vide order dated Nov. 21, 1961. The Authorised Chief Settlement Commissioner accepted the appeal and allowed full claim of the respondent, that is, Rs. 27,034/-/6 as cost

of repairs and Rs. 6,687/9/- as cost of replacement of old electric wiring. The respondent was not made payment in terms of the order of the Authorised Chief Settlement Commissioner dated Nov. 21, 1961 in spite of repeated demands. The Joint Chief Settlement Commissioner with the delegated powers of Central Government under Section 33 of the Displaced Persons (Compensation and Rehabilitation) Act, (hereinafter the Act) vide order dated July 10, 1967, set aside the order of the Authorised Chief Settlement Commissioner dated Nov. 21, 1961 after hearing the respondent and further remanded the case to the Authorised Chief Settlement Commissioner for a fresh decision. The operative part of the order of the Joint Chief Settlement Commissioner reads:—

"Before allowing the entire claim of the respondents, it was essential for the learned Authorised Chief Settlement Commissioner to have dealt with each item which had been disallowed by the officers below and to pass orders in respect of it. To allow the claim of the respondents in entirety without reference to the terms of the lease which governed the rights of the parties was not in accordance with law and, therefore, the impugned order cannot stand and is hereby set aside. The proceedings are remitted (to the Authorised Chief Settlement Commissioner) who will scrutinise each item and satisfy himself that the amount was such which was permissible under the terms of the lease. For this purpose due opportunity be afforded to the respondents to establish their contentions."

2. The respondent assailed the order of the Joint Chief Settlement Commissioner dated July 10, 1967, in Civil Writ Petn. No. 2143 of 1967, which has been accepted vide order dated April 11, 1979. It is against this order that the present Letters Patent Appeal is directed.

3. Railto Cinema, Amritsar, was leased out to Messrs. Amin Chand Tara Chand vide lease-deed dated May 27, 1936. The respondent remained in occupation of the cinema till Dec. 31, 1957. The relevant terms of the lease-deed dated May 27, 1936, are as below:—

(1) Annual repairs and whitewashing were to be done by the landlord;

(2) The lessees were not entitled to remove the material or ask for any compensation for any improvements in the building or for any new construction within its surroundings made by them. On the contrary, the landlord was to become owner of the improvements without any compensation.

4. The respondent claimed Rs. 27,034/-/6 as expenses incurred on the repairs of the cinema building from time to time after partition of the country and Rs. 6,687/9/- as cost of replacement of old electric wiring etc. The Assistant Settlement Commissioner, vide order dated Sept. 6, 1957, found that the respondent was entitled to Rs. 7,481/- on account of repairs and the claim for reimbursement of the cost of replacement of old electric wiring etc., was rejected. In an appeal against the order of the Assistant Settlement Commissioner, the Authorised Chief Settlement Commissioner vide order dated May 17, 1958 remanded the case to the Assistant Settlement Commissioner for fresh decision regarding the claim of the respondent for reimbursement of the cost of repairs and replacement of old electric wiring etc. The Assistant Settlement Commissioner in his order dated Nov. 23, 1960, observed that the following points (relevant for the purpose of this appeal) arose for decision out of the remand order:—

(1) What are the items of work carried out by the respondent and for which items of work, is he entitled to reimbursement?

(2) Has the respondent executed any replacement of the electric wiring and if so of what amount? Is the respondent entitled to reimbursement from the Government for such replacement?

5. The Assistant Settlement Commissioner discussed these two points in detail and held as under:—

Point No. 1.

"The petitioners (now respondents) have in all claimed Rs. 27,034/-/6 as cost of repairs alleged to have been carried out to the cinema building from time to time after the partition of the country. These repairs were verified on the spot by the Civil Engineers who estimated the actual expenditure at Rs. 21,356/-. As according to the terms of the lease, the landlord was responsible for annual repairs and whitewashing etc., only to the building, it was necessary to find out the amounts actually spent on these items. The District Rent and Managing Officer, Amritsar, reported that Rs. 7,823/4/- were spent on annual repairs etc., and Rs. 15,532/12/- were spent on additions/improvements to the building. These repairs were subsequently verified at the spot by the Assistant Valuation Officer, Amritsar, who estimated the cost of repairs as Rs. 7,481/12/- and that of additions/improvements at Rs. 13,827/6/- ... It is unfortunate that the petitioners did not produce their account-books alleging that

they were burnt in a fire which broke out in the year 1950. The petitioners have been carrying out repairs to the premises of their own accord and without any permission or authority from the Department The petitioners were running the Theatre in a building which was constructed by the landlord for them. If the petitioners made any additions or alterations to suit their own requirements, the landlord cannot be held liable for their cost I have carefully gone through the objections put in by the petitioners and feel that they are also entitled to reimbursement of the amount of Rs. 957/8/- and Rs. 1,125/- (Total Rs. 2,082/8/-) which were spent on the repairs of pavements around the cinema hall which were necessitated on account of the damage caused by the incessant rains of 1950. The repairs would be covered by the term 'repairs-special/ordinary' and can by no stretch of imagination be termed as additions/alterations.

I, therefore, hold that the petitioners are entitled to the reimbursement of Rs. 7,823/4/- as recommended by the District Rent and Managing Officer, Amritsar, and Rupees 2,082/8/- spent on repairs on pavements around the cinema hall (Total Rs. 9,905/12/-). The rest of their claim is disallowed.

Point No. 2.

The petitioners have claimed reimbursement of expenditure of Rs. 6,687/9/- alleged to have been incurred on old electric wiring etc. Shri Amin Chand stated that a part of electric wiring was replaced by the petitioners from time to time. He, however, failed to produce any voucher or accounts in support of the expenditure. According to the terms of the lease, the landlord had undertaken to supply wiring for the building of the cinema house only and the rest of the material was to be fitted by the petitioners at their own cost. In view of the clear stipulation in the lease-deed and the fact that the petitioners have failed to produce any account books in support of the claim, I hold that the petitioners did not execute any replacement of the electric wiring and they are not entitled to any reimbursement from the Government on this account."

6. The respondent feeling dissatisfied with the order of the Assistant Settlement Commissioner dated Nov. 23, 1960, preferred an appeal which was accepted by another Authorised Chief Settlement Commissioner vide order dated Nov. 21, 1961. The Authorised Chief Settlement Commissioner has held:—

"The appellants (now respondent) claim in all Rs. 27,034/-/6 as cost of repairs alleged

to have been carried out to the cinema from time to time after the partition of the country. The officer below has allowed Rs. 9,905/12/- and disallowed the rest on the ground that no formal sanction for the repairs had been obtained by the appellants from the department and further no vouchers and receipts were produced and further under the terms of lease-deed these repairs could not be carried out. The Authorised Deputy Custodian who was managing the property at that time vide his order dated April 26, 1954, observed as follows:—

"As regards major repairs, the lease-deed is silent, but ordinarily it is the landlord who should keep his property in proper and usable conditions. It appears that major and abnormal repairs were necessitated on account of heavy floods and heavy rains and if the lessees spent some amount from their own pockets to restore the property to its original condition or to save it from further damage and deterioration, I think they are entitled both in law and equity to be compensated for the same.

This was an implied sanction The term of the lease-deed says that any addition or alteration if made by the tenant will become the property of the landlord without paying any compensation thereof. This means that the tenant could carry the repairs and these, if carried out would become the part and parcel of the property. The Department as such in equity is liable to pay for them. Moreover, these repairs were required to be done because some damages had been done due to floods These items were duly verified by the Department through their Engineer and were found to be correct and as such the amount was to be reimbursed to the appellants and the Department took upon them to pay the amount. There is thus nothing to disentitle the appellants from the amount spent by them on repairs. I, therefore, hold that they are entitled for the reimbursement of the amount.

As regards point No. 2, the appellants have not been allowed this amount as they were to carry out the electric wiring at their own cost. This is no ground for not allowing this amount. When it is admitted that they have replaced the electric wiring, the appellants are liable for reimbursement. I, therefore, hold that they should be refunded this amount also."

According to the terms of the lease-deed the respondent was not entitled to be reimbursed to the expenditure incurred for making additions and improvements in the cinema building. The respondent was, how-

ever, entitled to the expenditure incurred for effecting special repairs. It had been found on verification by the District Rent and Managing Officer that Rs. 7,823/4/- had been spent on annual repairs etc. and Rupees 15,532/12/- were spent on additions/improvements to the cinema building. The Assistant Settlement Commissioner allowed Rupees 9,905/12/- to the respondent on account of expenses incurred on repairs. The Authorised Chief Settlement Commissioner in his order dated Nov. 21, 1961 did not record a finding that the total amount of Rs. 27,034/-/6 claimed by the respondent had been spent on repairs and that no part thereof had been spent for making additions and improvements to the cinema building. The Assistant Settlement Commissioner did not allow reimbursement of Rs. 6,687/9/- claimed to have been spent for replacement of old electric wiring by holding that no evidence had been adduced to support this claim. The Authorised Chief Settlement Commissioner allowed full claim on this account as well. It is under these circumstances that the Joint Chief Settlement Commissioner exercising the powers of the Central Government under Section 33 of the said Act passed the order dated July 10, 1967, the operative part of which has already been reproduced above.

7. The learned single Judge in the impugned order has held that the main ground for reversing the order of the Authorised Chief Settlement Commissioner dated Nov. 21, 1961, was that he should have dealt with each item which had been disallowed by the officers below and to pass orders in respect thereof. It is hardly a ground to invoke jurisdiction under Section 33 of the said Act. The order passed by the Joint Chief Settlement Commissioner in exercise of powers under Section 33 of the Act is arbitrary.

8. In view of the position explained above, it is difficult to agree with the finding of the learned single Judge that the order passed by the Joint Chief Settlement Commissioner is arbitrary. In fact, the order passed by the Authorised Chief Settlement Commissioner dated Nov. 21, 1961, suffers from such infirmity inasmuch as the total claim made by the respondent was allowed without recording a finding whether it had been incurred for effecting repairs or for making additions/alterations. It may be repeated that the expenses incurred by the respondent on making additions/improvements to the cinema building were not to be reimbursed. The omission on the part of the Authorised Chief Settlement Commissioner was thus highlighted and the case

was remanded by the Joint Chief Settlement Commissioner for fresh decision.

9. The learned single Judge has held that the Joint Chief Settlement Commissioner did not record any reason for explaining the delay in taking action under Section 33 of the Act and to say that the Central Government was competent to exercise this power and to interfere with the erroneous order passed by the Authorised Chief Settlement Commissioner is hardly an explanation to be accepted. Section 33 of the Act reads:—

“33. Certain residuary powers of Central Government:—

The Central Government may at any time call for the record of any proceeding under this Act and may pass such order in relation thereto as in its opinion the circumstances of the case require and as is not inconsistent with any of the provisions contained in this Act or the rules made thereunder.”

10. The significant words used in this section are “at any time.” In *Smt. Balwant Kaur v. Chief Settlement Commissioner (Lands), Punjab*, 65 Pun LR 1141 : (AIR 1964 Punj 33) (FB) in which the interpretation of Section 24 of the Act was involved it was held (at p. 59 of AIR):—

“S. 24 of the Act says that the Chief Settlement Commissioner may at any time call for the record of any proceeding under this Act and may pass such order in relation thereto as he thinks fit.” What is the meaning of the words ‘at any time’ occurring in this section, that is to say, within what time limit can the Chief Settlement Commissioner exercise his revisional powers either suo motu or on the application of an aggrieved party? Rule 104 lays down that a petition for revision under the Act shall be presented within the same period as a memorandum of appeal and Rule 103 says that a memorandum of appeal shall be presented within 30 days of the date of the order appealed against. Thus it will be seen that an aggrieved party has to file a revision within 30 days and no period has been prescribed for a suo motu revision by the Chief Settlement Commissioner. Ordinarily, a petitioner will have to file his revision within 30 days unless of course there were special circumstances which prevented him from doing so. The invariable rule in such case is that the aggrieved party must approach the Chief Settlement Commissioner at the earliest possible moment. Where there has been a great unexplained delay or laches in filing the revision, the Chief Settlement Commis-

sioner will naturally refuse to interfere. It is difficult to lay down any hard and fast rule in this connection. It will depend on the facts of each particular case as to whether there are grounds for entertaining the revision after the period of limitation prescribed in the rules. However, the Chief Settlement Commissioner suo motu can interfere with the orders of his subordinates and no limitation is prescribed for that either in the rules or in the statute. But it is understood that he would interfere within a reasonable time depending on the circumstances of each case. It is assumed that he should exercise his discretion in a reasonable manner and not arbitrarily. As I have already said, in this case also no hard and fast rule can be laid down

The observations made by their Lordships in the context of Section 24 of the said Act must apply mutatis mutandis to Section 33 as well. No time limit is prescribed for initiating suo motu proceedings under S. 33 of the said Act.

11. In *Purshotam Lal Dhawan v. Diwan Chaman Lal*, AIR 1961 SC 1371, their Lordships examined the implications of the words 'at any time' in Section 27 of the Administration of Evacuee Property Act. This section reads:—

"27. Powers of Revision of Custodian-General.— (1) The Custodian General may, at any time, either on his own motion or on application made to him in this behalf call for the record of any proceeding in which any Custodian has passed an order for the purpose of satisfying himself as to the legality or propriety of any such order and may pass such order in relation thereto as he thinks fit:

Provided that the Custodian-General shall not pass an order under the sub-section prejudicial to any person without giving him a reasonable opportunity of being heard.

12. Their Lordships held that S. 27 of the Administration of Evacuee Property Act confers a plenary power of revision on the Custodian-General and it empowers him to exercise his revisional powers either suo motu or on application made in that behalf at any time. The phrase 'at any time' indicates that the power of the Custodian-General is uncontrolled by any time factor, but only by the scope of the Act within which he functions.

13. In *Nar Singh Mansoor Singh v. State*, AIR 1967 Punj 111 (FB), it was held that the words 'at any time' used in S. 42 of the East Punjab Holdings (Consolidation and

Prevention of Fragmentation) Act render the power conferred on the State Government everlasting, interminable or indefinite in duration, exercisable without any limitation in point of time. Their Lordships observed (at p. 115):—

"It will thus appear that no limitation has been placed on the exercise of the power of revision. Whether that power has been conferred by a Statute which is not of a temporary duration or by a statute which is of a temporary duration, the power of revision can be exercised by the appropriate authority without limitation as to time. But it is axiomatic to say that the power cannot be exercised for an ulterior purpose or arbitrarily and if it is so exercised, the exercise of the same can be struck down by a Court in appropriate proceedings. I am, therefore, clearly of the view that neither the scheme of the Act nor the scheme of the revisional provision supports the contention of the learned counsel for the petitioners that some time limit should be placed on the exercise of the revisional power conferred on the State Government by S. 42 of the Act."

It was held in *Bhikan v. Punjab State*, 65 Pun LR 368 : (AIR 1963 Punj 255) (FB) that the expression 'at any time' as used in Section 36 of the Act calls for some limitation in them in point of time. They do not mean that the Settlement Officer can revoke or vary the scheme even after the purpose of consolidating the holdings is finally accomplished under the Act. In *Chahat Khan v. State of Punjab*, 68 Pun LR 239 : (AIR 1966 Punj 111) (FB), it was held that in the context of Section 36 of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, the setting in which it appears in Chapter III of the Act, and having regard to the object and purpose of the statute and the consolidation of holdings, there is material which goes to show clearly the limitation placed on the expression 'at any time' in this section as being terminable with the coming to end of the jurisdiction of the Settlement Officer (Consolidation) in the estate. The consolidation of holdings comes to an end and completion by the coming into force of the scheme. That is the stage when both the Consolidation Officer and the Settlement Officer (Consolidation) cease to have jurisdiction in the estate, for by then, the purpose and object of the notification under S. 14 of the Act has served itself and reached the end.

14. It is obvious that the observations made in the context of Section 36 of the East Punjab Holdings (Consolidation and Preven-

tion of Fragmentation) Act in Bhikan's case (supra) and Chahat Khan's case (supra) cannot be aptly made applicable to the words 'at any time' used in Section 33 of the Act. The case under consideration is clearly covered by the ratio of Smt. Balwant Kaur's case (supra), Purshotam Lal Dhawan's case (supra) and Nar Singh Mansoor Singh's case (supra).

15. The order passed by the Joint Chief Settlement Commissioner under Section 33 is just. The Authorised Chief Settlement Commissioner passed the order on Nov. 21, 1961, and the Joint Chief Settlement Commissioner exercising the power under S. 33 issued notice to the respondent on April 27, 1967. Keeping in view the circumstances of the case it is difficult to hold that the discretion exercised by the Joint Chief Settlement Commissioner in the order under S. 33 of the Act is arbitrary or is liable to be struck down on account of unreasonable delay. The impugned order of the learned single Judge, therefore, cannot be sustained.

16. In view of discussion above, the Letters Patent Appeal is accepted, the impugned order of the learned single Judge is set aside and C. W. P. No. 2143 of 1967 is dismissed with no order as to costs.

S. S. SANDHAWALIA, C. J.:— I agree.
Appeal allowed.

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S. S. SANDHAWALIA, C. J. AND
J. V. GUPTA, J.

Siri Chand and others, Petitioners v. The State of Haryana and others, Respondents.

C. W. P. No. 5046 of 1981, D/- 5-3-1982.

Land Acquisition Act (1 of 1894), Ss. 35, 36 and 17 — Exercise of powers under Sections 35 and 36 for temporary occupation of the land — Provisions of Section 17 do not apply.

Provisions of Part II of the Land Acquisition Act in which Sections 4 to 17 occur and which deal with permanent acquisition of land are not relevant for cases of temporary occupation of land which are separately and distinctly provided for in Sections 35 and 36 in Part VI of the Act. Section 35 is a self-contained provision applicable to cases of temporary occupation and the procedure for compensation is different from the one prescribed for cases of permanent acquisition. While in the former it is primarily based on agreement of the parties failing which the Collector himself refers the difference for decision to the Court under Section 35 (3),

the latter results in an award under Sec. 12 and a reference to the Court under Sec. 18. Proviso to sub-sec. (2) of Section 36 which entitles the landowner to compel the State to acquire the land permanently if the land temporarily occupied has been rendered unfit for his purposes further confirms the above. In this case relating to temporary occupation of the land for removing the earth therefrom the Notification invoking and applying provisions of Section 17 was held to be unsustainable. (Paras 6 to 11)

J. S. Malik with M. L. Sarin, for Petitioners; B. L. Bishnoi Addl. Advocate General with P. S. Duhan, Deputy Advocate General, for Respondents.

S. S. SANDHAWALIA, C. J.:— Whether the provisions of Section 17 of the Land Acquisition Act, 1894, are at all attracted to the exercise of the power under Ss. 35 and 36 of the said Act for the temporary occupation of land is the solitary though significant question which has necessitated the hearing of this writ petition by the Division Bench.

2. Learned counsel for the petitioners has expressly confined himself to the aforesaid pristinely legal issue and the facts relevant thereto are not at all in dispute. Admittedly the respondent-State issued the impugned notification, Annexure P-1, for acquiring land temporarily for taking earth for the construction of Ring Bund around village Khudan in Tahsil Jhajjar, District Rohtak, wherein they invoked the emergency powers under Section 17 of the Land Acquisition Act, 1894 (hereinafter called the Act). Aggrieved thereby the petitioners have preferred this writ petition to frontally assail the validity thereof.

3. Inevitably the controversy rages around the notification, Annexure P-1, which is under strenuous challenge and it is, therefore, apt to quote the relevant part thereof:—

"Whereas the Governor of Haryana is satisfied below is needed urgently by the Government at Public expenses, for a public purpose, i.e., for acquiring land temporarily for taking earth for the construction of Ring Bund around village Khudan in Tehsil Jhajjar, district Rohtak.

It is hereby declared that the land described in the specification below is required urgently for the above purpose.

This declaration is made under the provision of Sections 35 and 36 of the Land Acquisition Act, 1894, for information to all to whom it may concern;

And whereas the Governor of Haryana is further of the opinion that the purpose for which the land is required is of an urgent im-

portance within the meaning of Cl. (c) of sub-sec. (2) of Section 17 of the said Act.

Therefore, it is hereby directed under sub-section (4) of Section 17 of the said Act that the provisions of Section 5-A of the Act shall not apply in regard to this acquisition.

Plans of the land may be inspected in the office of Executive Engineer, Jhajjar Drainage Division, Jhajjar.

Specification

XX XX XX XX."
In assailing or sustaining the aforesaid notification learned counsel for the parties conceded that despite diligent research on their part the question arising herein seems to be res-integra. No authority, one way or the other, could be cited directly covering the point and the issue has, therefore, to be examined on first principle and the language of the statute. It is, therefore, apt to read at the outset the relevant provisions of S. 17 and Sections 35 and 36—

"S. 17 (1) In cases of urgency, whenever the appropriate Government so directs, the Collector, though no such award has been made, may, on the expiration of fifteen days from the publication of the notice mentioned in Section 9, sub-section (1), take possession of any waste or arable land needed for public purposes or for a Company. Such land shall thereupon vest absolutely in the Government free from all incumbrances.

(2) * * *

(3) * * *

(4) In the case of any land to which, in the opinion of the appropriate Government, the provisions of sub-sec. (1) or sub-sec. (2) are applicable, the appropriate Government may direct that the provisions of Sec. 6-A shall not apply, and, if it does so direct, a declaration may be made under S. 6 in respect of the land at any time after the publication of the notification under S. 4, sub-section (1)."

"S. 35 (1) Subject to the provisions of Part VII of this Act, wherever it appears to the appropriate Government that the temporary occupation and use of any waste or arable land are needed for any public purpose, or for a Company, the appropriate Government may direct the Collector to procure the occupation and use of the same for such term as it shall think fit, not exceeding three years from the commencement of such occupation.

(2) The Collector shall thereupon give notice in writing to the persons interested in such land of the purpose of which the same is needed, and shall, for the occupation and

use thereof for such terms as aforesaid, and for the materials, if any, to be taken therefrom, pay to them such compensation, either in a gross sum of money, or by monthly or other periodical payments, as shall be agreed upon in writing between him and such persons respectively.

(3) In case the Collector and the persons interested differ as to the sufficiency of the compensation or apportionment thereof, the Collector shall refer such difference to the decision of the Court.

36 (1) On payment of such compensation, or on executing such agreement, or on making a reference under S. 35, the Collector may enter upon and take possession of the land, and use or permit the use thereof in accordance with the terms of the said notice.

(2) On the expiration of the term, the Collector shall make or tender to the persons interested compensation for the damage, if any, done to the land and not provided for by the agreement, and shall restore the land to the persons interested therein:

Provided that, if the land has become permanently unfit to be used for the purpose for which it was used immediately before the commencement of such term, and if the persons interested shall so require, the appropriate Government shall proceed under this Act to acquire the land as if it was needed permanently for a public purpose or for a Company."

4. It calls for notice that in meeting the challenge to the impugned notification, learned counsel for the respondent-State seemed to be on unsure ground and was rather half-hearted in supporting the validity of the same. We did not, therefore, have the benefit of any serious or assiduous argument on its behalf.

5. Now a reference to the scheme of the Act would show that Part II thereof which contains Sections 4 to 17 therein deals primarily with the permanent acquisition of land as the very heading of this part would indicate. This portion of the statute is further sub-divided into the preliminary investigation; hearing of objections against such acquisition, declaration of intended acquisition and enquiry into measurements, value and claims, and award by the Collector and lastly with taking possession of the acquired land. It seems to be unnecessary to elaborate the matter because it was not disputed before us that all the provisions from Sections 4 to 17 are in the context of and relevant to an acquisition which is permanent in nature and which divests the owner of the

acquired land and vests it absolutely in the Government free from all encumbrances. It follows, therefore, that the whole purpose and object of Part II of the Act is to provide for the permanent acquisition of the land. In sharp contrast to Part II, Sections 35 to 37 are contained in Part VI of the Act which by its very heading pertains to the temporary occupation of the land. A reference to sub-section (1) of Section 35 makes it plain that such occupation will not exceed three years from its commencement. The remaining provisions also provide for compensation only for such temporary occupation. The three sections contained in Part VI prescribe separately the procedure to be adopted for this temporary occupation of waste and arable land and the power of the Government to enter and take possession thereof and pay compensation for the same, or restoration etc. It appears to be plain that the purpose and object of Part VI being manifestly a mere temporary occupation of land which is not to exceed three years seems to be diametrically different from a permanent acquisition envisaged in Part II of the Statute.

6. It is plain but nevertheless calls for highlighting in this context that Sec. 17 falls in Part II whilst Ss. 35 and 36 under which the temporary occupation of land is envisaged by the impugned notification come under Part VI. As pointed out above, the very objects and purposes of Parts II and VI of the Act are different. Again Section 17 falls in one part whilst the other two sections fall in another. Therefore on the larger scheme of the statute the provisions of S. 17 would not be relevant or attracted in the context of Sections 35 and 36 of the Act unless there are compelling reasons to the contrary. In the present case far from there being any compelling reasons, none whatsoever could be pointed out which can even show any elementary connection betwixt these provisions.

7. Again a closer analysis of S. 35 would indicate that the publication of notifications under Sections 4 and 6 are not at all attracted to the temporary occupation of land under Section 35. Sub-section (7) of S. 35 itself provides for the procedure of issuing notice in writing to the persons interested in such land and to pay them compensation as may be agreed upon in writing. Sub-section (3) provides that in case of disagreement over the quantum of such compensation or the apportionment thereof the Collector shall refer such difference to the decision of the Court. It would follow therefrom that the

provisions of Section 5-A regarding the hearing of objections would be wholly irrelevant in this context as well because it envisages the filing of these objections consequent upon a notification under Section 4 and within 30 days thereof. If Sections 4 and 6 are not attracted for temporary occupation of land it would follow a fortiori that no question of any objections under Section 5-A can arise. On the other hand a reference to sub-section (4) of Section 17 would indicate that when the emergency provisions are invoked thereunder the Government may direct that the provisions of Section 5-A shall not apply and consequently a declaration may be made under Section 6 in respect of the land notified under Section 4 forthwith without waiting for any objections or their adjudication. One of the very purposes of Section 17, therefore, is that in cases of urgency the procedure of 'objections and their adjudication' may be done away with. If it is held, as it must be that for temporary occupation of land the provisions of Ss. 4, 5-A and 6 are not attracted, it would follow doubly that Section 17, would be equally irrelevant to the exercise of the powers under Ss. 35 and 36.

8. Again the procedure for compensation for the temporary occupation of land is self-contained and entirely different from that for the purpose of permanent acquisition. It was conceded before us (even apart from such concession) and is otherwise plain from the statutory provisions that an award by the Collector under Section 12 and a reference to the Court against the same under Section 18 cannot be invoked in the context of a temporary occupation of land. Thereunder the method of compensation is primarily one to be by agreement and failing the same the Collector himself may refer such a difference for decision to the Court under Section 35 (3) of the Act. It would be thus patent that the methodology of compensation and criteria therefor in case of a permanent acquisition in Part II and for the temporary occupation of land under Part VI are entirely different and distinct with the result that the provisions of either part may not be relevant to the other.

9. Lastly in this context pointed reference must be made to the proviso to sub-sec. (2) of S. 36 of the Act. This vests a right in the landowner to demand the permanent acquisition of the land where its temporary user by the State has rendered it 'unfit for his purposes. Obviously when such a claim is made, such land which has been under temporary occupation would have to be per-

manently acquired either under the provisions of Part II of the Act or under Part VII thereof. The procedural provisions of either of the two parts whichever is resorted to would then have to be complied with. If resort is to be made to permanent acquisition for a public purpose under Part II then Sections 4, 5-A, 6 and the other provisions including therein those pertaining to an award by the Collector for assessing compensation and the right of the landowner to claim a reference to the Court under S. 18 would come into play afresh. The proviso to sub-section (2) of Section 36 thus highlights the line of distinction betwixt a temporary occupation under Part VI against a permanent acquisition of land either for a public purpose under Part II or for a Company under Part VII which has the effect of divesting the owner of the land of his title therein.

10. In view of the overwhelming considerations noticed above it seems to follow that the provisions of Section 17 forming part of Part II of the Act are not at all attracted to the exercise of the powers under Sections 35 and 36 of the Act contained in Part VI of the same. The answer to the question posed at the outset is, therefore, rendered clearly in the negative.

11. Applying the aforesaid rule it would be plain that the impugned notification which indivisibly invokes and applies the provisions of Section 17 is unsustainable in law. The same is hereby quashed. The State Government would obviously be entitled, if so advised, to proceed afresh in accordance with the provisions of Ss. 35 and 36 of the Act.

12. This writ petition is accordingly allowed but in view of the somewhat intricate question involved the parties are left to bear their own costs.

J. V. GUPTA, J.:— I agree.

Petition allowed.

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S. S. SANDHAWALIA, C. J. AND

R. N. MITTAL, J.

State Bank of India, Appellant v. The Sonapat Central Co-operative Bank Ltd. and another, Respondents.

Letters Patent Appeal No. 183 of 1978, D/- 1-4-1982.*

* Against judgment of S. P. Goyal, J. reported in 1978 Cur LJ (Civ) 434.

EZ/FZ/C80/82/HR/RSK

Civil P. C. (5 of 1908) (prior to amendment by Civil P. C. (Amendment) Act (1976), O. 21, Rr. 58 and 90 — Applicability — Person claiming property by title paramount to judgment-debtor — Cannot file objections under O. 21, R. 90 — He can file objections under O. 21, R. 58 if that remedy is available to him — In any case he has got a remedy by way of suit. (1890) ILR 12 All 440 (FB) and AIR 1975 Mad 147, Dissented from.

A person, who claims the property by title paramount to the judgment-debtor, cannot file objections under O. 21, R. 90 of the Code. He can file objections under O. 21, R. 58, if that remedy is available to him. In any case, he has got a remedy by way of suit. The reason why he cannot file objections under O. 21, R. 90 is that in execution of a decree for the recovery of the decretal amount, the interest of the judgment-debtor in the property is sold. In case an objector claims a paramount title to the judgment-debtor in that property, he can establish that right by an independent suit. If he is allowed to get it decided in objections under R. 90, that would open another flood gate of litigation for the auction-purchaser. That does not appear to be the purpose of Rule 90, which provides for setting aside the sale by the executing Court on the ground of material irregularity or fraud in publishing or conducting it on the objections of a person who claims interest in the property thro. the judgment-debtor. It does not appear to be the intention of the Legislature in framing the rule that the question of title of third person should be decided therein. The interest of the person who claims title paramount to the property sold is not affected adversely by such sale. He can claim it by an independent suit. (1888) ILR 15 Cal 488 (FB), AIR 1916 All 147, AIR 1923 Pat 451, AIR 1927 Cal 82, AIR 1971 Orissa 75 and AIR 1941 PC 45, Rel. on; (1893) ILR 20 Cal 418, AIR 1936 Lah 969, AIR 1939 Nag 179 and AIR 1963 Mad 156 (FB), Disting.; 1978 Cur LJ (Civ) 434, Affirmed; (1890) ILR 12 All 440 and AIR 1975 Mad 147, Dissented from. (Paras 7, 16)

Held, in the present case, no attachment had been effected prior to the sale of the property and that entitled the objector to raise an argument that it did not get the opportunity to file objections under O. 21, R. 58. However, if it could not file objections, it could institute a suit claiming paramount title in the property. The objector, had no right to challenge the auction on the ground of irregularity in publishing or conducting the sale. If in the suit it was held owner of

the property, the natural consequence would be that the sale would not be binding on it.

(Para 9)

Cases Referred :	Chronological	Paras
AIR 1975 Mad 147		5, 15
AIR 1971 Orissa 75		6
AIR 1963 Mad 156 (FB)		5, 14
AIR 1941 PC 45		5, 8
AIR 1939 Nag 179		5, 13
AIR 1936 Lah 969		5, 12
AIR 1927 Cal 82		6, 10
AIR 1923 Pat 451		6
AIR 1916 All 147		6
1893 ILR 20 Cal 418		5, 11
1890 ILR 12 All 440 : 1890 All WN 103 (FB)		5, 10
1888 ILR 15 Cal 488 (FB)		6, 8

R. K. Chhibber with V. K. Jhanji, for Appellant; Ch. Ram Sarup, for Respondents.

RAJENDRA NATH MITTAL, J.:— This Letters Patent appeal has been filed against the judgment dated 19th Jan., 1978, of the learned single Judge.

2. Briefly, the facts are that the Rohtak Central Co-operative Bank Ltd., Rohtak (hereinafter referred to as the decree-holder), obtained an award dated 10th May, 1965, against Badh Khalsa Co-operative House Building Society Ltd., Badh Khalsa, Sonepat hereinafter referred to as the judgment-debtor, for the recovery of a sum of Rupees 2,31,171.87. The award was executed by the decree-holder in the Court of the Senior Subordinate Judge, Sonepat. In execution of the decree, the land in dispute was sold by public auction on 2nd Oct., 1970. The State Bank of India, Sonepat (hereinafter called the Objector), filed objections under Order 21, Rule 90, Civil P. C., challenging the validity of the sale. The objector, in order to prove its locus standi to file objections, inter alia pleaded that the land had been sold by the judgment-debtor to one Joginder Singh prior to the making of the award, who created an equitable mortgage in its favour by deposit of title deeds. It challenged the sale on various grounds, which are not relevant for the decision of the present appeal.

3. The objection petition was contested by the decree-holder, who controverted the pleas of the objector and inter alia pleaded that the objector had no locus standi to file the objection petition. On the pleadings of the parties, the following issues were framed:—

1. Whether sale is liable to be set aside for the grounds alleged in the petition filed by the objector State Bank of India?

2. Whether objector has locus standi to file this objection petition?

3. Relief:

The executing Court treated issue No. 2 as a preliminary issue and held that the objector had no locus standi to file the objection petition. Consequently, it dismissed the same. The objector came up in appeal to this Court. The learned single Judge affirmed the judgment of the executing Court and dismissed the appeal. This Letters Patent appeal arises against the said judgment.

4. The only question that arises for determination is whether a person, who claims the property by title paramount to the judgment-debtor, can file objections under O. 21, R. 90 of the Code. In the present case, admittedly, the Code before its amendment by the Code of Civil Procedure (Amendment) Act, 1976, applies. Rule 90 reads as under:—

“90. Application to set aside sale on ground of irregularity or fraud.— (1) Where any immovable property has been sold in execution of a decree, the decree-holder, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it:

Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.”

5. The contention of Mr. Chhibber is that a person who claims a title paramount to the judgment-debtor is included in the words whose interests are affected by the sale. In support of his contention, he places reliance on Sheo Prasad v. Hira Lal, (1890) ILR 12 All 440 (FB), Abdul Gani v. A. M. Dunne, (1893) ILR 20 Cal 418, Mt. Mehr Bano v. Sher Mohammad, AIR 1936 Lah 969, All India Railwaymen's Benefit Fund Ltd., Nagpur v. Ramchand Hemraj Maheshri, AIR 1939 Nag 179, Jagat Narayan Singh v. Kharatar Sah, AIR 1941 PC 45; T. S. Sailappan v. Subbiah Pillai, AIR 1963 Mad 156 (FB) and Saraswathi Ammal v. Manickavasaka Reddiar, AIR 1975 Mad 147.

6. On the other hand, Ch. Ram Sarup has strenuously argued that the aforesaid words include only those persons who are claiming under the judgment-debtor and not claiming a title paramount to him. To fortify his argument, he cited Asmutunnissa Begum v. Ashruft Ali, (1888) ILR 15 Cal 488 (FB), Hardwari Lal v. Muhammad Salamat Ullah Khan, AIR 1916 All 147, Medni Prasad

Singh v. Nand Keshwar Prasad Singh, AIR 1923 Pat 451; Kunjoolal Pal v. Idurali Sardar, AIR 1927 Cal 82 and Padmalay Das v. Official Liquidator, Puri Bank Ltd., AIR 1971 Orissa 75.

7. We have duly considered the arguments of the learned counsel. From the cases referred to at the bar, it is clear that the point is a controversial one and two different views have been expressed by the High Courts. However, we prefer to have the view canvassed by Ch. Ram Sarup and taken by the learned single Judge. The reason for doing so is that in execution of a decree for the recovery of the decretal amount, the interest of the judgment-debtor in the property is sold. In case an objector claims a paramount title to the judgment-debtor in that property, he can establish that right by an independent suit. If he is allowed to get it decided in objections under Rule 90, that would open another flood gate of litigation for the auction-purchaser. That does not appear to be the purpose of the said rule. In our view, it provides for setting aside the sale by the executing Court on the ground of material irregularity or fraud in publishing or conducting it on the objections of a person who claims interest in the property through the judgment-debtor. It does not appear to be the intention of the Legislature in framing the rule that the question of title of third person should be decided therein. The interest of the person who claims title paramount to the property sold is not affected adversely by such sale. He can claim it by an independent suit.

8. The matter was considered by a Full Bench of five Judges of the Calcutta High Court in Asmutunnissa Begum's case, (1888 ILR 15 Cal 488) (supra), wherein it interpreted Section 311 of the Civil P. C., 1882, which contained the words "any person whose immovable property has been sold under this chapter may apply". The learned Chief Justice, speaking for the Court, held that a person who claimed to be a purchaser from the judgment-debtor prior to attachment was not entitled to come in under Section 311 and object to the sale of the judgment-debtor's property. The reason for arriving at the conclusion, as given by the learned Chief Justice, was that the title of that person to the property was not affected by the sale. There is some difference in the language of Section 311 of the Code of 1882 and that of Rule 90 of O. 21 of the Code of 1908, but so far as the present question is concerned, there does not appear to be difference in the provisions of the two Codes. Even

the facts of that case are similar to those of the present case. Therefore, in our opinion, the above ratio will apply even after the amendment of the Civil P. C. in 1908. The same interpretation is spelt out from the other cases referred to by Ch. Ram Sarup and Jagat Narayan Singh's case (AIR 1941 PC 45) (supra) to which reference has been made by Mr. Chhibber. In the latter case objections to the Court sale were filed by a person claiming title paramount to the property inter alia on the ground that irregularities had been committed in conducting the sale. It was observed by their Lordships of the Privy Council that a third party objecting to the sale of his property for the judgment-debtor of another person cannot disregard R. 58 of O. 21 and apply after the sale under R. 90 of that Order treating the case as one of irregularity in publishing or conducting the sale.

9. It is true that in the present case, no attachment had been effected prior to the sale of the property and that entitles the objector to raise an argument that it did not get the opportunity to file objections under O. 21, R. 58. However, if it could not file objections, it could institute a suit claiming paramount title in the property. The objector, in our view, has no right to challenge the auction on the ground of irregularity in publishing or conducting the sale. If in the suit it is held owner of the property, the natural consequence will be that the sale will not be binding on it.

10. No doubt, in Sheo Prasad's case, (1890 ILR 12 All 440) (FB) (supra), Mahmood, J. while dissenting with the majority view, made observations in the nature of obiter dicta that a person claiming title paramount to or independent of the judgment-debtor is within the meaning of S. 311 of the Code. But that view was even not followed by a Division Bench of that Court in Hardwari Lal's case, (AIR 1927 Cal 82) (supra). With great respect to the learned Judge, we have not been able to persuade ourselves to accept the view.

11. In Abdul Gani's case, (1893 ILR 20 Cal 418) (supra), immovable property was sold in execution of a decree against the ostensible owner as his property. The beneficial owner filed objections under S. 311 of the Civil P. C., 1882. The Munsif and the District Judge held that the objector had no locus standi to file the objections. In the High Court, the case was heard by a Division Bench. A difference arose between the two learned Judges and it was referred to a third Judge. The majority held that the

objector strictly did not claim a paramount title but he claimed it through benamidar and, therefore, he had a right to file objections. The facts show that the case is clearly distinguishable.

12. The facts in *Mt. Mehr Bano's case* (AIR 1936 Lah 969) (supra) are also different. In that case, the judgment-debtors filed an application under Rule 90 *ibid* impugning the sale on various grounds. The subordinate Judge upheld their objections and set aside the sale. The Additional District Judge, on appeal, maintained the order. The auction-purchaser filed an appeal to the High Court. The counsel for the respondents raised a preliminary objection that no second appeal was competent under Sec. 104 read with O. 43, R. 1(j) of the Code. While deciding the question of maintainability of the appeal, it was observed by the learned single Judge that the words "whose interests are affected by the sale" used in R. 90 were wide enough to cover every person whether he was a party to the suit or a stranger. The observations were in the nature of obiter dicta. In our view, Mr. Chhibber cannot derive any benefit from the above observations which were made in a different context. With respect to the learned Judge we also do not agree with him in this regard.

13. In *All India Railwaymen's case*, (AIR 1939 Nag 179) (supra), the proposition of law which came up before a Division Bench of Nagpur High Court was as to whether Rule 90 *ibid* entitled to an auction-purchaser to seek to set aside the sale. In our view, the above proposition is absolutely different than that in the present case and, therefore, the ratio in that case will not be applicable to the present case.

14. The proposition of law in *T. S. Sailapan's case* (AIR 1963 Mad 156) (FB) (supra), which was decided by a Full Bench, was also different. In that case, the question before the Full Bench was whether an interim receiver appointed under Section 20 of the Provincial Insolvency Act was entitled to apply to set aside a court sale of the property of a debtor under O. 21, R. 90 *ibid*. The learned Full Bench came to the conclusion that if a Receiver is appointed subsequent to the date of the execution sale, as well as in a case where he had been appointed before, it was competent to the Insolvency Court to clothe the Receiver with the authority to take proceedings under Order 21, Rule 90 of the Code to set aside the sale. It was further held that such authority could be given expressly or even impliedly and if

such Court directed the interim Receiver to take charge of the property which had been sold, he would have authority to institute all necessary proceedings to retain the property and thereby make the title of the debtor more perfect. We are of the opinion that this case too does not expressly support the contention of the learned counsel for the appellant.

15. In *Saraswathi Ammal's case* (AIR 1975 Mad 147) (supra) the proposition of law was somewhat similar to that as in the present case. The law laid down in that case does support the contention of the learned counsel for the appellant. However, with great respect to the learned Judges, we are unable to endorse the same view.

16. After taking into consideration the facts and case law, we are of the opinion that a person, who claims the property by title paramount to the judgment-debtor, cannot file objections under O. 21, R. 90 of the Code. He can file objections under O. 21, R. 58 of the Code, if that remedy is available to him. In any case, he has got a remedy by way of suit.

17. For the aforesaid reasons, we do not find any merit in the appeal and dismiss the same. However, we leave the parties to bear their own costs.

SANDHAWALIA, C. J.:— I agree.

Appeal dismissed.

AIR 1982 PUNJAB AND HARYANA 430

S. S. SANDHAWALIA, C. J. AND

J. M. TANDON, J.

Sheo Chand and others, Appellants v. Financial Commissioner, Haryana, Chandigarh and others, Respondents.

Letters Patent Appeal No. 222 of 1979, D/- 26-2-1982.*

Pepsu Tenancy and Agricultural Lands Act (13 of 1955), Section 32-E— Possession — Allottee given only symbolic possession of surplus land — Possession deemed to be delivered to allottee on depositing compensation by him — Death of landowner before allottee depositing compensation — Held, surplus land of landowner was not utilized in terms of Section 32-E during his lifetime and after his death his heirs became its owners by inheritance. AIR 1966 Punj 25, Foll. Decision in *C. W. P. No. 5080 of 1978, D/- 30-8-1979 (Punj & Har)*, Affirmed. (Para 3)
Cases Referred: Chronological Paras
AIR 1966 Punj 25 : 67 Pun LR 1016 3

* Against judgment of S. S. Kang, J. in *C. W. P. No. 5080 of 1978, D/- 30-8-1979.*

DZ/FZ/B461/82/MBR

S. S. Mahajan, for Appellants; R. S. Mittal with N. K. Khosla, for Respondents.

J. M. TANDON, J.:— Nanu (now deceased and represented by his son and daughter Mangal and Dhan Kaur respondents Nos. 4 and 5 respectively) was a big landowner in village Kheri Lamba, Tahsil Narwana, District Jind. His surplus case was decided by the competent authorities and 12 Standard Acres 1½ Units of land was declared surplus. Out of this surplus area, 7 Standard Acres 7 Units of land was allotted to Sheo Chand, Shera and Shri Chand appellants. On Nov. 21, 1967, the appellants were delivered symbolic possession of the allotted area as crops were standing thereon, by the Naib Tahsildar vide his report which reads:—

"The tenants have been directed that after getting the sanction of the Collector, they should deposit the compensation and the possession of the land shall be deemed to have been delivered to them after the compensation has been deposited by them."

2. The compensation was deposited by the appellants on Feb. 22, 1968. In the meantime, Nanu died on Jan. 3, 1968. The son and the daughter of Nanu who inherited his estate are small landowners. They approached the authorities with the prayer that the surplus area proceedings against their father be dropped on account of his death on Jan. 3, 1968, before his surplus area could vest in the State Government in terms of S. 32-E of the Pepsu Tenancy and Agricultural Lands Act, 1955, (hereinafter the Act). Having failed to get relief with respect to 7 Standard Acres 7 Units of land allotted in the names of the appellants, they filed Civil Writ Petition No. 5080 of 1978 which was accepted by a learned single Judge vide order dated August 30, 1979. It was held that the surplus land of Nanu had not been utilised during his lifetime and the same could not be utilised by the State as by inheritance it has become the property of his son and daughter Mangal and Dhan Kaur respectively. It is against this order that the present Letters Patent Appeal has been filed by the appellants.

3. The learned counsel for the appellants has argued that irrespective of the fact that the appellants were given symbolic possession of land (and not physical) measuring 7 Standard Acres 7 Units on Nov. 21, 1967, because crops were standing thereon, the surplus area of Nanu deceased to that extent shall be taken to have been utilised in terms of Section 32-E of the Act and the same shall vest in the State Government with effect

from that date. Mangal and Dhan Kaur respondents, therefore, cannot justifiably claim inheritance of this land from their father. The contention is without merit. Under Section 32-E of the Act, the surplus area of a landowner shall on the date on which possession thereof is taken by or on behalf of the State Government be deemed to have been acquired by the State Government for a public purpose and all rights, title and interest of all persons in such land shall stand extinguished. It was held in *Bhagwan Singh v. State of Punjab*, (1965) 67 Pun LR 1016 : (AIR 1966 Punj 25), that the land which is declared to be surplus vests in the State only on the date on which its possession is taken and its owner dispossessed and if before that day the original landowner has died, the question of surplus has to be determined with respect to the estate in the hands of the persons who succeed him as his heirs. The appellants were not delivered the actual possession of the land on Nov. 21, 1967. They were delivered only symbolic possession on that date because crops were standing thereon. The Naib Tahsildar who delivered the symbolic possession clearly stated in his report that the appellants had been directed to deposit the compensation after getting the sanction of the Collector and the possession of the land shall be deemed to have been delivered to them after the compensation had been deposited by them. The appellants deposited the compensation on Feb. 22, 1968. The appellants could thus be deemed to have been given the possession of the land on that date. The landowner could be deemed to have been dispossessed from the land on the date the appellants were deemed to have taken its possession. Nanu could be deemed to have been dispossessed from the land in dispute in terms of Section 32-E of the Act on Feb. 22, 1968, and before he could be dispossessed he died on Jan. 3, 1968. The learned single Judge has, therefore, rightly concluded that the surplus land of Nanu was not utilised in terms of Sec. 32-E of the Act during his lifetime and after his death on Jan. 3, 1968, his son and daughter Mangal and Dhan Kaur respondents respectively became its owners by inheritance.

4. No other point has been argued.

5. In the result, the Letters Patent appeal fails and is dismissed with no order as to costs.

S. S. SANDHAWALIA, C. J.:— I agree.
Appeal dismissed.

AIR 1982 PUNJAB AND HARYANA 432**RAJENDRA NATH MITTAL, J.**

National Fertilizers Ltd., Petitioner v. Municipal Committee, Bhatinda and another, Respondents.

Civil Revn. Nos. 1406 and 1696 of 1981, D/- 26-2-1982.*

(A) Civil P. C. (5 of 1908), O. 3, Rr. 1 and 2 — Power given by company to institute suits and other legal proceedings — Includes power to file appeals and revisions.

Appeals and revisions are continuation of a suit. Therefore if power has been given by a company to a person to institute suits and other legal proceedings, that power will include the power to file appeals and revisions. That will also include power to take a decision as to whether a suit or appeal or revision should be filed by the company or not. 1970 Cur LJ 631 (Punj & Har); (1976) 78 Punj LR 453; 1979 Rev LR 341 and AIR 1981 Punj & Har 113, Disting.

(Para 5)

(B) Civil P. C. (5 of 1908), S. 115 — Revision petition admitted by High Court — It cannot be dismissed later on ground that it was not filed by duly authorised person.

If once a revision petition has been admitted by the High Court, it cannot be dismissed later on the ground that it was not filed by a duly authorised person. Under Sec. 115 the High Court can call for the record of the case suo motu and revise the same if it finds that the Subordinate Court exercised a jurisdiction not vested in it or failed to exercise the jurisdiction so vested or acted in the exercise of its jurisdiction illegally or with material irregularity. Therefore, if the case is not presented by a duly authorised person and the Court finds that the impugned order falls within the purview of S. 115, it can suo motu revise it. AIR 1962 All 485. Foll.

(Para 7)

(C) Civil P. C. (5 of 1908), O. 18, R. 3 — Scope.

It is clear from R. 3 that in case the burden of proving some of the issues lies on the defendant, the plaintiff while starting his evidence may lead the same on all the issues, including those the burden of which is on the defendant or reserve his right to lead evidence on the issues the burden of which is on the defendant after the latter has pro-

duced his evidence. However, in the instant case, the plaintiff did not reserve his right to do so. The alleged practice in Courts at Bhatinda of not reserving the right to lead rebuttal evidence cannot be taken notice of in a revision petition. (1975) 77 Pun LR (D) 10, Disting. (Paras 8, 10)

Cases Referred: Chronological Paras

AIR 1981 Punj & Har 113: 83 Pun LR 110

1979 Rev LR 341: 1979 Pun LJ 565

(1976) 78 Pun LR 453: 1976 MCC 410

(1975) 77 Pun LR (D) 10: 1974 Rajdhani

LR 661

1970 Cur LJ 631: 73 Pun LR 39

AIR 1962 All 485: 1962 All LJ 586

H. L. Sibal with T. S. Doabia, for Petitioner; K. K. Cucria and J. R. Mittal, for Respondents.

JUDGMENT:— This order will dispose of Civil Revision Nos. 1406 and 1696 of 1981, which contain the similar questions of law and fact. The facts in the judgment are being given from Civil Revision No. 1406 of 1981.

2. The plaintiff instituted a suit for perpetual injunction for restraining the Municipal Committee, Bhatinda, defendant No. 1, from recovering octroi from the plaintiff in pursuance of notices dated 10th Jan., 1978, 14th Feb., 1978, 14th April, 1978 and 23rd April, 1978, and also from recovering the same in future on the ground that it was illegal and against the provisions of the Punjab Municipal Act. After the conclusion of the evidence of the defendants, time was given to the plaintiff to lead evidence in rebuttal. The Municipal Committee filed an application that it was not entitled to lead evidence in rebuttal as it had not reserved its right to do so. It was further stated that under the garb of the rebuttal evidence it wanted to fill in the lacunas in its evidence in affirmative, which it should not be allowed to do. The trial Court accepted the application of the Municipal Committee and held that the plaintiff-petitioner could not be given an opportunity to lead evidence in rebuttal. It has come up in revision against that order to this Court.

3. A preliminary objection has been raised by the counsel for the Committee that the revision petition had not been filed by a duly authorised person. It has also been urged that the petitioner had not taken any decision to file a revision petition against the impugned order. In the aforesaid circumstances, it is argued that the revision petition is liable to be dismissed on that short ground.

*From order of Sh. Amarjit Singh Sodhi, P. C. S., Senior Sub-J., Bhatinda, D/- 16-5-1981.

On the other hand, the contention of the learned counsel for the petitioner is that the revision petition has been filed by a duly authorised person and he has also the right to take a decision. In the alternative he has submitted that the revision petition has been admitted by this Court and even if it is held that it was not filed by a duly authorised person, the Court cannot dismiss it now on this ground as it has the power to revise the impugned order under Section 115 of the Civil P. C. (hereinafter referred to as 'the Code') suo motu.

4. I have given due consideration to the arguments of the learned counsel. The petitioner, in order to show that the revision was filed by a duly authorised person, produced an affidavit of Mr. R. D. Gharana, who has signed the Vakalatnama, showing as to how he derives his power to do so. Article 77 (6) of the Memorandum of Articles of Association relates to the powers of the Directors to bring and defend actions. It reads as follows:—

"To institute, conduct, defend, compound or abandon any legal proceedings by or against the company or its officers or otherwise concerning the affairs of the Company and also to compound and allow time for

(Contd. on col. 2)

Name of powers

12.3 Powers to institute any civil suits or conduct and defend any legal proceedings by or against the Company or its officers in connection with the affairs of the Company.

The General Managers have been empowered to further sub-delegate the powers to subordinate officers. In the present case the General Manager, National Fertilizers, in pursuance of that power has executed a special power of attorney dated 29th May, 1981 in favour of Mr. R. D. Gharana, Estate Officer, to institute civil suits, to file appeals, revisions etc.

5. From a reading of the above affidavit and the power of attorney dated 29th May, 1981, it is evident that the Estate Officer was authorised to sign the Vakalatnama in favour of Mr. T. S. Doabia, who filed the revision petition. It is well settled that appeals and revisions are continuation of a suit. Therefore if power has been given by a company to a person to institute suits and other legal proceedings, that power will include the power to file appeals and revisions. That

payment or satisfaction of claims or demands by or against the Company."

The Board of Directors under Art. 82 is competent to delegate its powers to the Standing/Executive Committee of Directors, Chairman, the Managing Director, an Executive Director and a Functional Director, subject to such terms and conditions and restrictions as it thinks fit to impose. The Board of Directors approved the delegation of powers in favour of the Chairman and Managing Director. The relevant item reads as follows:—

"To institute, conduct, defend, compound or abandon any legal proceedings by or against the company or its officer or otherwise, concerning the officers of the Company and also to compound and allow time for payment or satisfaction of any claims or demands by or against the Company."

He has also been empowered to sub-delegate the powers to subordinate officers, by the Board of Directors. The Chairman and Managing Director further delegated his powers to the General Managers of Nangal, Bhatinda and Panipat Units by virtue of office order dated 15th Dec., 1979. That power includes the power to institute any civil suit or conduct and defend any legal proceedings by or against the Company. The relevant extract is as follows:—

Extent

General conditions

Subject to guidelines issued by the Head Office from time to time."

Full

will also include power to take a decision as to whether a suit or appeal or revision should be filed by the company or not.

6. Learned counsel for the respondents has made reference to Municipal Committee, Ludhiana v. Surinder Kumar, 1970 Cur LJ 631; Municipal Committee, Karnal v. Sh. Mehlo Ram, (1976) 78 Pun LR 453; Garib Chand v. Municipal Committee, Budhlada, 1979 Rev LR 341; and Food Corporation of India v. Baldev Kaur, (1981) 83 Punj LR 110: (AIR 1981 Punj & Har 113). The former three cases relate to various Municipal Committees, wherein it has been held that it was incumbent for the Municipal Committee to pass a resolution before filing an appeal and thereafter it could do so. The above-said cases are, however, distinguishable. In those cases no powers had been conferred

by resolutions on the persons who were pursuing the cases on behalf of the Municipal Committees. In the Food Corporation of India's case (*supra*) an ex parte decree was passed against it. An application was filed for setting aside the ex parte decree wherein an objection was raised that it was not filed by a competent person. The Corporation relied upon the provisions of O. 29, R. 1 of the Code where it is prescribed that in a suit by or against Corporation any pleading may be signed and verified on behalf of the Corporation by the Secretary or by any Director or other principal Officer thereof, who is able to depose to the facts of the case. It was held by this Court that the provision did not empower the officer who filed the application for setting aside the ex parte decree, to conduct the case on behalf of the Corporation. Thus it is apparent that the facts of that case are also different. In my view, Mr. Mittal cannot derive any benefit from the aforesaid cases. After taking into consideration all the facts and circumstances, I am of the opinion that Mr. R. D. Gharana was duly authorised to file the revision petition in this Court and that the General Manager of the petitioner had the power to take a decision to file it.

7. The contention of the learned counsel for the petitioner in the alternative is that if once a revision petition has been admitted by a Court, it cannot be dismissed later on the ground that it was not filed by a duly authorised person. I agree with it. Sub-section (1) of S. 115 of the Code *inter alia* provides that the High Court may call for the record of any case which has been decided by any Court subordinate to the High Court and in which no appeal lies thereto and it may make such order in the case as it thinks fit. The High Court thus can call for the record of the case *suo motu* and revise the same if it finds that the Subordinate Court exercised a jurisdiction not vested in it or failed to exercise the jurisdiction so vested or acted in the exercise of its jurisdiction illegally or with material irregularity. Therefore, if the case is not presented by a duly authorised person and the Court finds that the impugned order falls within the purview of Sec. 115, it can *suo motu* revise it. In the said view, I am fortified by the observations in *J. P. Ojha v. Firm R. R. Tandon*, AIR 1962 All 485, wherein it was held that if the Court wants to throw out the revision on the ground that it was not properly presented it should do so at the earlier stage. It further observed that once the revision has been admitted, entertained

and listed for final hearing the Court cannot take the view that the revision was not properly presented.

8. On merits, Mr. Sibal, learned counsel for the petitioner, has argued that according to the practice in the Courts at Bhatinda, the right of leading evidence in rebuttal by the plaintiff on the issues the burden of which is on the defendants, is not reserved. He further urges that in view of that practice, the Court had earlier allowed the plaintiff to lead evidence in rebuttal after the defendant had concluded its evidence. The learned counsel for the respondent has controverted the submission of the counsel for the petitioner.

9. I have considered the argument of the learned counsel for the petitioner but regret my inability to accept it. Order 18, Rule 3 of the Code relates to the evidence where there are several issues and the burden of some of which lies on the defendant. It reads as follows:—

“Evidence where several issues:—

Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party; and, in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case.”

10. From a perusal of the rule, it is clear that in case the burden of proving some of the issues lies on the defendant, the plaintiff while starting his evidence may lead the same on all the issues, including those the burden of which is on the defendant or reserve his right to lead evidence on the issues the burden of which is on the defendant after the latter has produced his evidence. However, the plaintiff did not reserve his right to do so. No practice, as referred to by the learned counsel, can be taken notice of in a revision petition.

11. I have also gone through the issues carefully the burden of which is on the defendants. The learned counsel for the petitioner has also not been able to show that any of such issues required any evidence in rebuttal.

12. Faced with that situation, the learned counsel for the petitioner has urged that the

petitioner should be given an opportunity to lead additional evidence. He made a reference to Kaviraj Ganpat Lal Sindhwani v. Om Parkash, (1975) 77 Pun LR (D) 10.

12-A. I am not impressed with this contention of the learned counsel as well. In case he wants to lead additional evidence, he should make an application before the trial Court which will decide that on merits. He cannot be allowed to contend in this revision petition that he should be given an opportunity to lead additional evidence. The facts of Kaviraj Ganpat Lal Sindhwani's case (supra) are different. In that case, the plaintiff had reserved his right to lead rebuttal in the application while summoning the witnesses. However, he was not allowed to lead rebuttal evidence. Therefore, the ratio in that case will not apply to the present case. Accordingly, I do not find any merit in Civil Revn. No. 1406 of 1981.

13. As regards Civil Revision No. 1696 of 1981, the learned counsel for the petitioner has tried to make an additional point, that when the petitioner was producing evidence on the issues the burden of which lay on it, the Court, vide its order dated 8th Jan., 1981, closed its evidence. He urges that the petitioner itself did not close the evidence and, therefore, it was entitled to lead evidence in rebuttal.

14. I have considered the argument but find it without any substance. The order closing the evidence of the petitioner amounts to closing its evidence in affirmative as well as in rebuttal. In case it was aggrieved against that order, it could have come up in revision to this Court. After the respondent has led evidence, it cannot be said that the order amounts to closure of the evidence of the petitioner in affirmative only. It is true that in the present case, there were some issues on which the petitioner could lead evidence in rebuttal. However, as its evidence has been closed, now it has no right to do so.

15. Before parting with the judgment, another preliminary objection taken by the learned counsel for the respondent may be noticed. It is that no revision petition is maintainable against the impugned order under Section 115 of the Code. In view of the fact that I do not find any substance in the revision petition on merits, it is not necessary to decide this point.

16. For the aforesaid reasons, these revision petitions fail and are hereby dismissed. The costs in the revision petitions shall be

the costs in the cause. Counsel fee, in each revision petition, Rs. 250/-.

Petitions dismissed.

AIR 1982 PUNJAB AND HARYANA 435

S. S. SANDHAWALIA, C. J. AND
SURINDER SINGH, J.

Asha Rani and others, Appellants v.
Union of India, Respondent.

L. P. A. No. 137 of 1979, D/- 26-2-1982.*

Motor Vehicles Act (4 of 1939), S. 110-A — Fatal accident — Quantum of compensation — Age of the deceased is neither a conclusive nor a paramount factor in determining it — Multiplier of 16 should normally be applied — Cases where years of life expectancy are less than the applicable multiplier are exceptions to the Rule. 1980 Acc CJ 134 (Punj), Reversed; (1979) 81 Pun LR 618, Overruled.

For determining the quantum of compensation awardable to the dependants of the victim of fatal motor accident the earlier method of multiplying the annual dependency with the remaining years of life expectancy should be given up and should be replaced by the multiplier system adopting 16 as the normal multiplier which might rise up to a maximum of 20 and subject to reduction from the norm for various imponderables and other factors needed to be considered in a particular individual case. The whole object of awarding compensation was to give the dependants an equivalent financial support for the remaining years which the deceased was providing to them at the time of the accident. In this method the age of the deceased would be neither a conclusive nor a paramount factor in determining the quantum of compensation. The multiplier method would, however, be inapplicable to cases where the years of life expectancy are less than the multiplier sought to be applied. AIR 1979 Punj & Har 50; AIR 1962 SC 1 and AIR 1966 SC 1750, Foll.

(Paras 9 to 12)

In this case the deceased at the time of the accident was 45 years, and the life expectancy in the region was 70. There were no special reasons for reducing the multiplier. Hence the single Judge's order adopting 10 as the multiplier instead of 16 based on which compensation was awarded by the

*Against the judgment of S. P. Goyal, J. reported in 1980 Acc CJ 134.

Tribunal was set aside and the order of the Tribunal was restored. 1980 Acc CJ 134 (Punj), Reversed; (1979) 81 Pun LR 618, Overruled. (Paras 16 to 18)

Cases	Referred :	Chronological	Paras
(1980) 82 Pun LR 42			10
(1980) 82 Pun LR 357			10
AIR 1979 Punj & Har 50 (FB)	3, 6, 7, 12, 18		
(1979) 81 Pun LR 618 : 1980 ACJ 83	5, 15		
AIR 1966 SC 1750			8
AIR 1962 SC 1			8

Roshan Lal Sharma, for Appellant; M. J. S. Sethi, Addl. Advocate General with H. S. Kathuria, for Respondents.

S. S. SANDHAWALIA, C. J. :— Whether the age of the deceased is a conclusive or in any case a paramount consideration for the determination of compensation for his dependents under S. 110-B of the Motor Vehicles Act has come to be the spinal issue in this appeal under clause 10 of the Letters Patent.

2. On the 13th of Sept., 1966, at about 7.30 P.M. Harbans Lal deceased, an employee of the Amritsar Sugar and Oil Mills Ltd., Chheharta, was fatally run over by a military jeep whilst proceeding from Amritsar City towards Khalsa College. His widow and minor children preferred a claim petition alleging that the victim of the accident was killed because of the rash and negligent driving of the jeep. The claim was opposed by the Union of India but the Tribunal by its award dated the 15th of May, 1968, decided all the issues in favour of the claimants. It was held that the dependants have been deprived of financial support to the tune of Rs. 100/- per mensem and consequently the annual loss was assessed at Rs. 1,200/-. At the time of the accident Harbans Lal deceased was of 45 years of age and assessing his life expectancy as 60 years the Tribunal allowed the loss for 15 years and awarded Rs. 18,000/- to the claimants.

3. The Union of India appealed against the above award. The learned single Judge, affirmed the findings of the Tribunal on merits. However, with regard to the amount of compensation he referred to the Full Bench judgment in Lachhman Singh v. Gurmit Kaur, AIR 1979 Punj & Har 50, for evolving a suitable multiplier and held as follows :—

“..... The person involved in the accident was an unskilled labourer aged 45 years. Keeping in view all these imponderable circumstances, I feel a multiplier of 10 would

be suitable to arrive at the pecuniary loss caused to the dependents. Thus, the calculated amount of pecuniary loss is assessed at Rs. 12,000/-. Consequently, this appeal is allowed to the extent mentioned above and the amount of damages awarded to the respondents is reduced from Rs. 18,000/- to Rs. 12,000/-. No costs.”

4. Learned counsel for the appellants in assailing the aforesaid view had contended that the suitable and normal multiplier in the present case was 16 and there was no justification or exceptional circumstance for scaling down the multiplier to as low a level as that of 10. It was submitted that the normal life expectancy in this region has been authoritatively held to be 70 and the age of the deceased which was 45 years would be of little or no relevance for the assessment of compensation.

5. The vehement stand of the respondent-Union of India advocated by their learned counsel Mr. Mohinderjit Singh Sethi, however, was that the deceased being 45 years of age this was a conclusive or in any case the paramount consideration for fixing the multiplier and the learned single Judge was right in taking this factor into consideration for determining the same at a level of 10 only. It was forcefully contended by Mr. Sethi that a higher multiplier, if justifiable, could only arise in cases where the deceased was either in his teens or twenties. Counsel relied on Hoshiarpur National Transporters Pvt. Ltd. v. The Motor Accidents Claims Tribunal, Hoshiarpur, (1979) 81 Pun LR 618 to submit that in case of a deceased person of 40 years of age or above the multiplier could not go beyond 10. It is because of this firm stand that the meaningful question noticed at the very outset arises for consideration.

6. It appears to me that the aforesaid argument stems from some misapprehension of the true ratio in the authoritative decision of the Full Bench in Lachhman Singh's case (AIR 1979 Punj & Har 50) (supra). Undoubtedly a penumbral area does seem to exist with regard to the age of the deceased as a consideration for determining the multiplier to be applied. However, as the matter stands adjudicated upon by the binding decision of five Judges in Lachhman Singh's case, it is indeed wasteful and inapt to examine the matter afresh and it suffices to elucidate the ratio and the observations of the Full Bench in this context.

7. Now it deserves to be recalled that a reference to a larger Bench of five Judges in Lachhman Singh's case (to which I was a

party) was necessitated because of the conflicting and confusing modes resorted to by the Courts for the fixing of compensation for accident victims under the Motor Vehicles Act. Two basic methods employed for this purpose had come up for close consideration before the Full Bench. The first one was what has been called the interest theory resting on the principle that irrespective of other considerations the dependents must be given a lump sum amount as compensation, the interest wherefrom would be equivalent of the financial support which the deceased was giving to his dependents. The second method was that of determining the annual financial dependency of the deceased and multiplying the same with the remaining years of his normal life expectancy.

8. In critically examining the aforesaid two methods, Harbans Lal, J., who prepared the judgment of the Court eruditely delineated both the history and the theory of grant of compensation to the dependents of the victims of motor accidents, both under the statute and existing precedent. Reference was made to the authoritative English cases both of the Court of Appeal and the House of Lords in this context to hold that in England, the multiplier method had come to be the universally accepted mode for the grant of compensation in such cases. It was then noticed in particular that their Lordships of the Supreme Court had approvingly referred to the English cases and followed the principles spelt out therein in *Gobald Motor Service Ltd. v. R. M. K. Veluswami*, AIR 1962 SC 1 and *Municipal Corporation, Delhi v. Subhawanti*, AIR 1966 SC 1750.

9. Again on an indepth consideration it was held that both the interest theory and the method of multiplying the annual dependency for the remaining years of life expectancy were slippery and unsatisfactory methods of compensation. Specifically it was observed:—

“..... To my mind, the interest theory is impracticable and unrealistic and will not be a proper yardstick for determining the correct amount of compensation, and again:

“..... In order to do justice between the parties, the method of multiplying the annual dependency by the number of years by which the life has been cut short without any further reduction is unreasonable and unrealistic. The amount of damages or compensation should not serve as windfall to the dependents.”

As a necessary consequence both the aforesaid methods were rejected by the Full Bench and the multiplier system was authoritatively accepted with the following observations:—

“..... The multiplier principle appears to be more sound and equitable. The statement of law to the same effect has been enunciated by their Lordships of the Supreme Court.”

The basic six principles for applying the multiplier system and for determining compensation were then precisely spelt out in para 27 of the report. For the purpose of determining a suitable multiplier again the Full Bench had itself opined as follows:—

“..... For the purpose of determining this multiplier, no exact and mathematical calculation can be provided. The English Courts have held in some cases that 16 times multiplier was quite sound and reasonable. The Supreme Court have gone further and in one case even 20 times was considered to be a suitable multiplier.”

From the above it would necessarily follow that the normal multiplier is 16 and rises to a maximum of 20, and subject to reduction from the norm in view of the various imponderables and other factors which may come to be considered in a particular individual case.

10. Before proceeding further it calls for notice that within this jurisdiction it has now come to be well settled that the normal life expectancy in the region can be safely fixed at 70 years subject, of course, to the peculiar vagaries of an individual case. It is unnecessary to multiply authorities and it suffices to refer to the observations in recent cases which are in tune with the main stream of judicial opinion on this point. See *Sukhnandan Kaur v. National Insurance Co. Ltd.*, Chandigarh, (1980) 82 Pun LR 42; and *Kasturba Sewa Mandir, Rajpura v. Bachan Kaur*, (1980) 82 Pun LR 357.

11. In the light of the above what deserves highlighting is the fact that the Full Bench in terms rejected the method of determining compensation by multiplying the annual financial dependency with the remaining years of life expectancy. It is manifest that in this method once the annual financial dependency had been determined the age of the deceased was a paramount factor. For instance, as the normal expectancy of life in the region has been held to be 70 years then it would follow that if the deceased person was of 20 years of age the annual financial dependency was to be multiplied 50 times. On the other hand if the deceased

was of 60 years then the figure would be only the remaining 10 years. Consequently the age of the deceased in this method was a paramount, if not a conclusive consideration. The Full Bench expressly rejected this method as unreasonable and unrealistic. Therefore in a way the paramountcy or conclusiveness of age for the determination of compensation stands already authoritatively negated.

12. In Lachman Singh's case (AIR 1979 Punj & Har 50) (FB) (supra), the ratio proceeds on the basic hypothesis that the law provides primarily for the pecuniary loss caused to the dependents and solatium was alien to the concept of compensation in this context. The whole object, therefore, is to give the dependents an equivalent financial support for the remaining years which the deceased was providing to them at the time of the accident taking into consideration various imponderables in an individual case but not matters which were totally conjectural and hypothetical. For instance, the slippery factor of inflation matched by rising 'Bank interest rates' was ruled out of ken. The primary purpose herein is to give the dependents a consolidated fund of money which would continue to yield annual financial support which the deceased was providing to his dependents. Once that basic object is achieved the age of the deceased ceases to have relevance except in one instance. This is where the remaining life expectancy is lesser than the multiplier sought to be applied. This may be highlighted by an extreme example. In a case where a deceased would be 69 years of age and the life expectancy is pegged at 70 years then obviously a multiplier above one would be uncalled for. Similarly where the age of the victim of the accident is 60 years the maximum multiplier cannot go beyond 10 subject, of course, to reduction in view of any other factors. In cases where this limitation does not come in, the age of the deceased person ceases to be of any relevance. It is not that the compensation for a man dying at 20 (all other things being equal) has necessarily to be double or higher than the one killed at the age of 40. This is so because the consolidated sum of money given as compensation to the dependents is an impersonal fund of money which will continue to yield an income equivalent to the annual financial dependency thereafter, irrespective of the age of the deceased. Indeed the assumption is that this amount would guarantee the availability of an equivalent annual financial income for the rest of the time thereafter.

13. The aforesaid aspect may be illustrated by a concrete example. Assuming in a particular case that the annual financial dependency of the deceased was Rs. 10,000/-. By applying normal multiplier of 16 compensation would be granted at the figure of Rs. 1,60,000/-. At the normal rate of interest or other prudent investment this amount would yield an income to the tune of Rupees 10,000/- annually continuously thereafter. That being so the widow or the dependents of such a deceased would thereafter continue to receive that amount every year. Consequently in such a context whether the deceased was 18 years of age or 54 years would hardly be relevant to the issue of compensation.

14. It bears repetition that the multiplier system has been accepted and adopted primarily because it excluded the freakish consideration of the age of the deceased on which the earlier method of multiplying the annual dependency with the remaining years of life expectancy hinged. That formula worked to such anomalies that if the deceased person were to be killed at 18 then on the norm of 70 years' life expectancy the quantum of compensation was to be arrived at by multiplying the annual dependency with so high a figure as 52. This obviously leads to great distortion. In order to apply a corrective to the aforesaid distortion, this method had to be rejected and the multiplier concept substituted in its place. To again introduce the consideration of age (but for the exception noticed above) in the multiplier system would be reinducting the same fallacy therein which was sought to be rectified by rejecting the earlier method.

15. Reference must necessarily be now made to the observations of the learned Judge in M/s. Hoshiarpur National Transporter's case (1979-81 Pun LR 618) (supra). Therein also the learned Judge had applied the multiplier of 10 only in the case of a victim of accident aged 41 years. A perusal of the judgment would show that even after taking into consideration the special features of the case and reducing the annual financial dependency from a figure of Rs. 15,600/- to Rs. 13,000/- he still applied a multiplier of 10 only. It is plain that on the normal life expectancy of 10 years the deceased could still expect to live for another 29 years. The multiplier of 10, as already noticed, was far below the norm and the other imponderables had been expressly taken notice of to cut down the figure of the annual dependency. No reason other than that of age seems to have weigh-

ed with the learned Judge in deviating from the normal multiplier of 16.

16. For the detailed reasons recorded above and with the greatest respect to the learned Judge the consideration of the age of the deceased being 41 years was irrelevant for deviating from the normal multiplier and the judgment has, therefore, to be overruled on this point.

17. To conclude it is held that the age of the deceased person is neither a conclusive nor a paramount factor in the determination of the compensation except in those cases where the remaining years of life expectancy are less than the multiplier which is sought to be applied.

18. Reverting back to the facts of the present case in the light of the above what has first to be borne in mind is that the Tribunal had rendered its award way back in 1968. At that stage the enunciation of the law and the Full Bench judgment in Lachhman Singh's case (AIR 1979 Punj & Har 50) was as yet more than a decade away and consequently its principles could not possibly be applied. Apparently the view with regard to the normal expectancy of life was also taken on the conservative side by the Tribunal and was pegged at 60 years only. Later judgments of this High Court have now authoritatively held that within this jurisdiction the normal life expectancy in this region can reasonably be placed as 70 years. That being so the deceased being 45 years could expect to live for another 25 years. It deserves notice that neither before the Tribunal nor before the learned single Judge or before us any dispute was raised with regard to the quantum of annual financial dependency fixed at the figure of Rs. 1,200/- per year. No other imponderable or special factor which could warrant the reduction of the normal multiplier in the present case exists. The only thing that seemed to have weighed with the learned single Judge was the age factor which, as opined above, was not relevant in the context of the remaining life expectancy of as much as 25 years. Therefore, it appears to us that there is no warrant for applying a multiplier of less than the normal one of 16. It deserves recalling that the Full Bench in Lachhman Singh's case (AIR 1979 Punj & Har 50) (FB) itself had determined the suitable multiplier at 16. It bears repetition that their Lordships of the Supreme Court have applied a multiplier as high as 20 though this must be considered as virtually the outer limit. Consequently we see no reason why in this case the norm

of 16 should at all be deviated from. Applying the same the compensation figure would work out to Rs. 19,200/- only. However, because the appellants had not preferred any appeal against the judgment of the Tribunal wherein Rs. 18,000/- had been awarded and further because the express claim in the present letters patent appeal also is for the restoration of the amount of compensation by the Tribunal, we are precluded from granting compensation at the aforesaid amount of Rs. 19,200/-. This appeal is, therefore, allowed and in the peculiar circumstances the compensation awarded to the appellants is restored to Rs. 18,000/-. The appellants would also be entitled to their costs.

Appeal allowed.

AIR 1982 PUNJAB AND HARYANA 439 FULL BENCH

PREM CHAND JAIN, S. C. MITAL AND
RAJENDRA NATH MITTAL, JJ.

Hardwari Lal, Rohtak, Petitioner v. G. D. Tapase, Chandigarh and others, Respondents.

Civil Writ Petn. No. 3658 of 1980, D/- 16-9-1981.

(A) Maharshi Dayanand University Act (Haryana Act No. 25 of 1975), S. 9 — First Statutes of Maharshi Dayanand University Statutes 4 (6), (7) — Appointment of Vice-Chancellor — Terms and conditions of appointment — Validity — Chancellor stipulating that the term would be renewed — No violation of Statute 4 (7) is involved.

Where the Chancellor while laying down the terms and conditions of appointment of the Vice-Chancellor of the Maharshi Dayanand University, laid down a term therein that the term of appointee would be renewed, the Chancellor could not be said to have over-stepped his authority nor could be said to have violated the provisions of clause (7) of Statute 4 which only prescribe the tenure for which ordinarily an appointment can be made. The Chancellor, by stipulating the term in question had only assured the appointee that he would get the second term also and laying down of such a term is not in violation of any statutory provisions. (Case law discussed.)

(Para 33)

A combined reading of the two clauses of Statute 4 would show that the appointment of a Vice-Chancellor is to be made by the Chancellor ordinarily for a period of three years and on the terms and conditions to

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be laid down by him (the Chancellor), with a power to renew the term. These two clauses are independent and do not come in conflict with each other in any way. Clause (7) only standardises the tenure which otherwise could have been unreasonably short or long at the whim of the Chancellor. Clause (6) mentions the name of the appointing authority who is given an absolute power to lay down the terms and conditions of appointment. The words 'may renew' occurring in clause (7) indicate existence of power of renewal. Under the scheme of the Act and the Statutes, the Chancellor plays a very important role. He is not merely a titular head. In the selection of the Vice-Chancellor, he is the sole Judge and his opinion is final in all respects. In choosing a Vice-Chancellor, the main consideration to prevail upon the Chancellor is the interest of the University and if in a given case the services of a person cannot be procured without providing for him a longer period than the one prescribed in clause (7), then the Chancellor under the Statute would certainly be entitled, if he so chooses, to stipulate and agree that the term of the appointee would be renewed. By laying down a term that the term will be renewed, the Chancellor has done nothing more than making a promise to the appointee that on the expiry of the term of office, his term will be renewed. Such a promise, in the wake of the power available under the Statute, could validly be made even at the time of initial appointment. By giving an assurance, the Chancellor is not actually renewing the term at the time of initial appointment. He is only making a promise. (Paras 26 to 28)

(B) Evidence Act (1 of 1872), S. 115 — Promissory estoppel — Applicability — Appointee to post of Vice-Chancellor promised renewal of term at the time of initial appointment — Promisee-appointee, a seasoned politician, resigning his seat in assembly on basis of promise — Doctrine of promissory estoppel is attracted.

Where on the review of the whole case relating to the appointment of the Vice-Chancellor, the only possible conclusion that could be drawn was that the appointee was given an assurance by the then Chancellor that his term would be renewed by incorporating it in the terms and conditions of appointment of the Vice-Chancellor, and that it was on the basis of that assurance that the appointee who was besides being an able educationalist, has been a shrewd and seasoned politician, thought of accept-

ing the Vice-Chancellorship of the University and resigning his seat from the Legislative Assembly, plea of appointee for promissory estoppel would have to be sustained even if the same was based on an assurance to the future when the promisor had the necessary authority to make the promise and he intended to be legally bound and intended his promise to be acted upon; with the result that it was so acted upon. In such a case, prejudice caused to the appointee could not be judged from the fact alone that he got more emoluments as Vice-Chancellor than what he would have got as an M.L.A. Causing of prejudice had to be presumed as by accepting the job of Vice-Chancellor the appointee had to forgo his political career. (Case law discussed.)

(Para 40)

(C) Constitution of India, Art. 226 — Mala fides — Inference of — Evidence and proof — Adequacy.

Where the Chancellor had a right to nominate persons to the Court and it was not necessary for him to consult the Vice-Chancellor while making such nominations and the Chancellor could even make recommendations to the Vice-Chancellor regarding the admission of certain students in the University and as such he could always have bona fide difference of opinion with the Vice-Chancellor then, merely because the Chancellor had difference of opinion with the Vice-Chancellor in the matter of nominations to the Court and recommendations made in regard to admission of certain students, it could not be said that the Chancellor was actuated by bias when he refused to renew the term of the Vice-Chancellor. (Para 48)

(D) General Clauses Act (1897), S. 3 (b) — No date in Amendment Act as to when it would come into force — In view of Section 3 (b), it would be deemed to have come into force on the date when it was published in the Official Gazette. (Para 49)

(E) Dayanand Maharshi University Act (25 of 1975), S. 9-A (as inserted by Ordinance 5 of 1980) — Applicability.

The provisions of S. 9-A apply to the existing incumbent in the office of Vice-Chancellor and not only to appointment made after the promulgation of the Ordinance. (Para 53)

(F) Maharshi Dayanand University Act (25 of 1975), S. 9-A (as inserted by Ordinance 5 of 1980) — Section 9-A as introduced by Ordinance is discriminatory — Violates Art. 14. (Constitution of India, Article 14).

Where the Vice-Chancellor aged more than 65 years, had filed a writ petition to have his term renewed which he was entitled to, in view of incorporation of a promise to that effect in terms and conditions of his appointment and S. 9-A was introduced only to cover a situation which might arise in the event of the success of the petition, as it was then only that the incumbent would be continuing as Vice-Chancellor, the words 'continue in if he has attained the age of 65 years' occurring in S. 9-A of the Ordinance and the Amendment Act, must be considered to be discriminatory and violative of Art. 14 of the Constitution as the same were designed to operate to the detriment of one and one person only, i.e. the incumbent whose term had to be renewed as a result of the said promise/assurance. As such, the words in question have to be struck down as unconstitutional. (Case law discussed.)

(Para 85)

(G) Constitution of India, Arts. 226, 196 and 212 — Allegation of mala fides against legislature in respect of a legislation — Investigation of — Propriety.

In the instant case the petitioner made allegations only against the Chief Minister and the named person in his capacity as Chancellor while challenging the Ordinance and the Act that replaced it as having been passed mala fide. No allegation has been made against any member of the Assembly or the members of the Council of Ministers. The Governor, the members of the Council of Ministers or the members of the Legislative Assembly were not impleaded as respondents. There was absolutely no suggestion that the Legislators had exercised their privilege of vote against their will or for consideration other than their own judgment. The petitioner had not even alleged that the Bill was passed as a result of any fiat by the Chief Minister against whom unsubstantiated allegations of mala fide have been made.

Held, it would not be necessary in this case to go into the question whether the allegations of mala fide can be gone into against the Legislature or not as the petitioner had virtually failed to establish any mala fide against the Legislature or the Governor as such.

(Para 96)

(H) Constitution of India, Arts. 361 and 226 — Immunity to Governor under Article 361 — Does not extend to acts done in his capacity as Chancellor of a University. AIR 1962 Madh Pra 73 (Pt. 'a'), Dissented from. (Maharshi Dayanand University Act

(25 of 1975), Pre.; First Statutes of Maharshi Dayanand University, Statute 4).

No absolute immunity under clause (1) of Art. 361 of the Constitution is available to the Governor for the acts done in exercise of the power or in performance of the duties as Chancellor of the University.

(Para 132)

Under the scheme of the Act and the Statutes, in the University affairs there cannot be any interference from the State Government. The State Government is an authority quite distinct from the authority of the Chancellor. The State Government cannot advise the Chancellor to act in a particular manner. The University is a statutory body, autonomous in character. Under the Act and the Statutes, the Chancellor has been given certain powers exercisable by him in his absolute discretion without any interference from any quarter. For the appointment of the Vice-Chancellor or the Pro-Vice-Chancellor, he is not required to consult the Council of Ministers. It is correct that by virtue of his office the Governor becomes the Chancellor of the University but while discharging the functions of his office he does not perform any duty or exercise any power of the office of the Governor. While discharging the functions of the office, the Chancellor does not act on the aid and advice of the Council of Ministers. It would not be correct to say that as the Governor holds the office of the Chancellor of the University by virtue of his office, therefore, the powers and duties he exercises or performs under the relevant Act or the Statute, are the powers and duties of his office as Governor. The Governor is vested with certain powers and duties under the Constitution that normally are exercised or performed on the aid and advice of Council of Ministers and, therefore, it becomes necessary to give immunity to such person in the discharge of the duties of his office. But this is not the position in the case of the Chancellor as he, under the Act, has his own independent existence and exercises his power without any interference from any quarter. The office he holds is a statutory office and is quite distinct from the office of the Governor. If immunity is extended to the Chancellor also, then it would lead to anomalous results, that is, that in respect of action of the Governor as the Head of the State executive, appropriate proceedings against the State would be open, while it would not be permissible for any person to question the action of the Chancellor in any proceedings,

for the reason that the Chancellor's action not being the action of the Governor as the Head of the State executive, the second proviso of Art. 361 (1) would have no applicability. In this view of the matter, there is no escape from the conclusion that the powers and duties exercised and performed by the Chancellor under the Act or the Statutes of the University have absolutely no relation to the exercise and performance of the powers and duties of the office of Governor. (Paras 121, 122)

In such a case, the distinction between the two modes of appointment, that is, where the Governor of a State shall be the Chancellor of the University and where the Governor by virtue of his office or as ex officio shall be the Chancellor, would not make any difference. The real test to be seen is whether while holding the office of the Chancellor, is the Governor performing any duties or is exercising any power relating to his office? Further, it has also to be seen whether by holding the office of the Chancellor, is the Governor not holding entirely a different office and in a different capacity? As the answer to these two questions is in the negative, then the Governor as Chancellor would not be exercising or performing any power or duty in his capacity as Governor nor would the exercise or performance of the power or duty of the office of the Chancellor would have any relation to the exercise or performance of the duty of the office of the Governor. AIR 1962 Madh-Pra 73 (Pt. 'a'), Dissented from.

(Para 125)

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P. P. Rao, Sr. Advocate, J. S. Malik and Bulgania Daulta, for Petitioner; U. D. Gaur, Advocate General (Haryana), B. L. Gulati, Dy. Advocate General, (Haryana), for Nos. 2 and 3. Y. S. Chitale and Mrs. Sadhana Ram Chandran, for No. 1, for Respondents.

PREM CHAND JAIN, J.:— Shri Hardwari Lal has filed this petition under Article 226 of the Constitution of India calling in question the legality and constitutional validity of Haryana Ordinance No. 5 of 1980 (hereinafter called the Ordinance) and the Maharshi Dayanand University (Amendment) Act, 1980 (Haryana Act No. 40 of 1980) (hereinafter called the Amendment Act) and has also prayed for issuance of mandamus directing respondent No. 1 to renew his term as Vice-Chancellor of the Maharshi Dayanand University, Rohtak (hereinafter called the University).

2. In order to appreciate the controversy, it is generally appropriate to give details of the allegations made in the petition, but so far as the present petition is concerned, I find that it may not be possible to do so at this stage and it would suffice if a few facts are mentioned as a preface, which are to the following effect :—

3. Shri Hardwari Lal, petitioner, was appointed as Vice-Chancellor of the University on 28th Oct., 1977. The petitioner had been elected to the State Assembly in June, 1977, and had resigned the Assembly seat to accept the Vice-Chancellorship of the University in Oct., 1977, on the asking of Mr. H. S. Brar, the then Chancellor of the University who specially invited him during the third week of Oct., 1977, to discuss the state of education in Haryana and made a compelling request to the petitioner to accept the Vice-Chancellorship either of Kurukshetra University or the University at Rohtak.

4. It is further averred in the petition that to make the offer attractive and to persuade the petitioner to give up politics and resign his seat in the Assembly to which he had been elected for six years, only four months earlier, Shri H. S. Brar, clothed with the statutory authority to appoint Vice-Chancellors at Kurukshetra and Rohtak Universities and to determine in his sole discretion the terms and conditions of their appointment, offered to the petitioner a salary of Rs. 4,000/- per mensem exclusive of any pension which he might get in the event of his agreeing to resign his seat in the Haryana Assembly, but the petitioner declined to accept a salary higher than the usual salary of Vice-Chancellors in Haryana and Punjab and agreed to quit politics in order to take up the assignment at Rohtak on the conditions that, (a) he would get at least six years' tenure to enable him to build up the new University, and (b) he would not be pushed about by the Government, during his stipulated tenure.

5. It is further averred, that the then Chancellor pointed out that according to the provisions of clause (7) of Statute 4 of the First Statutes of the Rohtak University, he would issue the notification regarding petitioner's appointment for a three-year term in the first instance, but would make the first term imperatively renewable in the "terms and conditions of the appointment" to be determined by him under the authority of clause (6) of Statute 4.

6. The petitioner has given reasons as to why did he feel compelled to secure the above assurance. The petitioner has further given details as to why did he agree to resign the hard-won Assembly seat which he had incidentally won as an independent candidate in the 1977 Assembly Elections. He has also given details of undue political interference in the working of the University by the politicians and the facts going to show as to how efforts were being made to harass and denigrate him. Allegations of mala fide have also been made against respondents Nos. 1 and 2. The petitioner has also made reference to the earlier litigation which took place between him and the respondents. I have not given details of all those allegations as I would refer to the same at the appropriate time when I deal with the respective contentions of the learned counsel for the petitioner.

7. It is further averred that the petitioner was entitled, as a matter of right, to the renewal of his first term, but no notification in that respect was issued with the result that the petitioner was forced to file this petition on 13-10-1980 for issuance of a writ of mandamus commanding respondent No. 1 to notify the renewal of the petitioner's term as Vice-Chancellor for a period of three years commencing from 28th of Oct., 1980. In the petition, an interim prayer was also made that since his term of office was to expire on 27th of Oct., 1980, therefore, an interim order be issued allowing him to continue as Vice-Chancellor of the University. After issuing notice of motion, the petition was admitted to D. B. by the Bench on Oct. 14, 1980, but the ad interim relief prayed for was declined. However, it was ordered that till the decision of the petition, the Secretary, Education Department, Haryana, would perform the duties of Vice-Chancellor.

8. Before the petition could be heard, the Governor of Haryana issued Ordinance No. 5 of 1980 on 1st of Nov., 1980, by which after Sec. 9 of the Maharshi Dayanand University Act, 1975, S. 9-A was inserted which reads as under :—

"Maximum age of Vice-Chancellor and Pro-Vice-Chancellor: Notwithstanding anything to the contrary contained in any law, contract or the statutes, no person shall be appointed to, or continue in, the office of the Vice-Chancellor or Pro-Vice-Chancellor, as the case may be, if he has attained the age of sixty-five years."

On the basis of the aforesaid Ordinance, an application (C. M. No. 2010 of 1980)

was filed in this Court on 4th of Nov., 1980 on behalf of the State praying that the writ petition had become infructuous and that the same be dismissed but that application was rejected and the matter was heard on merits by the Division Bench. Finding that important questions were involved, the matter was referred to be decided by a larger Bench on 10th of Dec., 1980. On 26th of Dec., 1980, the Ordinance was replaced by the Maharshi Dayanand University (Amendment) Act, 1980 (Haryana Act No. 40 of 1980). As the Ordinance was promulgated and the Amendment Act was enacted after the filing of the petition, the petitioner was allowed to suitably amend the petition. Now through the amended petition, which was put in on Feb. 19, 1981, the petitioner has challenged the legality and constitutional validity of the Ordinance and the Amendment Act also.

9. The petition has been contested on behalf of all the respondents. Separate written statements have been filed by the Chancellor, respondent No. 1; Chief Minister of Haryana, respondent No. 2 and on behalf of the State of Haryana, respondent No. 3 by Joint Secretary, Education Department.

10. In the written statement filed by the Chancellor, preliminary objections have been taken to the effect that no writ would lie against him because of the protection under Art. 361 of the Constitution of India, that examining the validity of Ordinance No. 5 of 1980 is only academic as the same stands repealed by the Amendment Act, that no mandamus can be issued unless there is violation of some statutory obligation, that without declaring the Amendment Act ultra vires, no writ can be issued and that it is settled law that the motive which impelled the legislature to pass the law is really irrelevant in declaring that law ultra vires, if the legislature is competent to pass a law.

11. On merits, the material allegations made in the petition have been controverted and the firm stand taken is that renewal of the term is only when the first term is over as renewal presupposes that it is discretionary with the Chancellor to consider the matter afresh after the first term is over and that there cannot be a renewal of the term at the time when the Vice-Chancellor is appointed initially. The allegations of mala fide have been emphatically denied.

12. The Chief Minister, Haryana, in his written statement has also taken somewhat similar type of preliminary objections which

have been raised by respondent No. 1. So far as the averments on merits are concerned, respondent No. 2 has controverted them. He has also stoutly and firmly denied the allegations of mala fide made against him.

13. In the written statement filed on behalf of the State, again similar type of preliminary objections have been raised. On merits, the allegations made in the petition have been controverted and facts have been brought out to show that the issuance of the Ordinance and the enactment of the Amendment Act were not as a result of any bias against the petitioner but was as a result of a policy decision taken on the basis of the suggestions made earlier by the Committees constituted by the Government of India for making suggestions on the working of the Universities, which had favoured the idea of fixation of maximum age limit of the incumbent for the Vice-Chancellorship.

14. The petitioner sought to file lengthy replication to the aforesaid three written statements. As in the replication many fresh facts were raised, we did not permit the petitioner to file the replication. However, during the course of arguments, the learned counsel for the petitioner was permitted to make reference to some of the relevant facts from the replication which were necessary to determine the controversy.

15. On merits, the first contention raised by Shri P. P. Rao, learned counsel for the petitioner was that on the basis of the facts placed on the file, the petitioner was entitled to issuance of a writ of mandamus, commanding respondent No. 1 to notify the renewal of the petitioner's term as Vice-Chancellor of Maharshi Dayanand University for a period of three years with effect from 28th Oct., 1980. What was sought to be argued by Mr. Rao was that under Statute 4 (7) of the First Statutes of the University, two terms of three years each could legally be given by the Chancellor as there is a power of renewal available to the Chancellor in the aforesaid Statute and that such a power could legally be exercised by the Chancellor even at the stage of initial appointment. In the alternative, it was submitted by the learned counsel that even if the Chancellor could not decide about the renewal of the term at the time of initial appointment, then also in the instant case, he (the Chancellor) by laying down a term in exercise of his power under Statute 4 (6) that the term of the petitioner will be renewed, was legally bound by such a term and that it was not open to the Chancellor especially when the existence of the terms

and conditions has not been disputed, to challenge the validity of his own power to lay down such a term. Further, the Chancellor by laying down such a term made a promise to the petitioner that his term will be renewed, that the petitioner acting on that promise, changed his position inasmuch as he resigned his seat from the Haryana Vidhan Sabha to which he had been elected for a period of six years and that the Chancellor on the principle of promissory estoppel was estopped from refusing to renew the term of the petitioner. The learned counsel had also urged that even if all the abovementioned contentions of his were found untenable, then also, the action of the Chancellor in granting renewal should be deemed to have been taken by granting relaxation in exercise of the power under Statute 26.

16. In reply to the aforesaid contentions of Mr. Rao, Dr. Chitale, learned counsel for respondent No. 1, submitted that the power to renew is really a power to make fresh appointment, that certain considerations are to be taken note of before exercising the power of renewal, that the words 'may renew' pre-suppose some conscious consideration before granting a renewal of the term, that under clause (7) advance renewal or in other words, renewal of term at the time of initial appointment is not permissible, that a person appointed as Vice-Chancellor cannot claim as a matter of right renewal and that an authority by an order or contract cannot legally fetter in advance the future exercise of discretion when the statute itself suggests its exercise in future at an appropriate time.

17. Dr. Chitale also sought to support the aforesaid argument of his by further contending that terms and conditions of appointment and term of appointment as used in clauses (6) and (7) of Statute 4 are distinct, that the providing of the terms and conditions has been left completely with the Chancellor, but the power to fix a term has not been left to the discretion of the Chancellor, inasmuch as a term for a specific period is provided by clause (7). What was intended to be argued by the learned counsel was that under clause (5), no fetter has been put on the power of the Chancellor in laying down terms and conditions of the Vice-Chancellor at the time of appointment, but the power of the Chancellor is circumscribed by clause (7) of the Statute inasmuch as no appointment can be made by him for more than three years and that is why the Chancellor initially appointed the

petitioner only for a term of three years. The learned counsel also went on to argue that there could be no estoppel with regard to an action which was ultra vires of the Statute and the plea that the term of renewal should be deemed to have been granted by the Chancellor by exercising the power of relaxation is wholly untenable.

18. For proper appreciation of the contentions advanced by the learned counsel for the parties before us and in order to find out as to which contention is more plausible, it is necessary to make reference to certain provisions of the Act and the Statute and also to the pleadings of the parties.

19. The Maharshi Dayanand University was established in May, 1976 by The Rohtak University Act, 1975 (Haryana Act No. 25 of 1975) (hereinafter referred to as the Act). Section 3 of the Act provides for the appointment of the first Chancellor and the first Vice-Chancellor by the Government, so also the first members of the Court, the Executive Council and the Academic Council. The section further stipulates that the Rohtak University would be a body corporate and shall have perpetual succession and a common seal with power to acquire, hold and dispose of properties and to contract and may by the said name sue or be sued. Section 4 provides the limits of the area within which the University shall exercise its powers. Section 5 gives the details of the powers and the duties to be exercised and performed respectively by the University. Section 8 to which reference in particular was made, gives the designation of the persons who shall be the Officers of the University. It includes the names of Chancellor and Vice-Chancellor also. Section 9 provides that the mode of appointment and functions of the officers of the University other than the Chancellor shall be prescribed by the Statutes and the Ordinances, insofar as they are not prescribed in the Act. It is also provided in the section that subject to the provisions of the Act, the powers and duties of the officers of the University, the term for which they shall hold office and the filling of casual vacancies in such offices shall be such as prescribed by the Statutes. Section 19 provides that the Chancellor may, at any time, require or direct any officer or authority of the University to act in conformity with the provisions of this Act, and the Statutes, Ordinances and Regulations made thereunder. It is further provided that the power exercised by the Chancellor under sub-sec. (I) shall not be called in question in any Civil Court. Sec-

tion 22 prescribes the conditions of service of officers and teachers.

20. Coming to the first statutes of the University, we find that Statute 2 provides that the Governor shall be the ex-officio Chancellor of the University. Statute 3 lays down that the Chancellor by virtue of his office will be the Head of the University and if present, would preside over the convocation of the University for conferring degrees and at all meetings of the Court. Statute 4 is the most important statute for the purpose of this case. Clauses (1) to (5) of this Statute describe the status of the Vice-Chancellor, his powers and duties. Clauses (6) and (7), to which reference will have to be made repeatedly, may be reproduced in extenso and read as under :—

“(6) The Vice-Chancellor shall be appointed by the Chancellor on the terms and conditions to be laid by the Chancellor.

(7) The Vice-Chancellor shall hold office ordinarily for a period of three years, which term may be renewed.”

Statute 5 relates to Pro-Vice-Chancellor. The only other statute which needs mention is Statute 26, which gives the power of relaxation to the Chancellor and is reproduced as under :—

“Notwithstanding the provisions of the aforesaid statutes the Chancellor shall be competent in exceptional cases, to relax any condition mentioned therein.”

21. Coming to the facts of the case, I find that Shri M. L. Batra was appointed as the first Vice-Chancellor of this University on 9th April, 1976. On 18th Aug., 1977, Shri Batra proceeded on leave. It appears that the then Chancellor was trying to find out some other eminent person to be appointed as the Vice-Chancellor of the University. It seems that the choice of the Chancellor fell on the petitioner, as on 25th Oct., 1977, a letter (Annexure P-4 to the petition) was written by the then Chancellor Shri H. S. Brar to the petitioner, which reads as under :—

“My dear Ch. Sahib,

When you met me the other day, we talked about the state of school and university education in Haryana and about the need to improve things. I have since given further thought to the matter and I feel that with your long and varied experience of administration and education, you could make great contribution to the cause of education in the State, if you would take

up one of the two Universities Kurukshetra or Rohtak — as Vice-Chancellor.

I know about your interest in politics. But, I feel that you might be able to serve the State better as a Vice-Chancellor than as an M. L. A. Incidentally, while there is no legal bar to your continuing as an M. L. A., even after going to the University, it would seem more proper if you could persuade yourself to resign your seat in the Assembly and give all your time to the University.

I would expect you to let me have your reply without delay.

With kind regards,

Yours sincerely,

(Sd/- H. S. Brar).”

On receipt of this letter, the petitioner sent a reply to the Chancellor on 26th Oct., 1977, which is in the following terms :—

“Respected Governor,

Kindly refer to your letter No. 11/PSGovr. 77/1116, dated the 25th Oct., 1977, regarding the Vice-Chancellorship of the Kurukshetra/Rohtak Universities.

I feel greatly encouraged by your good opinion of me and I feel honoured that you think me fit for the position of a Vice-Chancellor.

I practically founded the Kurukshetra University some 20 years ago and I should not like to go back to this now. I should prefer to go to Rohtak. I, of course, assume that :—

(i) I shall be given at least six years so that I can build up this new University. The three years term (ordinarily) which the Charter of the University mentions is much too brief for anybody to build up the Institution, from a scratch;

(ii) Things at Rohtak have been unstable so far. I thus, shall be allowed to work without interference from the Government Secretariat.

I entirely agree with you that it will be improper for me to continue as an M. L. A. if I go to the University. I am, therefore, resigning my seat from the Assembly. I am writing in this connection to the Speaker of the Assembly to say that my resignation may be taken as being operative from the 1st of Jan., 1978.

With kind regards,

Yours sincerely,

Sd/- Hardwari Lal.”

On receipt of the aforesaid letter from the petitioner, a Notification dated 26th Oct., 1977, appointing the petitioner as Vice-

Chancellor of the University was issued, which is in the following terms :—

"In exercise of the powers conferred by sub-clause (6) of clause 4 of the 1st Statutes, as contained in Schedule to the Maharshi Dayanand University Act 1975, the Chancellor of the Maharshi Dayanand University is pleased to appoint Shri Hardwari Lal to be the Vice-Chancellor of the Maharshi Dayanand University, Rohtak with immediate effect, for a period of three years.

2. His terms and conditions of appointment will be issued separately."

The petitioner, in pursuance of the aforesaid notification, took over charge as Vice-Chancellor of the University on 28th of Oct., 1977. In exercise of the powers under clause (6), the Chancellor had laid down terms and conditions of appointment of the petitioner. Besides providing for the pay and other things, the Chancellor also prescribed a term, which reads as under :—

"Shri Hardwari Lal will be whole time Vice-Chancellor and shall not engage himself directly or indirectly in any trade or business whatsoever without the prior permission of the Chancellor. The term of appointment will be for a period of three years, which term will be renewed."

22. The pleas taken in the petition on the basis of which the first contention on merits was raised by Mr. Rao, and to which specific reference was made at the time of arguments, read as under :— "Para 3 (iv) To make the offer attractive and to persuade the petitioner to give up politics and to resign his seat in the Assembly, to which he had been elected for six years only four months earlier, Shri Brar, clothed with the statutory authority to appoint Vice-Chancellors at Rohtak and Kurukshetra Universities and to determine, in his sole discretion, the terms and conditions of their appointment, offered to the petitioner a salary of Rupees 4,000/- per mensem, exclusive of any pension which he might get in the event of his agreeing to resign his seat in the Haryana Assembly. The petitioner declined to accept a salary higher than the usual salaries of Vice-Chancellors in Haryana and Punjab, but agreed to quit politics in order to take up the assignment at Rohtak on the conditions that (a) he would get at least six years' tenure to enable him to build up the new University, and (b) he would not be pushed about by the Government, during his stipulated tenure.

Shri Brar pointed out that according to the provisions of Clause (7) of Statute 4. of

the University Act, he would issue the notification regarding the petitioner's appointment for a 3-years term, in the first instance, but would make the first term imperatively renewable in the "terms and conditions of the appointment" to be determined by him under the authority of Clause (6) of Statute 4.

As Chancellor, Shri Brar had the statutory authority to relax any provision of the Statutes vide Statute 26 of the First Statutes.

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That the reasons why the petitioner felt compelled to secure the above assurances were —

(a) The University had been established only 18 months earlier, against the explicit advice of the University Grants Commission, and had not yet been recognised by the Commission for receiving any Central grants, without which no University could attain its full status. In fact, the University Grants Commission had stopped even the grants, which the Regional Post-Graduate Centre, Rohtak, made by the Haryana Govt., the very base of the University, had been getting as a part of Kurukshetra University, until April, 1976. The petitioner also knew that the first Vice-Chancellor designate (Dr. P. N. Chhutani) had been dropped, even before he had actually taken over, the second (Shri M. L. Batra) had been chased out much before the expiry of his first term, a Pro-Vice-Chancellor (Dr. J. D. Singh) had been appointed for the purpose of chasing out the Vice-Chancellor for whom he (Dr. J. D. Singh) had been made to officiate, and he (the Pro-Vice-Chancellor) had turned the University, during 9 weeks of his officiating Vice-Chancellorship into a parochial and sectional institution. The Medical College, Rohtak, which along with the erstwhile Regional Post-Graduate Centre, constituted what had come to be called M. D. University, was operating under the shadow of an enquiry ordered to be made by an outsider. Even the question of the site for the University was awaiting final decision. The infant University was, thus beset with numerous problems and handicaps.

The petitioner could see that one three years' term would in no case suffice for him first to secure the necessary patronage of the University Grants Commission and to cleanse the Augean Stables and then to build up the University from a scratch. The petitioner did not, therefore, consider it worthwhile to sacrifice his earlier occupation with-

out being assured of a term of the length, adequate in his view.

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Knowing what he did about the shabby and fraudulent treatment meted out to Vice-Chancellors at Hissar, Kurukshetra and Rohtak in recent times, the petitioner was greatly hesitant about accepting the Vice-Chancellor's job in Haryana. It was, therefore, that he had not said "yes" to Shri J. L. Hathi's offer and had later felt compelled to discuss things threadbare with his successor Shri H. S. Brar, before making up his mind about accepting the proffered job. It was, in any case, for this reason that the petitioner had insisted on securing a written and unconditional assurance regarding the length of his tenure. Indeed, he would have never even thought of changing his profession, and would have never accepted the Chancellor's invitation to join as Vice-Chancellor at Rohtak, in spite of all its eagerness, if he had not been categorically and unconditionally given 6 years' tenure.

Para 3 (vi);

The arrangement regarding the petitioner's appointment, substantively for six years, and the other terms and conditions of his service/appointment, as described in (v) above was formalised when (a) Shri Brar, the Chancellor of the University wrote to the petitioner a formal letter fervently offering him the appointment along with the advice that the petitioner might resign his seat in the State Assembly in order to give all his time to the University and, (b) the petitioner formally accepted the appointment on the explicit conditions which he had previously mentioned verbally and to which Shri Brar, in his statutory capacity of the Chancellor of the University and by virtue of his statutory powers under Statute 4 (6) and Statute 26 of the 1st Statutes of the University, an integral part of the University's Act, had unconditionally agreed. In return, the petitioner agreed to resign and actually resigned his seat in the Haryana Assembly and also agreed to be bound by the condition that he would not engage in any other profession and would give all his time to the University, which was still in an embryonic state and had to be carefully tended.

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(Para 3-A): That even after the terms and conditions of his appointment had been finally settled and formalised, the petitioner had occasion to write to Shri H. S. Brar twice and in both these significant communications, the point that the petitioner

had come to Rohtak as Vice-Chancellor for six years was thrown into bold relief."

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22-A. The stand taken by respondent No. 1 in his written statement with regard to the aforesaid pleas, is to the following effect:—

"(iv) (a): Under Statute 26 of the Maharsi Dayanand University Act, 1975, the then Chancellor could relax the provision and appoint him for six years but he did not do that.

(b) That vide Notification No. HRB-EA-77/5545-5550 dated 26th Oct., 1977, the petitioner was appointed for a period of three years only.

(c) That renewal of a term is only after the first term is over. This pre-supposes that it is discretionary with the Chancellor to consider the matter afresh after the first term is over. There can be no renewal at the time the Vice-Chancellor is appointed initially.

In respect of sub-para (vi), it is denied that the petitioner's appointment was for six years and it is also denied that this was ever formalized. The letter at Annexure P/4 dated 25-10-1977 from Shri H. S. Brar making an offer of appointment did not contain any offer of appointment for a tenure of six years. It is denied that while accepting the offer of appointment the petitioner had made any explicit condition that he would accept the offer of Vice-Chancellorship on the basis of any explicit conditions which he had allegedly previously mentioned verbally or to which Shri H. S. Brar had agreed.

The copies of the letters exchanged by Shri H. S. Brar and the petitioner and the notification concerning the petitioner's appointment as Vice-Chancellor of M. D. University, Rohtak (at Annexure P/4) nowhere state that the appointment of the petitioner has been made for a term of six years. The substantive appointment order dated 26th Oct., 1977 clearly states that the appointment is for a period of three years, the terms and conditions of appointment issued on 27th Oct., 1977 reiterate that the appointment will be for a period of three years and it is further stated that this term will be renewed. Statute 4 (7) of the M. D. University Act is reproduced below:—

"The Vice-Chancellor shall hold office ordinarily for a period of three years, which term may be renewed."

The appointment order read with the provision of law quoted above made it clear that as per the provisions of law the appoint-

ment was for a period of three years and that at the end of this period of three years the term may be renewed.

The contents of para 3-A are admitted to the extent that Annexures P/5, P/6 and P/7 were received by my predecessor but he did not ever uphold the petitioner's contention that the petitioner was appointed for six years. It is denied that at any time Shri H. S. Brar stated that he had appointed the petitioner for a 6 years' tenure.

The M. D. University, Rohtak, had also issued a notification dated 5-11-1977 in which it had notified that the appointment of the petitioner was for three years. A copy of this notification is at Annexure R-1/1.

In respect of para 19, the answering-respondent denies that under any provision of law the petitioner is entitled to continue as Vice-Chancellor for a period of 6 years with effect from 28th Oct., 1977. The petitioner's appointment was for 3 years and this period has lapsed on 27th Oct., 1980. The answering respondent is under no statutory duty to complete any procedural formalities or to issue any enabling notification under any provision of law.

The answering respondent denies in respect of para 25 that the petitioner was appointed for a term of six years. He was appointed for 3 years and the non-renewal of his term does not amount to any breach of his terms and conditions or to his removal from a public office. The answering respondent denies that the petitioner has any right to continue in office for more than a period of three years. The answering respondent denies that he is terminating the tenure of the petitioner much less arbitrarily and further submits that no rules of natural justice have been violated by the answering respondent.

In respect of para No. 26, the answering respondent denies that the petitioner's term of appointment was initially for a period of six years. The answering respondent submits that no term or condition of appointment of the petitioner has been violated which requires to be enforced by a writ of mandamus."

23. On the respective contentions of the learned counsel for the parties, the following points would need determination, viz.:

(A) Is there any power under the Statute to grant the renewal of the term of the Vice-Chancellor?

(B) By making a promise to renew the term, is not the Chancellor estopped from refusing to renew the term on the doctrine of promissory estoppel?

(C) In case, such a power exists, then at what point of time the power of renewal of the term could be exercised?

(D) Could the power of renewal be exercised by the Chancellor at the time of initial appointment of a person as Vice-Chancellor?

(E) Assuming that the power of renewal could be exercised only on the expiry of the first term, then has not such a power of renewal been exercised by the Chancellor by relaxing the relevant statutory provision in exercise of his powers of relaxation under Statute 26?

(F) Is the action of the Chancellor in not renewing term of the petitioner mala fide?

24. Before I deal with the points enumerated above, it may be observed that though lengthy arguments were advanced by the learned counsel for the parties, yet on thorough consideration of the entire matter, I find that the case is not that complicated and that the same can straightway be decided by making reference to Clauses (6) and (7) of Statute 4 and the doctrine of promissory estoppel.

25. So far as the first point is concerned, it may straightway be observed that Dr. Chitale, appearing for respondent No. 1, did not contest the competence of the Chancellor to grant renewal of the term. Even otherwise, a bare perusal of Clause (7) of Statute 4 shows that the Chancellor is invested with the power to grant renewal of the term. Thus in view of this specific provision, the Chancellor has the power to grant renewal of the term.

26. Point (B) relates to the applicability of the doctrine of promissory estoppel. Before I deal with that aspect, it would be appropriate to analyse the provisions of Clauses (6) and (7) of Statute 4 and notice some arguments of Dr. Chitale which he thought had some bearing on this point. A combined reading of the two clauses would show that the appointment of a Vice-Chancellor is to be made by the Chancellor ordinarily for a period of three years and on the terms and conditions to be laid down by him (the Chancellor), with a power to renew the term. These two clauses are independent and do not come in conflict with each other in any way. Clause (7) only standardises the tenure which otherwise

could have been unreasonably short or long at the whim of the Chancellor. Clause (6) mentions the name of the appointing authority who is given an absolute power to lay down the terms and conditions of appointment.

27. The words 'may renew' occurring in Clause (7) indicate existence of power of renewal. Under the scheme of the Act and the Statutes, the Chancellor plays a very important role. He is not merely a titular head. In the selection of the Vice-Chancellor, he is the sole judge and his opinion is final in all respects. In choosing a Vice-Chancellor, the main consideration to prevail upon the Chancellor is the interest of the University and if in a given case the services of a person cannot be procured without providing for him a longer period than the one prescribed in Clause (7), then the Chancellor under the Statute would certainly be entitled, if he so chooses, to stipulate and agree that the term of the appointee would be renewed.

28. By laying down a term that the term will be renewed, the Chancellor has done nothing more than making a promise to the appointee that on the expiry of the term of office, his term will be renewed. Such a promise, in the wake of the power available under the Statute, could validly be made even at the time of initial appointment. By giving an assurance, the Chancellor is not actually renewing the term at the time of initial appointment. He is only making a promise. The act of actual renewal has to be done only when a notification in that respect is issued, which may be issued a few months or a few days prior to the date of expiry of the term. It is only then that the actual renewal of the term would take place.

29. As is evident from the contention, the main emphasis laid by Dr. Chitale was on the theory that the executive cannot, by contract or order, fetter in advance the future exercise of the statutory discretion where the statute itself contemplates its exercise at the appropriate time in future. According to the learned counsel, the expression 'will be renewed' in the term has to be read as 'may be renewed' as the statute does not authorise the exercise of power of renewal at the time of initial appointment and the words 'will be renewed' would hardly be binding; otherwise the matter of discretion would be converted into a matter of compulsion.

30. Dr. Chitale had drawn our attention to the judgment of the Supreme Court in

State of Tamil Nadu v. Hind Stone etc., 1981 SCALE 237 : (AIR 1981 SC 711) for the proposition that before passing an order of renewal, the work of the incumbent and certain other factors have to be taken into consideration. The relevant passage on which reliance was placed is at page 250 (of SCALE) : (at p. 720 of AIR) of the report and reads as under :—

"The next question for consideration is whether Rule 8-C is attracted when applications for renewal of leases are dealt with. The argument was that Rule 9 itself laid down the criteria for grant of renewal of leases and therefore Rule 8-C should be confined, in its application, to grant of leases in the first instance. We are unable to see the force of the submission. Rule 9 makes it clear that a renewal is not to be obtained automatically, for the mere asking. The applicant for the renewal has, particularly, to satisfy the Government that the renewal is in the interests of mineral development and that the lease amount is reasonable in the circumstances of the case. These conditions have to be fulfilled in addition to whatever criteria is applicable at the time of the grant of lease in the first instance, suitably adapted, of course, to grant of renewal. Not to apply the criteria applicable in the first instance may lead to absurd results. If as a result of experience gained after watching the performance of private entrepreneurs in the mining of minor minerals it is decided to stop grant of leases in the private sector in the interest of conservation of the particular mineral resources, attainment of the object sought will be frustrated if renewal is to be granted to private entrepreneurs without regard to the changed outlook. In fact, some of the applicants for renewal of leases may themselves be the persons who are responsible for the changed outlook. To renew leases in favour of such persons would make the making of Rule 8-C a mere exercise in futility. It must be remembered that an application for the renewal of a lease is, in essence an application for the grant of a lease for a fresh period. We are, therefore, of the view that Rule 8-C is attracted in considering applications for renewal of leases also."

In my view, the aforesaid observations are clearly distinguishable and have no applicability to the facts of the case in hand as the same have been made keeping in view the particular rules, especially Rule 9, which talks of the procedure that was required to be followed before a lease could be renewed

and also mentions the time when an application for renewal was to be made.

31. In support of the contention that the executive cannot by contract or order fetter in advance the future exercise of statutory discretion where the statute itself contemplates its exercise in future, the learned counsel had relied on the following judgments and the text-books:—

Rederiaktiebolaget Amphitrite v. R., (1921) All ER Rep 542; *Antonia Buttigieg v. Stephen H. Cross*, AIR 1947 PC 29; *Ransom and Luck, Ltd. v. Surbiton Borough Council*, (1949) 1 All ER 185; *William Cory and Son, Ltd. v. City of London Corporation*, (1951) 2 All ER 85; *Hovell v. Falmouth Boat Construction Ltd.*, (1951) 2 All ER 278; *Commissioner of Crown Lands v. Page*, (1960) 2 All ER 726; *Southend-on-Sea Corporation v. Hodgson (Wickford) Ltd.*, (1961) 2 All ER 46; *Cudgen Ruile (No. 2) Pty. Ltd. v. Chalk*, (1974) 4 Aust Law Rep 438; *Anseti Transport Industries (Operations) Pty. Ltd. v. Commonwealth of Australia*, (1977) 17 Aust Law Rep 513; *Halsbury's Laws of England*, 5th ed. (1) Para 34, Page 36; *De Smith's Judicial Review of Administrative Action*, 4th ed. 317.

I do not propose to deal with these judgments individually as most of them have been considered and referred to in some of the judgments of the Supreme Court to which I would presently be adverting.

32. Moreover, I find that the aforesaid judgments are of no assistance to the learned counsel for respondent No 1 as the same have been produced to support an argument which is proceeding on an assumption that the Chancellor had exercised his power of renewal at a stage when the same was not exercisable under the Statute and this assumption, as indicated above, is without any foundation.

33. An argument had also been built that renewal is a fresh appointment and that there is no difference in grant and renewal. The learned counsel in support of his argument had relied on the judgment of the Supreme Court in *M. C. Chockalingam v. V. Manichavasagam*, AIR 1974 SC 104, wherein in para 17 of the report, it has been observed thus —

"We are also unable to accept the submission of Mr. Setalvad that the case of renewal of a licence of this type is different from that of a grant. Rule 13 finds place in Part 1-A of the Rules with the title 'General'. Under Section 5 (2) (a) of the Act, the licensing authority shall not grant

a licence unless it is satisfied that the rules made under this Act have been substantially complied with. We, therefore, do not find any justification in making a distinction between grant and renewal of a licence under the provisions of the Act read with the Rules. Rule 13 is, therefore, clearly applicable to grant as well as to renewal of a licence."

A bare perusal of the aforesaid observations clearly shows that it was in the light of the provisions of that Act and the Rules that no distinction was made between grant and renewal of licence. But in the present case the word 'renewed' keeping in view the context in which it has been used, would mean allowing the incumbent to continue in office for another term on the same terms and conditions and with all the benefits of continuity of service. If the word 'renewed' has to mean fresh appointment, then the appointee will lose all benefits of the continuity of service. But such is not the intention of the framers of the Statute. Reference in this connection may be made to an unreported judgment of this Court in *Dr. S. K. Dutta v. Chancellor, Kurukshetra University*, (C.W.P. No. 1685 of 1978) decided on May 22, 1978, wherein on the question of renewal it has been observed thus:—

"Clause 4 (vii) of the First Statute of the Kurukshetra University gives the Vice-Chancellor a term of office for three years which term may be 'renewed'. 'Renew' means in the dictionary sense 'make new' and also 'extend' or 'continue'. The Governor actually used the word 'extend' while acting under the clause. In this situation, we are of the opinion that the intention of the Governor was not to make a new appointment. This is also what the clause envisages because it talks of the renewal of the term and not of the 'appointment'. The petitioner is thus entitled to leave for the entire term (including that granted to him through extension) as calculated according to rules."

Another point that was sought to be raised by Dr. Chitale was that the words 'terms and conditions' used in Cl. (6) are different from the word 'term' occurring in Cl. (7), that so far as the term of office is concerned, the same has been provided for in Cl. (7) and that under Cl. (6), no terms and conditions could be laid by the Chancellor with regard to the term of office. In my view, this point again is not sustainable. By laying down the terms and conditions of appointment, the Chancellor has not overstepped his authority nor has he violated the provisions of Clause (7) which only pre-

scribe the tenure for which ordinarily an appointment can be made. The Chancellor, by stipulating the term, has only assured the petitioner that he would get the second term also and laying down of such a term is not in violation of any statutory provisions.

34. Having noticed the provisions of Cls. (6) and (7) and some of the points raised by Dr. Chitale, I now advert to the question of the applicability of doctrine of promissory estoppel on which lot of arguments were advanced on either side. The learned counsel for the parties traced the origin of the doctrine of promissory estoppel by referring to several judgments both of foreign Courts and the Supreme Court, but I do not propose to deal with all the cases individually as I find that sufficient guidance is available from some of the judgments of the Supreme Court to which I am going to make reference presently.

35. The celebrated judgment in which the doctrine of promissory estoppel finds its most eloquent exposition is in *Anglo-Afghan Agencies case* (AIR 1968 SC 718) wherein Shah J. speaking for the Court, observed at page 723 of the report thus:

"We are unable to accede to the contention that the executive necessity releases the Government from honouring its solemn promises relying on which citizens have acted to their detriment. Under our constitutional setup no person may be deprived of his right or liberty except in due course of and by authority of law: if a member of the executive seeks to deprive a citizen of his right or liberty otherwise than in exercise of power derived from the law — common or statute — the Courts will be competent to and indeed will be bound to, protect the rights of the aggrieved citizen."

36. The next case to which reference may be made is in *M. P. Sugar Mills v. State of U. P.*, AIR 1979 SC 621. In his judgment Bhagwati, J., on consideration of all the English judgments as well as the judgments of the Supreme Court with regard to the Promissory Estoppel, has observed thus (para 24):

"The law may, therefore, now be taken to be settled as a result of this decision, that where the Government makes a promise knowing or intending that it would be acted on by the promisee, and in fact the promisee acting in reliance on it, alters his position, the Govt. would be held bound by the promise and the promise would be enforceable against the Govt. at the instance of the promisee, notwithstanding that there is no

consideration for the promise and the promise is not recorded in the form of a formal contract as required by Article 299 of the Constitution. It is elementary that in a republic governed by the rule of law, no one, howsoever high or low, is above the law. Everyone is subject to the law as fully and completely as any other and the Govt. is no exception. It is indeed the pride of constitutional democracy and rule of law that the Government stands on the same footing as a private individual so far as the obligation of the law is concerned: the former is equally bound as the latter. It is indeed difficult to see on what principle can a Government, committed to the rule of law, claim immunity from the doctrine of promissory estoppel? Can the Govt. say that it is under no obligation to act in a manner that is fair and just or that it is not bound by considerations of "honesty and good faith"? Why should the Govt. not be held to a high "standard of rectangular rectitude while dealing with its citizens"? There was a time when the doctrine of executive necessity was regarded as sufficient justification for the Govt. to repudiate even its contractual obligations, but let it be said to the eternal glory of this Court, this doctrine was emphatically negatived in the *Anglo-Afghan Agencies case* (AIR 1968 SC 718) and the supremacy of the rule of law was established. It was laid down by this Court that the Government cannot claim to be immune from the applicability of the rule of promissory estoppel and repudiate a promise made by it on the ground that such promise may fetter its future executive action. If the Government does not want its freedom of executive action to be hampered or restricted, the Government need not make a promise knowing or intending that it would be acted on by the promisee and the promisee would alter his position relying upon it. But if the Government makes such a promise and the promisee acts in reliance upon it and alters his position, there is no reason why the Government should not be compelled to make good such promise like any other private individual. The law cannot acquire legitimacy and gain social acceptance unless it accords with the moral values of the society and the constant endeavour of the Courts and the legislatures must, therefore, be to close the gap between law and morality and bring about as near an approximation between the two as possible. The doctrine of promissory estoppel is a significant judicial contribution in that direction. But it is necessary to point out

that since the doctrine of promissory estoppel is an equitable doctrine, it must yield when the equity so requires. If it can be shown by the Government that having regard to the facts as they have subsequently transpired, it would be inequitable to hold the Government to the promise made by it, the Court would not raise an equity in favour of the promisee and enforce the promise against the Government. The doctrine of promissory estoppel would be displaced in such a case because, on the facts, equity would not require that the Government should be held bound by the promise made by it. When the Government is able to show that in view of the facts which have transpired since the making of the promise, public interest would be prejudiced if the Government were required to carry out the promise, the Court would have to balance the public interest in the Government carrying out a promise made to a citizen which has induced the citizen to act upon it and alter his position and the public interest likely to suffer if the promise were required to be carried out by the Government and determine which way the equity lies. It would not be enough for the Government just to say that public interest requires that the Government should not be compelled to carry out the promise or that the public interest would suffer if the Government were required to honour it. The Government cannot, as Shah, J., pointed out in the Anglo-Afghan Agencies case (AIR 1968 SC 718), claim to be exempt from the liability to carry out the promise "on some indefinite and undisclosed ground of necessity or expediency", nor can the Government claim to be the sole judge of its liability and repudiate it "on an ex parte appraisal of the circumstances". If the Government wants to resist the liability, it will have to disclose to the Court what are the subsequent events on account of which the Government claims to be exempt from the liability and it would be for the Court to decide whether those events are such as to render it inequitable to enforce the liability against the Government. Mere claim of change of policy would not be sufficient to exonerate the Government from the liability; the Government would have to show what precisely is the changed policy and also its reason and justification so that Court can judge for itself which way the public interest lies and what the equity of the case demands. It is only if the Court is satisfied, on proper and adequate material placed by the Government, that overriding public interest requires

that the Government should not be held bound by the promise but should be free to act unfettered by it, that the Court would refuse to enforce the promise against the Government. The Court would not act on the mere ipse dixit of the Government, for it is the Court which has to decide and not the Government whether the Government should be held exempt from liability. This is the essence of the rule of law. The burden would be upon the Government to show that the public interest in the Government acting otherwise than in accordance with the promise is so overwhelming that it would be inequitable to hold the Government bound by the promise and the Court would insist on a highly rigorous standard of proof in the discharge of this burden. But even where there is no such overriding public interest, it may still be competent to the Government to resile from the promise "on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position" provided of course, it is possible for the promisee to restore status quo ante. If, however, the promisee cannot resume his position, the promise could become final and irrevocable. Vide *Ajayi v. Briscoe*, (1964) 3 All ER 556 (PC)."

37. The last case to which reference may be made is in *Jit Ram Shiv Kumar v. State of Haryana*, AIR 1980 SC 1285, wherein on consideration of the entire case law, the scope of the plea of doctrine of promissory estoppel against the Government was summed up as follows (at p. 1302):—

"(1) The plea of promissory estoppel is not available against the exercise of the legislative functions of the State.

(2) The doctrine cannot be invoked for preventing the Government from discharging its functions under the law.

(3) When the officer of the Government acts outside the scope of his authority, the plea of promissory estoppel is not available. The doctrine of ultra vires will come into operation and the Government cannot be held bound by the unauthorised acts of its officers.

(4) When the officer acts within the scope of his authority under a scheme and enters into an agreement and makes a representation and a person acting on that representation puts himself in a disadvantageous position, the Court is entitled to require the officer to act according to the scheme and the agreement or representation. The officer cannot arbitrarily act on his mere whim and

ignore his promise on some undefined and undisclosed grounds of necessity or change the conditions to the prejudice of the person who had acted upon such representation and put himself in a disadvantageous position.

(5) The officer would be justified in changing the terms of the agreement to the prejudice of the other party on special considerations such as difficult foreign exchange position or other matters which have a bearing on general interest of the State."

38. Keeping in view the law enunciated by the Supreme Court, I would now proceed to deal with the facts of the case in hand. On 27th Oct., 1977, the Chancellor in exercise of his power under clause (6) laid down a term that the 'term of the petitioner will be renewed'. The wording of the term and use of the word 'will' clearly indicate that the Chancellor definitely wanted to bind himself by exercising the statutory power of renewal available to him. By incorporating this term the Chancellor made a promise and gave an assurance in unequivocal terms that the term of the petitioner will be renewed. It is evident from letter dated 26th Oct., 1977, that the then Chancellor treated the case of the petitioner as an exceptional one because of his (petitioner's) being an eminent educationalist and capable administrator and in order to procure his services, a promise was made for the grant of a second term. It is not that the Chancellor had no power to stipulate such a term as this term owes its legal efficacy to clauses (6) and (7) which confer a power on the Chancellor to renew a term and also invest him with unfettered power to lay down terms and conditions on which the appointment is to be made. The terms and conditions laid by the Chancellor have become conditions of service of the petitioner, which are enforceable in the Court of law. The petitioner through this petition is praying for the enforcement of his legal right which is flowing from a term laid down under the statutory power. The theory of fettering in advance the future exercise of statutory discretion would apply where a functionary of Government by an act not permissible in law, tries to bind the Government. While considering the plea of promissory estoppel, which plea is available against respondent No. 1 only, the Government is not concerned at all. The Government is only concerned with the validity of the Ordinance and the Act, which is entirely a separate and independent issue. That is why, on this issue no arguments were advanced by the learned

Advocate-General, and the matter was left to be dealt with entirely by Dr. Chitale, learned counsel for respondent No. 1.

39. The question as to the applicability of the doctrine of promissory estoppel against the legislative or executive acts of the Government does not strictly arise in this case as estoppel is not being pleaded against any legislative or executive act of the Government or its functionaries. It is being pleaded against an authority which has its own independent existence under the Statute, the authority which performs its functions and acts under the provisions of the Act and the Statute without any interference from any other authority. The assurance/promise was given by the then Chancellor on which the petitioner acted and changed his position. As observed earlier, the Chancellor did not act outside the scope of his authority and that being so, the doctrine of promissory estoppel would apply with full rigour and force in the instant case. As is evident from the argument of Dr. Chitale the only ground on which the issue is being contested on behalf of respondent No. 1 is that the Chancellor had no power to grant renewal at the time of initial appointment. It is not the case of the Chancellor that although promise was made by the then Chancellor, but the petitioner had disintitiled himself in equity to get renewal because of valid and sound reasons which did not permit his continuance for another term in the interest of the University. The Court would always decline a relief in equity if circumstances are shown that the continuance of a person as Vice-Chancellor would not be in the interest of the University. The Chancellor is not powerless and has ample power to protect the interest of the University. Even during the tenure of office or after the grant of renewal, the Chancellor can always remove a Vice-Chancellor for his misconduct. See in this connection the judgment of the Supreme Court in *Dr. Bool Chand v. Chancellor, Kurukshetra University*, AIR 1968 SC 292, where it has been observed thus (paras 11, 21):—

"The power to appoint a Vice-Chancellor has its source in the University Act: investment of that power carries with it the power to determine the employment; but the power is coupled with duty. The power may not be exercised arbitrarily; it can be only exercised for good cause, i.e. in the interests of the University and only when it is found after due enquiry held in manner consistent with the rules of natural justice, that the

holder of the office is unfit to continue as Vice-Chancellor."

xx xx xx xx
xx xx xx xx

"The University Act, the Statutes and the Ordinances do not lay down the conditions in which the appointment of the Vice-Chancellor may be determined; nor does the Act prescribe any limitations upon the exercise of the power of the Chancellor to determine the employment. But once the appointment is made in pursuance of a Statute, though the appointing authority is not precluded from determining the employment, the decision of the appointing authority to terminate the appointment may be based only upon the result of an enquiry held in a manner consistent with the basic concept of justice and fairplay."

xx xx xx xx
xx xx xx xx

"In the very scheme of our educational set up at the University level, the post of Vice-Chancellor is of very great importance, and if the Chancellor was of the view after making due enquiry that a person of the antecedents of the appellant was unfit to continue as Vice-Chancellor, it would be impossible, unless the plea that the Chancellor acted maliciously or for a collateral purpose is made out, for the High Court to declare that order ineffective."

40. Thus, when the facts of the case are viewed in the light of the observations of the Supreme Court in general and the fourth principle enunciated in Jit Ram's case (AIR 1980 SC 1285) in particular, it is quite evident that the Chancellor had acted within the scope of his authority in laying down the term that the term of the petitioner will be renewed and that the petitioner had acted on that promise/assurance and had changed his position. In the instant case, estoppel will have to be sustained even if the same may be based on an assurance to the future because the promisor intended to be legally bound and intended his promise to be acted upon; with the result that it was so acted upon. It was a real promise — promise intended to be binding, intended to be acted upon and in fact acted upon.

41. It was also sought to be argued by Dr. Chitale that in the instant case, even if all the averments made in the petition are accepted, then also the petitioner has not raised a question of estoppel at all; that the petitioner has tried to raise the issue of promissory estoppel in his pleadings, but from the correspondence which was exchanged

between the petitioner and the Chancellor, no inference can be drawn that any promise was given by the Chancellor to the petitioner on the basis of which he changed his position to his detriment. Making pointed reference to letter dated 25th of Oct., 1977 (Annexure P4) the learned counsel submitted that only an offer was made to the petitioner to take up the Vice-Chancellorship of one of the two Universities, Kurukshetra or Rohtak and further a suggestion was made that though it may not be a legal bar, yet it would seem proper if the petitioner could resign the seat in the Assembly. Adverting to the reply of the petitioner, dated 26th of Oct., 1977, the learned counsel submitted that on his own assumption only a suggestion had come from the petitioner that he would get six years as three years' period as mentioned in the charter, would be too brief for anybody to build up the institution and the other factor mentioned in the letter by the petitioner was that he should be allowed to work without interference from the Government Secretariat.

42. The learned counsel further elaborated the point by contending that the petitioner resigned the seat not because he was to get a six years' period but as he wished to devote his whole time in building up the University and that the six years' offer was never made by the Chancellor nor was the suggestion of the petitioner in this respect accepted by him (Chancellor). The learned counsel also drew our attention to letter (Annexure P/6) addressed to the Chancellor wherein the petitioner had written that if he (petitioner) was no longer wanted in the University, then he might be paid his emoluments for the remainder of his six years' term and be relieved. From this letter, the learned counsel wished to emphasise that the petitioner was more keen to get money than to get the renewal of his term. Reference was also made to letters dated 5th Sept., 1980 (Annexure P/38, page 197), dated 13th Sept., 1980 (Annexure P/42, page 215), dated 21st Sept., 1980 (Annexure P/36, page 186), dated 24th Sept., 1980 (Annexure P/43, page 216), dated 4th Oct., 1980 (Annexure P/45, page 219), dated 7th Oct., 1980 (Annexure P/26, page 153) and dated 8th Oct., 1980 (Annexure P/40, page 212) respectively, to show that in none of these letters there was any indication that the petitioner had resigned his seat in the Legislative Assembly because he was to get two terms or six years' tenure as Vice-Chancellor and that a promise/assurance had been given by the Chancellor in that respect.

43. The learned counsel, on the question that by resigning the seat from the Legislative Assembly, no prejudice had been caused to the petitioner, drew our attention to the affidavit filed on behalf of the Chancellor wherein material allegations made in the petition and which have been reproduced in the earlier part of the judgment with regard to the promissory estoppel have been denied. The learned counsel had also submitted that as an M. L. A., the petitioner would have only drawn an amount of Rs. 78,000/- as emoluments while as a Vice-Chancellor for a period of three years, he had already drawn an amount of Rupees 1,59,000/- (approximately) as salary. This amount he had drawn in addition to the T. A. and leave encashment benefits.

44. On the other hand, it was submitted by Mr. Rao that all the ingredients of the doctrine of promissory estoppel had been pleaded in the petition; that a promise was made by the Chancellor to the petitioner that his term will be renewed by stipulating such a term in the terms and conditions which were laid down in exercise of the statutory power and that the petitioner acted upon that promise and thereby altered his position; that the petitioner's terms and conditions were laid on 27th of Oct., 1977 and were conveyed the same day to him; that the petitioner had submitted his resignation on the basis of that promise and thereby altered his position to his detriment; that by going back on the promise, the petitioner who resigned his seat from the Legislative Assembly to which he had been elected as an independent candidate, has been prejudicially affected as he no longer remains a Vice-Chancellor and has also lost his hold in politics.

45. After giving our thoughtful consideration to the entire matter, we find no merit in the contention of the learned counsel for the respondent. In order to determine if the doctrine of promissory estoppel is attracted to the facts of this case or not, the pleadings, the documents and other factors have to be considered not in isolation but their effect has to be seen cumulatively. When the whole case is viewed in its totality, then the only possible conclusion that can be drawn is that the petitioner was given an assurance by the then Chancellor that his term will be renewed and that it was on the basis of that assurance that the petitioner thought of accepting the Vice-Chancellorship of the University and resigning his seat from the Legislative Assembly.

The petitioner, besides being an able educationalist, has been a shrewd and seasoned politician. If he had not been given the assurance or promise that he would get two terms as Vice-Chancellor, then he would not have resigned his seat from the Legislative Assembly. The assumption of the petitioner that he would get six years' tenure is not unfounded as foundation for such an assumption is available from the terms and conditions. It would be pertinent to observe that in the return filed by respondent No. 1, it has not been specifically denied that no assurance was given by the then Chancellor to the petitioner; rather the whole case is based on the main legal argument that such a term could not be incorporated nor could the then Chancellor fetter his discretion at the time of the initial appointment which was exercisable in future. The petitioner in his pleadings, the relevant portion of which has been reproduced in the earlier part of the judgment, has clearly laid foundation for the applicability of doctrine of promissory estoppel and those pleas find full support from the term that the 'term will be renewed' and the subsequent correspondence which transpired between the petitioner and the Chancellor, wherein the petitioner had been requesting the Chancellor to renew the term on the basis of that term. There cannot be any gainsaying that the petitioner did act on the assurance and alter his position and that by itself would be sufficient to attract the doctrine of promissory estoppel as has been held by their Lordships of the Supreme Court in an unreported decision in *Bhim Singh v. State of Haryana*, C. A. No. 1949 of 1979 (since reported in AIR 1980 SC 768), wherein it is observed thus:—

"By virtue of Ext. P.1, the State (respondent) held out certain specific promises as an inducement for the appellants to move into a new Department (Agriculture Department). After they had gone over to the Agriculture Department, the State, by virtue of its Ext. P.3, sought to go back upon the earlier promise made in Ext. P.1. The appellants having believed the representation made by the State and having further acted thereon cannot now be defeated of their hopes which have crystallised into rights, thanks to the application of the doctrine of promissory estoppel. Therefore, it is not open to the State, according to the law laid down by this Court, to backtrack. We, therefore, direct the State to implement Ext. P.1 and confer such rights and benefits as are promised thereunder in entirety."

Moreover, to say that it was not to the prejudice of the petitioner to have changed his position, is again not correct. To the petitioner who has been a seasoned politician, causing of prejudice has to be presumed as by accepting the job of Vice-Chancellor he had to forgo his political career. It was rightly contended by Mr. Rao that the petitioner has lost all contacts in his constituency and it may not now be possible for him to re-establish his political career, that the prejudice caused to the petitioner cannot be judged from this fact alone that he got more emoluments as Vice-Chancellor than what he would have got as an M. L. A. and that on the facts proved the only inference that could be drawn was that on the basis of the promise/assurance the petitioner changed his position to his detriment. In this view of the matter, I have no hesitation in holding that the petitioner has factually made out a case for the applicability of doctrine of promissory estoppel and no ingredients are wanting in that respect.

46. In the view I have taken on points (A) and (B), it is not necessary to record any finding on points (C), (D) and (E):

47. This brings me to the contention of Mr. Rao on point (F), that non-grant of renewal is as a result of the bias of the Chancellor, respondent No. 1, against the petitioner and that the act of respondent No. 1 in not renewing the term suffers from the vice of mala fide. What was submitted by Mr. Rao was that Shri G. D. Tapase assumed charge of the office of Governor of Haryana on 28th Feb., 1980; that the Chancellor immediately thereafter had started interfering in the affairs of the University and wished to project that he should have more powers and in that respect had sent certain suggestions, a copy of which has been attached as Annexure P.22 with the petition; that in order to show his superiority respondent No. 1 had once told the petitioner as to how he had suspended Dr. Hajela, the Vice-Chancellor of Alahabad University; that the petitioner was never allowed any opportunity to meet the Chancellor in private; that the Chancellor differed with the petitioner on the question of reservation of seats/posts for members of Scheduled Castes/Scheduled Tribes; that the Chancellor wished to nominate one Shri P. S. Azad to the Court which was not liked by the petitioner, who wrote a D.O. letter to the Chancellor dated 19th Aug., 1980 (Annexure P.29), that again the petitioner registered his protest with regard to the nomination of certain

M. L. A.s by the Chancellor on the University Bodies; that the petitioner wrote a D.O. letter dated 9th Sept., 1980 (Annexure P.35) again registering his protest about the statement made by the Chancellor to the press, to the effect that the report of Dulat Commission had been received and was under process; that the Chancellor, who belongs to Scheduled Caste and is a Maharashtrian, wanted one Mr. Patil from that State to be admitted into the Medical College as the latter was also a Scheduled Caste, but the petitioner could not oblige the Chancellor; that similarly there was a tussle between the petitioner and the Chancellor on the question of admission of one Rajinder Samohtra, son of Gian Chand, an I. A. S. Officer, for admission to M. D. Course and that the petitioner again could not oblige Bharat Tapase son of respondent No. 1, in giving admission to one Anurag Srivastava to M. B. A. Course.

48. It was on the basis of the aforesaid facts that the petitioner claims that the action of the Chancellor in not renewing the term suffers from the vice of mala fide. I am afraid, I am unable to agree with this contention of the learned counsel for the petitioner. The Chancellor in his affidavit has denied all the allegations. There can be no gainsaying that the Chancellor has certainly a right being the Head of the Institution, to send his suggestions. It appears that the petitioner feels that except him, no other officer in the University should have a say in the administration or should make any valuable suggestions. The pleas on which the petitioner depends for proving his allegation of mala fide not only remain unsubstantiated but are flimsy. The Chancellor has a right to nominate persons to the Court. It is not necessary for him to consult the Vice-Chancellor. The Chancellor can always have bona fide difference of opinion with the Vice-Chancellor. The Chancellor can even make recommendations to the Vice-Chancellor regarding the admission of certain students in the University. Regarding the making of the statement to press on Dulat Commission report, the petitioner is forgetting that Shri G. D. Tapase must have made that statement as Governor and not as Chancellor. The Chancellor is not under the authority of the Vice-Chancellor: rather the acts of the Vice-Chancellor can always be scrutinised by the Chancellor whether the same are within the four corners of the Act, the Statute and the Ordinance or not. The Vice-Chancellor cannot dictate the Chancellor as to how has he to conduct himself

regarding the affairs of the University. In this view of the matter, I find no merit in the plea of the petitioner that the Chancellor did not renew his term as he had bias against him and hold that the allegations of malafide are baseless and have not been substantiated.

49. This brings me to the challenge made against the validity of Maharshi Dayanand University (Amendment) Ordinance, 1980 (An Ordinance to amend the Act) which was promulgated by the Governor of Haryana in exercise of his powers under Cl. (1) of Art. 213 of the Constitution of India on 1st of Nov., 1980, and of the Amendment Act by which after S. 9 of the Act, the following section was inserted:—

“9-A. Maximum age of Vice-Chancellor and Pro-Vice-Chancellor :

Notwithstanding anything to the contrary contained in any law, contract or the Statutes, no person shall be appointed to or continue in the office of the Vice-Chancellor or Pro-Vice-Chancellor, as the case may be, if he has attained the age of 65 years.”

The Ordinance was to come into force at once. Thereafter on 23rd Dec., 1980, the Maharshi Dayanand University (Amendment) Act, 1980 (An Act to amend the 1975 Act) was enacted resulting into the repealing of the aforesaid Ordinance. Section 9-A in the Amendment Act, which has been inserted after Sec. 9 of the Act, is exactly in the identical language as that of the Ordinance. In the Amendment Act, there is no date on which it was to come into force. Hence, in view of S. 3 (b) of the General Clauses Act, the Amendment Act would be deemed to have come into force on the date when it was published in the Official Gazette i.e. 26th Dec., 1980.

50. Before I advert to the contentions raised regarding the validity of the Ordinance and the Act, an argument of Mr. Rao may be noticed that the provisions of Section 9-A of the Amendment Act are to apply only to the persons who were appointed as Vice-Chancellors after the promulgation of the Ordinance. The learned counsel referred to the averment made in the written statement filed on behalf of respondent No. 3 wherein, in reply to the plea taken in paragraph 30 (G) of the petition, it has been stated thus:—

“It is evident from the above recommendations of the Committee that the retirement age of the Vice-Chancellor should be fixed at 65 years. Since comprehensive amendment of the Maharshi Dayanand University

Act was to take time and a vacancy in the office of the Vice-Chancellor, Maharshi Dayanand University, Rohtak, has arisen on 27th of Oct., 1980 and another vacancy of Vice-Chancellor in the Kurukshetra University, Kurukshetra, was to arise on 5th of April, 1981, therefore, it was thought expedient by the Government to decide the point relating to the fixation of maximum age of the Vice-Chancellor”

On the basis of the aforesaid averment, the learned counsel submitted that a vacancy had already existed in the University, that that vacancy was likely to be filled and that Section 9-A was to cover the appointment of a person, which was to be made in that vacancy which had already come into existence, i.e., on 27th of Oct., 1980 on the expiry of the term of the petitioner. The learned counsel analysed the language of Section 9-A and submitted that the words “has attained the age”, would apply to a person who was appointed after the promulgation of the Ordinance and who would attain the age during the tenure of his office. According to the learned counsel, the petitioner when he was appointed as Vice-Chancellor, was already 67 years of age and that if the provisions of S. 9-A were to be made applicable to him, then instead of the words “has attained”, the words “had attained” would have been used. It was further contended by the learned counsel that the words “continue in” again, would apply to fresh appointment because a vacancy had already existed and that when an appointment would be made in that vacancy, then the appointee, under the provisions of Section 9-A of the Act would not be entitled to continue in the office if he, during his tenure, for which he was appointed, attains the age of 65 years. Great emphasis was laid on the fact that a firm stand has been taken on behalf of respondents Nos. 2 and 3 that a vacancy had come into being on 27th of Oct., 1980 when the petitioner had relinquished the charge of his office and if the Ordinance was issued knowing that a vacancy existed, then the only possible construction that could be put on the provisions of S. 9-A would be that it was to apply to an incumbent who was to be appointed after the coming into force of the Ordinance.

51. After giving my thoughtful consideration to the entire matter, I find no merit in the contention of the learned counsel. Plain analysis of the section, without non obstante clause, would show that no person shall be appointed to or continue in the

office of the Vice-Chancellor or Pro-Vice-Chancellor if he has attained the age of 65 years. So far as the appointment of a person to the office, who has attained the age of 65 years is concerned, there is no problem because the section is very clear. The question that needs determination is as to what meaning should be given to the words "continue in". If these words have to be interpreted merely on the basis of the averment made in the written statement and reproduced above, then there might be some merit in the contention of the learned counsel for the petitioner, but for the correct interpretation that has to be put on the words 'continue in' and 'has attained', a fact which is patent on the record, has to be kept in mind that is, that the petitioner had filed this petition in the Court claiming a relief that a direction be given to respondent No. 1 to issue a notification renewing the term and in case this relief is granted by the Court, then on the date on which the Ordinance was promulgated, the petitioner would be deemed to be in office. Though a positive stand has been taken by the State about the existence of the vacancy, yet the Court cannot be oblivious of the fact that the purpose of the issuance of notification was also to meet a situation if the same arose in the event of the success of the petition. If the language of the section without non obstante clause and treating the petitioner to be in office on the date of promulgation of the Ordinance is analysed, then the words 'continue in' have necessarily to apply to the person who happens to be in office and not only to the appointments to be made after the promulgation of the Ordinance. There can hardly be any doubt that the Ordinance was issued to cover the case of the petitioner also; otherwise the non obstante clause is not only superfluous but meaningless too. The non obstante clause has been introduced in order to overcome the term which has been prescribed by the Chancellor in the terms and conditions by which it has been stipulated that the term of the petitioner will be renewed.

52. Mr. Rao, learned counsel for the petitioner, was right in contending that the words "continue in" would apply to a person who is in office on the date of promulgation of the Ordinance and as earlier observed, if the petition succeeds, then the petitioner would be continuing in office on the date when the Ordinance was promulgated.

53. The whole case of the learned counsel proceeds on the assumption that there is

a vacancy in existence on the date when the Ordinance was promulgated, but as earlier observed the factum of the pendency of this petition has also to be kept in mind. The matter may further be elucidated by taking this example: Suppose, after the 27th of Oct., 1980 and before the promulgation of the Ordinance, a person had been appointed as Vice-Chancellor at the age of 64 1/2 years for a term of three years. could it be said in such a case that the provisions of the section would not apply to such an appointee? Obviously, the answer has to be in the negative because a person is continuing in office on the date of promulgation of the Ordinance. Similarly, in the event of the success of this petition, the petitioner would be continuing in office on the date of promulgation of the Ordinance. Thus, viewed from any angle, I find no merit in the contention of the learned counsel that the provisions of S. 9-A are not to apply to the petitioner and have to be made applicable to any appointment made after the promulgation of the Ordinance.

54. I would now deal with the contention raised by Mr. Rao regarding the validity of the Act and the Ordinance, which is founded on Art. 14 of the Constitution.

55. The scope and effect of Art. 14 as it protects all persons against discriminatory and hostile legislation have been discussed and explained by the Supreme Court in a series of cases. Among the important judgments of the Supreme Court relating to the doctrine of equality before law which have been treated as leading authorities, must be mentioned the following:—

Budhan Choudhry v. State of Bihar, AIR 1955 SC 191; Ram Krishna Dalmia v. Justice S. R. Tendolkar, AIR 1958 SC 538.

In Budhan Choudhry's case, the Supreme Court summed up the law as follows (at p. 193):—

"It is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and, (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases; namely, geographical, or according to objects

or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that Art. 14 condemns discrimination not only by a substantive law but also by a law of procedure."

In *Ram Krishna Dalmia's case* (AIR 1958 SC 538) (supra), the Supreme Court after quoting the above passage, proceeded to observe as follows (paras 11, 12):—

"The principle enunciated above has been consistently adopted and applied in subsequent cases. The decisions of this Court further establish—

(a) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;

(b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;

(c) that it must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;

(d) that the Legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;

(e) that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and

(f) that while good faith and knowledge of the existing conditions on the part of a Legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.

The above principles will have to be constantly borne in mind by the Court when it is called upon to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of the laws.

(12) A close perusal of the decisions of this Court in which the above principles have been enunciated and applied by this Court will also show that a statute which may come up for consideration on a question of its validity under Art. 14 of the Constitution may be placed in one or other of the following five classes:—

(i) A statute may itself indicate the persons or things to whom its provisions are intended to apply and the basis of the classification of such persons or things may appear on the face of the statute or may be gathered from the surrounding circumstances known to or brought to the notice of the Court. In determining the validity or otherwise of such a statute the Court has to examine whether such classification is or can be reasonably regarded as based upon some differentia which distinguishes such persons or things grouped together from those left out of the group and whether such differentia has a reasonable relation to the object sought to be achieved by the statute, no matter whether the provisions of the statute are intended to apply only to a particular person or thing or only to a certain class of persons or things. Where the Court finds that the classification satisfies the tests, the Court will uphold the validity of the law, as it did in *Charanjitlal v. Union of India* (B) (AIR 1951 SC 41) (supra); *State of Bombay v. F. N. Balsara* (C) (AIR 1951 SC 318) (supra); *Kedar Nath Bajoria v. State of West Bengal*, 1954 SCR 30: (AIR 1953 SC 404) (I); *V. M. Syed Mohammad & Co. v. State of Andhra*, 1954 SCR 1117: (AIR 1954 SC 314) (J) and *Budhan Choudhry v. State of Bihar* (A) (AIR 1955 SC 191) (supra).

(ii) A statute may direct its provisions against one individual person or thing or to several individual persons or things but no reasonable basis of classification may appear on the face of it or be deducible from the surrounding circumstances, or matters of common knowledge. In such a case the Court will strike down the law as an instance of naked discrimination, as it did in *Ameerunnissa Begum v. Mahboob Begum*, 1953 SCR 404: (AIR 1953 SC 91) (K) and *Ramprasad Narayan Sahi v. State of Bihar*, 1953 SCR 1129: (AIR 1953 SC 215) (L).

(iii) A statute may not make any classification of the persons or things for the purpose of applying its provisions but may leave it to the discretion of the Government to select and classify persons or things to whom its provisions are to apply. In determining the question of the validity or otherwise of such a statute the Court will not strike down the law out of hand only because no classification appears on its face or because a discretion is given to the Government to make the selection or classification but will go on to examine and ascertain if the statute has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of the selection or classification. After such scrutiny the Court will strike down the statute if it does not lay down any principle or policy for guiding the exercise of discretion by the Government in the matter of selection or classification, on the ground that the statute provides for the delegation of arbitrary and uncontrolled power to the Government so as to enable it to discriminate between persons or things similarly situate and that, therefore, the discrimination is inherent in the statute itself. In such a case the Court will strike down both the law as well as the executive action taken under such law, as it did in *State of West Bengal v. Anwar Ali Sarkar* (D) (AIR 1952 SC 75) (supra); *Dwarka Prasad v. State of Uttar Pradesh*, 1954 SCR 803: (AIR 1954 SC 224) (M) and *Dhirendra Kumar Mandal v. Superintendent and Remembrancer of Legal Affairs*, (1955) 1 SCR 224: (AIR 1954 SC 424) (N).

(iv) A statute may not make a classification of the persons or things for the purpose of applying its provisions and may leave it to the discretion of the Government to select and classify the persons or things to whom its provisions are to apply but may at the same time lay down a policy or principle for the guidance of the exercise of discretion by the Government in the matter of such selection or classification; the Court will uphold the law as constitutional, as it did in *Kathi Raning Rawat v. The State of Saurashtra* (E) (AIR 1952 SC 123) (supra).

(v) A statute may not make a classification of the persons or things to whom their provisions are intended to apply and leave it to the discretion of the Government to select or classify the persons or things for applying those provisions according to the policy or the principle laid down by the statute itself for guidance of the exercise of

discretion by the Government in the matter of such selection or classification. If the Government in making the selection or classification does not proceed on or follow such policy or principle, it has been held by this Court, e.g. in *Kathi Raning Rawat v. The State of Saurashtra* (E) (supra) that in such a case the executive action but not the statute should be condemned as unconstitutional."

56. We have, therefore, to approach the problem posed before us bearing in mind the above principles laid down by the Supreme Court insofar as they may be applicable to the facts of the present case.

57. It was contended by Mr. Rao, learned counsel, that the petitioner had acquired a vested right to hold the office of the Vice-Chancellor for a period of three years more, on the basis of the promise/assurance given by the Chancellor to renew his term, that such a right could not be taken away during the currency of the period by any legislative enactment, that the provisions of S. 9-A so far as they provide that no person shall continue in office who has attained the age of 65 years, are primarily and only aimed at the petitioner as on the date when the legislation was brought, by virtue of the term in the terms and conditions laid down by the Chancellor, the petitioner was to continue as Vice-Chancellor for another term of three years, that the petitioner, if at all, could be removed from his office by the Chancellor in the terms of law laid down in *Bool Chand's case* (AIR 1968 SC 292), but now in view of the provisions of Section 9-A, on the date of the promulgation of the Ordinance or on the date when the Act was published and came into force, the petitioner would be deemed to have been removed from the office of the Vice-Chancellor, that the only object of the legislation was to ease out the petitioner and that there is no nexus or connection between the basis of the classification and the object of the legislation. It was further vehemently contended by the learned counsel that though it was open to the Legislature in an appropriate case to make certain provisions applicable to only one individual or a group of individuals, yet the classification that is effected by the Statute has to be a classification founded on intelligible differentia and that differentia must have a rational relation to the object sought to be achieved by the Statutes. Applying the test laid down by the Supreme Court, the learned counsel urged that the impugned legislation must be

considered to be violative of Art. 14 of the Constitution.

58. On the other hand, it was submitted by the learned Advocate-General that the fixing of the age by enacting S. 9-A is not arbitrary as the same has been fixed keeping in view the reports of the eminent persons and also the report of the Sub-Committee of which the petitioner was the Chairman, that the legislation is not aimed at the petitioner, but has been made with regard to the office of the Vice-Chancellor, that the legislation does not make any distinction between the sitting Vice-Chancellor and the Vice-Chancellor to be appointed after the enactment and that the legislation has not been aimed at particularly against the petitioner though incidentally it has affected him adversely.

59. Dr. Chitale supported the stand taken by the learned Advocate-General and buttressed his argument by contending that the legislation applies universally to everyone who was and is to occupy the office, that the stand of the petitioner is not only untenable but unreasonable also as what he wishes the Legislature to do, is to carve out an exception for him and make special enactment which could facilitate him to continue in the said office, that if the plea of the petitioner is accepted, then at no point of time would the Legislature be able to make a law as it would invariably affect a person in office, that no vested right has accrued to the petitioner in the instant case, that fixation of age limit resulting in reduction of period of tenure is not a punishment, nor does it constitute removal and that the Act is a valid piece of legislation and has been enacted with a view to achieve a laudable object for which repeatedly emphasis has been laid by various Committees.

60. I now proceed to consider as to whether the petitioner has been able to establish that the words 'continue in if he has attained the age of 65 years' in Section 9-A so far as they are made applicable to him are discriminatory and, as such, violative of Article 14 of the Constitution.

61. The petitioner was appointed Vice-Chancellor on 27th Oct., 1977, for a period of three years, which tenure was to be renewed for another term of three years. In the earlier part of the judgment I have already held that the petitioner is entitled to the renewal of the term on the basis of the promise made and assurance given by the then Chancellor and on account of that finding the petitioner is entitled to continue

and would be deemed to have continued as Vice-Chancellor with effect from 27th Oct., 1980, for another period of three years. Normally, the petitioner would be entitled to continue in that post for the full term which will expire only at the end of Oct., 1983. Now this term has been abruptly cut short by issuing the impugned Ordinance on 1st Nov., 1980, by which after Sec. 9, Section 9-A has been introduced, which puts a bar on a person to continue as Vice-Chancellor who has attained the age of 65 years. This Ordinance was later on replaced by the Amendment Act on 26th Dec., 1980.

62. The Statement of Objects and Reasons, which necessitated the insertion of Sec. 9-A, as given in the Bill, which was introduced in the Vidhan Sabha for amending the Act, reads as under:—

"The Act and Statutes of Maharshi Dayanand University, Rohtak did not provide any retirement age for the Vice-Chancellor and Pro-Vice-Chancellor. The Education Commission (1964-66) appointed by the Government of India and the Committee on the Governance of Universities and Colleges (1971) appointed by University Grants Commission had recommended that the retirement age of the Vice-Chancellor should be prescribed at 65 years. Keeping in view the expediency of the circumstances the Governor of Haryana promulgated the Maharshi Dayanand University (Amendment) Ordinance, 1980 (Haryana Ordinance No. 5 of 1980) to amend the Maharshi Dayanand University Act, 1975, by way of insertion of following section in the Haryana Act, 25 of 1975:—

9-A. Maximum age of Vice-Chancellor and Pro-Vice-Chancellor.—

Notwithstanding anything to the contrary contained in any law, contract or the Statutes, no person shall be appointed to, or continue in, the office of the Vice-Chancellor or Pro-Vice-Chancellor, as the case may be, if he has attained the age of sixty-five years." From the aforesaid statement, it is evident that as no age of retirement was provided for the post of Vice-Chancellor and Pro-Vice-Chancellor and as the Education Commission appointed by the Government of India and the Committee on the Governance of Universities and Colleges (1971) appointed by the University Grants Commission had prescribed the retirement age of a Vice-Chancellor at 65 years, it was thought expedient to make the necessary amendment in the Act and it was this object which re-

sulted in the promulgation of the Ordinance and the Amendment Act.

63. In the written statement, the stand taken on behalf of respondent No. 3 with regard to the promulgation of the Ordinance and the enactment of the Amendment Act, is as follows:—

“With regard to para 30-E of the petition it is submitted that in order to make comprehensive amendments, in the light of the guidelines/recommendations of the reports of (a) Education Commission, (b) Report of the Committee on Model Act for Universities and, (c) the report of the Committee on Governance of Universities and Colleges Part I, the Haryana Government constituted a Committee vide notification No. 45/1-80-ED-1 (6), dated 8th August, 1980 comprising the petitioner as its Chairman and 8 other members. It may further be submitted that the Committees mentioned at (a) and (c) in this para have recommended 65 years as the maximum age for the Vice-Chancellor to hold office. The Committee on Model Act for Universities in its Report had also favoured the idea of fixation of maximum age limit for the incumbent of the Vice-Chancellorship. x x x x x

x x x x x x

The allegation of the petitioner that the Government of Haryana has been contemptuous of the recommendations of the Gajendragadkar Committee regarding the Governance of Universities, is wrong and hence denied. As is evident from the submission made above, the Government has already constituted a Committee, consisting of 9 members including the petitioner as its Chairman, to suggest necessary amendments in the Maharshi Dayanand University Act keeping in view the guidelines of the aforesaid Committees including the Gajendragadkar Committee. x x x x

x x x x x x

It is submitted that University Grants Commission vide its letter dated 2-4-1979 had agreed, in principle, to declare the Maharshi Dayanand University, Rohtak, fit to receive Central assistance in terms of S. 12-A of the University Grants Commission Act, provided that the State Government/University amend the Act and Statutes of the University in accordance with the general observations made by the Education Commission (1964-66) appointed by the Government of India and the Committee on Governance of Universities and Colleges (1971), appointed by the University Grants Commission.

The Education Commission in this regard in its report, has observed:—

“The retirement age for the Vice-Chancellor should be 65 years, an exception being made in the case of exceptionally qualified person of All-India eminence”. The Report of the Committee on Governance of Universities and Colleges has observed as under:—

“In regard to the question of prescribing an age limit of retirement for Vice-Chancellor, it may be observed that where the post of Vice-Chancellor is honorary and the Vice-Chancellor is expected and required to work voluntarily, it may not be realistic to lay down any age limit. We may add that some of the distinguished full time salaried Vice-Chancellors who at the time of their appointment or during their tenure had crossed the age of 65 years are known to have rendered signal service to their respective Universities. Nevertheless, we think in view of the arduous duties, the office of the Vice-Chancellor should be a whole-time salaried one, and the Vice-Chancellor should retire on completing the age of 65 years.”

It is evident from the above recommendations of the Committees that the retirement age of the Vice-Chancellor should be fixed at 65 years. Since comprehensive amendment of the Maharshi Dayanand University Act was to take time and a vacancy in the office of the Vice-Chancellor, Maharshi Dayanand University, Rohtak, has arisen on 27-10-80 and another vacancy of Vice-Chancellor in the Kurukshetra University, Kurukshetra was to arise on 5-4-1981, therefore, it was thought expedient by the Government to decide the point relating to the fixation of maximum age of the Vice-Chancellor. x x

x x x x x x

The contention of the petitioner that no legislation extraordinary or ordinary was at all needed is wrong, misconceived and hence denied. It is submitted that the said Ordinance (now Act No. 40 of 1980) had not been issued in respect of the petitioner only, but it will regulate all the future appointments of Vice-Chancellors and Pro-Vice-Chancellors.”

64. From the pleas reproduced above, it is again quite clear that the firm stand taken on behalf of the State is that the promulgation of the Ordinance and the enactment of the Amendment Act was to give effect to the recommendation made earlier by the Education Commission and the Committee on the governance of Universities and Colleges that the retirement age of the Vice-

Chancellors should be fixed at 65 years and that the impugned legislation is not at all aimed at the petitioner, but is to regulate all the future appointments of Vice-Chancellors and Pro-Vice-Chancellors.

65. Before advertng to the merits of the contention, it may be made clear that the Education Commission was appointed as far back as 1964, which had recommended the retirement age at 65 years, while the Committee on the governance of Universities and Colleges was constituted in the year 1971, which again had suggested the retirement age at 65 years. But in spite of both these reports, the Act which came into force in the year 1975, under which the University was established, did not provide for any retirement age. It appears that these reports remained lying in a cold storage and were not given effect to by the Legislature either at the time of the enactment of the Act or thereafter, and it was only on 1st Nov., 1980, and that too in the shape of an Ordinance that the retirement age of the Vice-Chancellor was fixed at 65 years. This is how the impugned legislation had come into being.

66. Coming to the merits of this matter, on consideration of the entire material in the light of the facts of the case in hand and the law enunciated by their Lordships of the Supreme Court, we find considerable force in the contention of the learned counsel, Mr. Rao.

67. The first question that needs determination is whether by the impugned legislation, has any distinction been made between sitting Vice-Chancellor and the Vice-Chancellors to be appointed thereafter and in case such a distinction has been made, then is there any rational relation of the differentia to the object sought to be achieved? As is evident from the contention of the learned Advocate-General, no distinction has been made between sitting Vice-Chancellor and the Vice-Chancellors to be appointed after the enactment nor is the legislation aimed against the petitioner. If the case has to be judged in the light of the phraseology used in the section, then there may be some merit in the contention of the learned Advocate-General, but if the impact and the ultimate effect of the legislation is seen, then the argument of the learned Advocate-General loses all its force. For the proposition that it is not the phraseology but the effect of the law which has to be seen, reference may be made to the following observations of the Supreme Court in *Khandige Sham Bhat v. Agricultural In-*

come-tax Officer, Kasargod, AIR 1963 SC 591, which read as under (para 7):—

“Though a law *ex facie* appears to treat all that fall within a class alike, if in effect it operates unevenly on persons or property similarly situated, it may be said that the law offends the equality clause. It will then be the duty of the Court to scrutinise the effect of the law carefully to ascertain its real impact on the persons or property similarly situated. Conversely, a law may treat persons who appear to be similarly situate differently; but on investigation they may be found not to be similarly situate. To state it differently, it is not the phraseology of a statute that governs the situation but the effect of the law that is decisive.”

Coming to the impugned provision, a little scrutiny of the same would clearly show that the words ‘continue in — if he attains the age of 65’ are solely meant for the petitioner and none else. The first term of the petitioner was to expire on 27th of Oct., 1980, and on the basis of the promise, he was entitled to get the renewal of the term. If the renewal had been granted, then he would have continued as Vice-Chancellor for another term of three years. As the term was not renewed, the present petition was filed. In the event of the petitioner getting the relief claimed, he would be deemed to be continuing Vice-Chancellor for another term. In other words, on 1st of Nov., 1980, when the Ordinance was promulgated, the petitioner would be Vice-Chancellor in office and the words ‘continue in’ would apply only to him.

68. As is evident from the contentions of the learned counsel for the respondents, the firm stand taken by them is that no distinction has been made between the sitting Vice-Chancellor and the Vice-Chancellors to be appointed in future inasmuch as the words ‘continue in — if he attains the age of 65’ are not only to apply to the petitioner but to the future appointees also. In my opinion, the stand taken by the learned counsel for the respondents is not sustainable. Though the language of the section is couched in such a manner so as to give an impression that the impugned provisions are also to apply to future appointees, yet the impact and ultimate effect of the legislation is only on the petitioner. There can be no gain-saying that in the wake of the provisions of Section 9-A, the Chancellor is normally expected to appoint a person as Vice-Chancellor for a term which he is able to complete before attaining the age of 65. It is again equally clear that an appointee to this high

office would also not ordinarily accept an office the tenure of which he is unable to complete. In this situation, there may not be any occasion for the applicability of the words 'continue in' so far as the future appointees are concerned. I do not agree with the learned Advocate-General that the legislation is not aimed at particularly against the petitioner though it may be affecting him also adversely. Rather the legislation so far as it uses words 'continue in', in the circumstances of the case, is only directed against the petitioner and petitioner alone and is making a positive distinction between the sitting Vice-Chancellor and the Vice-Chancellors to be appointed after the enactment.

69. Further, the petitioner is not wanting any exception to be carved out in his favour in order to facilitate his continuing in the office, as was contended by Dr. Chitle. The petitioner is only pleading that the impugned legislation is discriminatory and hostile against him and he has been successful in establishing the same. It is correct that in view of the law laid down in *Ram Krishna Dalmia's case* (AIR 1958 3C 538) (supra), a legislation can relate to single individual, but then there have to be some special circumstances or reasons applicable to him and not applicable to others, which may warrant the treatment of that individual as a class by himself. In the instant case, the only purpose sought to be achieved through the legislation is to remove the petitioner. The post which the petitioner was holding is a tenure post and the petitioner as a result of the promise, has acquired a right to continue in the post.

70. Mr. Gour, learned Advocate-General, had also drawn our attention to Ordinance No. 4 of 1980 issued with regard to Kurukshetra University wherein Sec. 8-A, which is exactly in similar terms as Section 9-A, has been introduced, in order to show that the petitioner alone has not been singled out and that age limit has also been fixed in the case of the Vice-Chancellor of Kurukshetra University. In our view, the issuance of this Ordinance is of no assistance in upholding the vires of the impugned legislation. In Kurukshetra University, the Vice-Chancellor's term was to expire on 5th of April, 1981. There was absolutely no occasion for issuing an Ordinance and introducing Section 8-A in respect of that University on 1st of Nov., 1980, especially when the Legislative Assembly was to meet in Dec., 1980, when the Act of the University could be

suitably amended. Further, the Vice-Chancellor of Kurukshetra University was much below the age of 65 years and in his case, the words 'continue in' would be meaningless. Moreover, after the expiry of his tenure on 5th of April, 1981, a fresh appointment, if any, would have been made by the Chancellor in the light of provisions of Section 8-A. Thus the issuance of Ordinance and putting of the words 'continue in' in Section 8-A of the Kurukshetra University Act were only with a view to give out an impression that the amendment was being made in respect of all the Vice-Chancellors and that the petitioner was not being singled out.

71. The next question that needs determination is whether there is a reasonable basis for grouping the petitioner as a class by himself and does that reasonable basis appear either in the Statute itself or is deducible from other surrounding circumstances? Again, the answer has to be in the negative.

72. The amendment in the Act has been brought in on the basis of the reports of the Commission and the Committee as a result of which the retirement age has been fixed at 65, but nowhere in those reports any indication is available that a person who was validly appointed should not be allowed to complete his tenure in the event of his attaining the age of 65 years. The Vice-Chancellor holds a very important and honoured position in the University and this office in the various Universities all over the country has always been manned by jurists or eminent and able educationalists. The choice of the person to be appointed as Vice-Chancellor is the sole prerogative and within the absolute discretion of the Chancellor. By bringing a legislation of the kind which virtually results in the removal of the incumbent instantaneously, no reasonableness can be attributed. The dominant intention appears to be to remove the petitioner through this colourable legislation. If the petitioner was not liked and was misconducting himself, then he could certainly be removed in terms of the law laid down in *Boal Chand's case* (AIR 1968 SC 292) (supra). As a result of the impugned legislation, the petitioner on 1st Nov., 1980 would cease to hold the office of the Vice-Chancellor. The effect of the legislation is that the incumbent would be on the road and would not even get breathing time for making alternative arrangements for his living etc. The Commission and the Com-

mittee had only recommended the retirement age to be fixed, but their reports could not be used for the purpose of bringing in a legislation which could make a mockery of the high office of the Vice-Chancellor and could result in inflicting a punishment of removal by cutting short the period of his tenure. I do not see any policy underlying the Act justifying this differential treatment accorded to the petitioner. While all the Vice-Chancellors appointed under the Act would hold office for the full period of their tenure for which they are appointed, the petitioner is being literally forced out of office on the day the Ordinance is promulgated.

73. Further, as to why the petitioner has been singled out and distinguished from the Vice-Chancellors, to be appointed after the enactment, remains unexplained. The petitioner, on the date of initial appointment, was of 67 years of age. For the full period of his first term, he had fully discharged the functions of his office. There is no allegation nor is there any suggestion that he is not physically or mentally fit.

74. To further show the unreasonableness and arbitrariness of the impugned legislation, I propose to take an example on which questions were also put to the learned counsel for the respondents. Suppose on the basis of the reports etc., the impugned legislation had been brought in on 1st Nov., 1977, i.e., five days after the initial appointment of the petitioner, then could it be said that the petitioner who was above 67 years of age at the time of the initial appointment, would not continue in office and would cease to be a Vice-Chancellor? Could such a legislation be defended by putting up a defence that the same was not aimed at the petitioner though it was likely to affect him incidentally? Could it be said that there is a reasonable basis for grouping the petitioner as a class by himself? Could it be said that there was a reasonable nexus of the legislation with the object sought to be achieved? On a reasonable approach, the answer to all these questions has to be in the negative. If this legislation had come into being on 1st of Nov., 1977, then the same would have been struck down on the ground that it had been brought in only with a view to remove the petitioner. If this could be the result with regard to the legislation which if it had been brought immediately after the initial appointment of the petitioner, then I fail to understand how the present legislation would be good which has been brought in after five days of the renewal of the term

of the petitioner. I cannot, for a moment, appreciate as to on what basis a legislation can be supported, which results into snapping of the statutory term on the 5th day of its start. There can be no gainsaying that the service of the petitioner is sought to be terminated forthwith by enacting S. 9-A of the Act. In other words, by the impugned legislation a device has been adopted for terminating the services of the petitioner.

75. It would not be out of place to observe that the words "continue in" appear to have been incorporated in the impugned provision as there must have been an apprehension that if this petition is allowed, then the petitioner would be deemed to continue in office as Vice-Chancellor. In other words, the present legislation is only to cover a situation which may arise in the event of the success of the petition, as it is then only that the petitioner would be continuing as Vice-Chancellor. Further, the non obstante clause in the section, again, has been added in order to avoid the term incorporated in the terms and conditions on the basis of which this petition has been filed.

76. Moreover, except the Statement of Object and Reasons, which has been reproduced in the earlier part of the judgment, no other surrounding circumstances were brought to our notice to support the discriminatory legislation. But Mr. Rao, learned counsel for the petitioner, did point out the following facts in support of the plea raised by the petitioner.

77. On 10th of Sept., 1979, a statement alleged to have been made by respondent No. 2, appeared in the newspaper that the petitioner was being suspended as he was unwilling to go on leave, though on 13th Sept., 1979, a statement was issued by respondent No. 2 denying the making of any such statement. Apprehending the suspension, the petitioner filed C. W. P. No. 3228 of 1979 in this Court, on which an ad interim order staying his suspension was passed. In response to the notice of motion issued, the Chancellor pleaded that so far as he was concerned, no action was under contemplation against the petitioner, with the result that the petition was dismissed in limine on 20th of Sept., 1979.

78. However, on the next day, i.e., 21st Sept., 1979, the Chancellor suspended the petitioner pending enquiry against him by the Commission of Enquiry set up by the Government. The petitioner again filed a petition. C. W. P. No. 3385 of 1979 reported in 1980 Lab IC 630 (Punj & Har) (FB) in this Court, calling in question the

legality of the suspension order. The Motion Bench issued notice of motion and also granted ad interim stay of the operation of the order of the petitioner's suspension. The writ petition was contested on behalf of the respondents, which was ultimately allowed on the ground that there was no power of suspension with the Chancellor under the Act and accordingly the order of suspension was set aside on 16th November, 1979.

79. The matter did not rest here as 8 days after the decision of the writ petition, an Ordinance (No. 11 of 1979) was promulgated empowering the Chancellor to, (a) suspend the Vice-Chancellor; (b) to change the terms and conditions of his appointment and (c) to terminate Vice-Chancellor's services on three months' notice or on payment of three months' salary. It would be pertinent to point out at this stage that no similar Ordinance was issued in respect of Kurukshetra University and Mr. Rao was right in contending that pattern of uniformity advocated by the State is only a farce. Facing some action on the basis of the Ordinance, the petitioner approached the Supreme Court and filed a petition (C. W. P. No. 1518/1979) for the striking down of Ordinance No. 11 of 1979. A prayer for the issuance of a writ restraining the Chancellor from giving effect to the provisions of the said Ordinance was also made, but that prayer was declined with the observations that as and when any action is taken against the petitioner under the impugned Ordinance, a prayer for stay may be made. The petitioner had also filed S. L. P. No. 10323 of 1979 against the order of this Court dated 16th Nov., 1979 on the ground that the High Court should have also decided the allegations of mala fide and the question of the tenure to which the petitioner was entitled. As no action was taken on the basis of the Ordinance and the same was allowed to lapse, the petitioner withdrew both the petitions before the Supreme Court on 18th of April, 1981.

80. The aforesaid facts again lend support to our view that the dominant intention is to remove the petitioner through this colourable legislation and that words 'continue in' in the impugned provision are aimed at the petitioner only.

81-82. The only relevant case, which has some bearing and to which reference may be made in detail is Dinnapati Sadasiva Reddi, Vice-Chancellor, Osmania University v. Chancellor, Osmania University, AIR 1967 SC 1305. The facts of that case are as follows:

Dinnapati Sadasiva Reddy, appellant, was appointed Vice-Chancellor of the Osmania University by order dated 30th April, 1964, passed by the Governor of Andhra Pradesh, in his capacity as Chancellor of the said University, for a term of 5 years. The term of the office was to expire at the end of April, 1969. During the middle of 1965, certain amendments were sought to be introduced in the Act by providing for the removal of the Vice-Chancellor by the Chancellor from office under certain circumstances. There was also a proposal to reduce the term of office of the Vice-Chancellor from 5 years to 3 years, from the date of his appointment, and for provisions being made enabling the Government to give directions to the University relating to matters of policy to be followed by it. The amendments sought to be introduced in the Act appear to have come in for considerable criticism from several quarters. But ultimately the Andhra Pradesh Legislature passed the Osmania University (Amendment) Act, 1966 (Act II of 1966), amending the Osmania University Act of 1959 in certain particulars. The said amendments were to the effect that the Vice-Chancellor shall not be removed from office, except as provided for in Section 12 (2) of the amended Act. The term of office was also fixed at 3 years under the amended Section 13. The Osmania University Act was again amended by the Osmania University (Second Amendment) Act, 1966. Under this amendment, Section 13-A was enacted. In brief, that section was to the effect that the person holding the office of the Vice-Chancellor, immediately before the commencement of the amending Act of 1966, was to hold office only until a new Vice-Chancellor was appointed under sub-section (1) of Section 12; and it also provided that such appointment shall be made within 90 days after such commencement. There was a further provision that on the appointment of such new Vice-Chancellor, and on entering upon his office, the person holding the office of Vice-Chancellor immediately before such appointment, shall cease to hold that office. As the amendment introduced, adversely affected the appellant, he filed a writ petition praying for the issue of a writ or order declaring Section 5 of the Osmania University (Second Amendment) Act, 1966, which introduced Section 13-A in the original Act, as unconstitutional and void. In that writ petition, he challenged the validity of Section 13-A, on several grounds. On consideration of the entire matter, the High

Court of Andhra Pradesh came to the conclusion that Section 5 of the Second Amendment Act introducing Section 13-A in the original Act was not vitiated by any infirmity as alleged by the appellant, and finally dismissed the appellant's writ petition. Dissatisfied from the judgment of the High Court, the appellant approached the Supreme Court. The main ground of attack on behalf of the appellant in appeal again was based upon Art. 14 of the Constitution. On consideration of the respective contentions of the learned counsel for the parties, Vaidialingam J., speaking for the Court, observed, thus (at p. 1314 of AIR):—

"In our view, the Vice-Chancellor, who is appointed under the Act, or the Vice-Chancellor who was holding that post on the date of the commencement of the Second Amendment Act, form one single group or class. Even assuming that the classification of these two types of persons as coming under two different groups can be made, nevertheless, it is essential that such a classification must be founded on an intelligible differentia which distinguishes the appellant from the Vice-Chancellor appointed under the Act. We are not able to find any such intelligible differentia on the basis of which the classification can be justified.

It is also essential that the classification or differentia effected by the statute must have a rational relation to the object sought to be achieved by the statute. We have gone through the Statement of Objects and Reasons of the Second Amendment Bill, which became law later, as well as the entire Act itself, as it now stands. In the Statement of Objects and Reasons for the Second Amendment Bill, extracted above, it is seen that except stating a fact that the term of the office of the Vice-Chancellor has been reduced to 3 years under S. 13 (1) and that Section 13-A was intended to be enacted, no other policy is indicated which will justify the differentiation. The term of office fixing the period of three years for the Vice-Chancellor has been already effected by the First Amendment Act and, therefore, the differential principle adopted for terminating the services of the appellant by enacting S. 13-A of the Act cannot be considered to be justified. In other words, the differentia adopted in Section 13-A and directed as against the Appellant — and the appellant alone — cannot be considered to have a rational relation to the object sought to be achieved by the Second Amendment Act.

While a Vice-Chancellor appointed under Section 12 of the Act can be removed from

office only by adopting the procedure under Section 12 (2), the services of the appellant, who was also a Vice-Chancellor and similarly situated, is sought to be terminated by enacting Section 13-A of the Act. We do not see any policy underlying the Act justifying this differential treatment accorded to the appellant. The term of office of the Vice-Chancellors has been no doubt reduced under the First Amendment Act and fixed for 3 years for all the Vice-Chancellors. But, so far as the appellant is concerned, by virtue of Section 13-A of the Act, he can continue to hold that office only until a new Vice-Chancellor is appointed by the Chancellor, and that appointment is to be made within 90 days. While all other Vice-Chancellors, appointed under the Act, can continue to be in office for a period of three years the appellant is literally forced out of his office on the expiry of 90 days from the date of commencement of the Second Amendment Act. There is also no provision in the statute providing for the termination of the services of the Vice-Chancellors, who are appointed under the Act, in the manner provided under Section 13-A of the Act. By Section 13-A, the appellant is even denied the benefits which may be available under the proviso to sub-section (1) of Section 13 of the Act, which benefit is available to all other Vice-Chancellors."

83. In view of the aforesaid finding, the appeal was allowed and Section 5 of the Second Amendment Act introducing Section 13-A in the Act was held to be violative of Article 14 of the Constitution and was struck down as unconstitutional.

84. Mr. Rao, learned counsel for the petitioner, had placed great reliance on the above reproduced observations and had contended that the present case was fully covered by the judgment of the Supreme Court. On the other hand, learned Advocate General and Dr. Chitale, learned counsel, appearing for the respondents had submitted that Section 13-A, which was introduced by Section 5 of the Second Amendment Act, was clearly directed against the appellant in that case, that in the instant case the impugned section covers the cases of the present and future Vice-Chancellors and that the observations of the Supreme Court have been made in relation to that particular section which had been inserted only with a view to get rid of the appellant in that case. In our view, Mr. Rao, learned counsel is right that the observations of the Supreme Court clearly go to support the case of the petitioner. It has been held by us that the

words 'continue in' are directed only against the petitioner and have been added only with a view to force the petitioner out of the office. In view of this finding, the distinction drawn by the learned counsel for the respondents that the provisions of Sec. 13-A are different from the provisions of impugned Section 9-A, becomes meaningless.

85. As a result of the aforesaid discussion, we hold that the words 'continue in if he attains the age of 65 years' occurring in Section 9-A of the Ordinance and the Amendment Act, are discriminatory and violative of Article 14 of the Constitution, as the same are designed to operate to the detriment of one and one person only i.e. the petitioner, whose term had to be renewed as a result of the promise/assurance on 27th Oct., 1980, and, as such, have to be struck down as unconstitutional.

86. Mr. Rao, learned counsel for the petitioner, had also challenged the legality and constitutional validity of the Ordinance on the ground that the Ordinance is not a normal form of legislation and more so in respect of the matters concerning Universities and that too in the matter of fixation of the age of the Vice-Chancellors. According to the learned counsel, issuance of the Ordinance has to be in the nature of exception as the normal process of law making is through legislation and that the exception in the shape of Ordinance has to be construed very strictly and conditions stipulated in Article 213 have to be rigorously satisfied. What was sought to be argued by the learned counsel was that in the instant case no circumstance existed which could warrant the issuance of the impugned ordinance.

87. On the other hand, it was submitted by the learned Advocate General that for the purpose of the present petition, it was not necessary to go into the validity of the Ordinance as the same had been repealed by the Amendment Act and that the purpose and the sufficiency of circumstances cannot be gone into. Dr. Chitale, learned counsel appearing for respondent No. 1, had also urged that the Court could not go into the circumstances leading to the issuance of the Ordinance and that the issue regarding the legality of the Ordinance was not justiciable. According to the learned counsel, the constitutional validity of the Ordinance could not be challenged on the ground that the Governor was not really satisfied with respect to the conditions mentioned in Art. 213 of the Constitution or that those conditions did not exist and that his satisfaction was not real or that the satisfaction was based

on extraneous considerations and was mala fide.

88. The Ordinance has been repealed by the Amendment Act. Since the impugned provision so far as it affects the petitioner adversely is being struck down by us as violative of Article 14, we refrain from expressing any opinion on the extent of the jurisdiction of this Court to examine whether the conditions relating to the satisfaction of the Governor were fulfilled and on other allied points raised on either side by the learned counsel for the parties with regard to the constitutional validity of the Ordinance.

89. I would now pass on and advert to the plea of the petitioner that the issuance of the Ordinance and the enactment of the Amendment Act are as a sequel of the malice borne against him by the Governor and the Chief Minister of Haryana. The learned counsel had read out to us from the petition the allegations of mala fide. These allegations have been emphatically denied by Shri G. D. Tapase, who has been made a respondent in his capacity as the Chancellor of the University and not the Governor, and the Chief Minister.

90. On the respective contentions of the learned counsel for the parties, which were advanced before us, the point of mala fide has two aspects, i.e. (i) legal and (ii) factual.

91. On legal aspect, it was submitted by Mr. Rao, learned counsel for the petitioner that the mala fide of Legislature can legally be gone into by Courts of law, that in the instant case, sufficient proof has been placed on the file to show that the issuance of Ordinance and the enactment of the Amendment Act are as a result of the malice borne by the Governor and the Chief Minister against the petitioner, that the position of a Minister as it obtains today and also as reflected by Rules of Business, is quite different from that of a Legislator, that the Chief Minister represents the mind and will of the Council of Ministers that nothing can go against the will of the Chief Minister and that in this situation, it was not at all necessary to implead all the Ministers nor was it at all necessary to bring out facts and figures for showing the individual malice of the Council of Ministers. Mr. Rao further submitted that once malice was proved against respondent No. 2, then considering the pre-eminence of Chief Ministers status and position, malice would be presumed. It was further submitted by the learned counsel that it was not at all neces-

sary to implead the Governor or all the Ministers of the State when the State is a party which effectively represents them. In support of his contention that the allegations of mala fide can legally be gone into against the Legislature, the learned counsel relied on a Full Bench judgment of this Court in *Hardwari Lal v. Election Commission of India etc.*, ILR (1977) 2 Punj 269.

92. On the other hand, it was submitted by Mr. U. D. Gour, learned Advocate-General that no mala fide could be attributed to the Legislature, that the vires of an Act cannot be gone into on the ground of mala fide and that in case the legislative competency is established, then in determining the constitutional validity of a statute, the question of malice is immaterial.

93. Dr. Chitale, appearing for respondent No. 1, supported the stand taken by the learned Advocate-General and in addition contended that the petitioner has not laid factual foundation for proving mala fide of the Legislature inasmuch as no data regarding the members present, number of members who voted for and against the enactment, and the influence that was exercised by the Chief Minister on the members who voted for the enactment, has been supplied, that on the basis of the allegations made against the Chief Minister alone, without impleading all the members of the Assembly, this question could not effectively and properly be decided nor could legally an adverse finding be recorded against those who are not present before this Court. It was also submitted that if the legislative Act cannot be invalidated on the ground of mala fide, then the Ordinance also gets the protection as the issuance of the Ordinance is also a legislative function, and, therefore, the same principles would apply in the case of Ordinance also. An argument was also advanced that the Governor acts on the advice of the Council of Ministers and, therefore, the personal motive or mala fide of the Governor does not come into play at all. Further, the Governor has not been made a party nor has any allegation of mala fide been made against him in that capacity and that whatever allegation has been made is against Shri G. D. Tapase in his capacity as Chancellor of the University and as such the allegation of mala fide against the Governor cannot be gone into.

94. Dr. Chitale had also contended that the law laid down in *Hardwari Lal's case* (ILR (1977) 2 Punj 269) (FB) (supra) has no applicability as in that case, the resolution of the House had been assailed on the

ground of mala fide. According to the learned counsel, legality of the exercise of legislative power can never be challenged on the ground of mala fide.

95. On a careful consideration of the entire matter, I find that it would not be necessary in this case to go into the question whether the allegations of mala fide can be gone into against the Legislature or not as the petitioner has virtually failed to establish any mala fide against the Legislature or the Governor as such. In the petition, he has made allegations only against the Chief Minister and Shri G. D. Tapase in his capacity as Chancellor. No allegation has been made against any member of the Assembly or the members of the Council of Ministers. The Governor, the members of the Council of Ministers or the members of the Legislative Assembly have not been impleaded as respondents. There is absolutely no suggestion on the file that the Legislators had exercised their privilege of vote against their will or for consideration other than their own judgment. The petitioner has not even alleged that the Bill was passed as a result of any fiat by respondent No. 2 against whom unsubstantiated allegations of mala fide have been made. The learned counsel for the petitioner has tried to establish the plea of mala fide without laying any foundation for the same purely on conjectures. The attack on the ground of mala fide thus must necessarily fail and the Ordinance and the Amendment Act do not suffer from any infirmity on this score.

96. Though in view of my finding on the legal aspect, it is not at all necessary to deal with the factual allegations of mala fide made against respondents Nos. 1 and 2, yet as lot of emphasis during the course of arguments had been laid on the allegations of mala fide, we have decided to deal with those allegations on merit.

97. In the petition, the petitioner has started by saying that in the year 1977, Shri Bhajan Lal had defected from the Congress Party to the newly formed Janata Party and was contesting elections to the Haryana Vidhan Sabha in June, 1977 as a Janata Party candidate, that the petitioner, actuated purely by spirit of public service, had brought out a long pamphlet in which he described in some detail the shady past of Janata Party candidates including that of Shri Bhajan Lal, that Shri Bhajan Lal belongs to a small sect of Bishnois in Haryana and has been out to help his Bishnoi com-

patriots, in ways, fair or foul, that when respondent No. 2 was a Minister in Shri Devi Lal's Government, he insisted on the admission of one Mohinder Singh Bishnoi to the post-graduate course in the Medical College, Rohtak, that Mohinder Singh Bishnoi did not make the merit and the petitioner had to send a letter of apology to respondent No. 2 on 10th of May, 1979, that respondent No. 2 still insisted on his admission, that the petitioner felt compelled to increase the number of seats in the Department of Medicine and to admit him, that similarly respondent No. 2 wanted admission of one Sanjiv Mehta S/o Shri B. L. Mehta of Bombay in the University, that the petitioner showed his inability to admit that boy and thereby earned the displeasure of respondent No. 2, that during one of the visits to Rohtak, respondent No. 2 personally gave to the petitioner a list of 13 students who were seeking admission to M.B.B.S. course, that one of them was related to Som Dutt, Private Assistant to respondent No. 2, that another slip was brought to the petitioner by somebody to whom it had been given by Ram Narain, Senior P. A. to respondent No. 2, and that in spite of his best efforts, the petitioner could not oblige respondent No. 2, which caused displeasure to respondent No. 2.

98. It has been further averred that the petitioner had suspended Dr. K. N. Garg, officiating Principal of the Medical College on 12th of April, 1978, that amongst the serious charges against him was the charge that he had made a false representation to the Shah Commission regarding emergency excesses and that without completing the inquiry and in order to embarrass and defy the petitioner, Dr. K. N. Garg was reinstated and Dr. Mehrotra, who was acting as Director-Principal, was removed to rehabilitate Dr. K. N. Garg, with a view to smoothen the way for admission of Miss Sunita Rani and to enable her to appear in the examination along with her batch as Dr. Mehrotra was of the view that she should not be allowed to appear along with the other students of her batch and instead appear subsequently. The petitioner has also averred that he had given certain adverse remarks in the Annual Confidential Reports of various teachers, but the Chief Minister wished to reconsider/review the same.

99. It was also submitted that on 17th of Aug., 1979 Dulat Commission was appointed by the Haryana Government to inquire into the allegations made by Janata Legislators against the petitioner that on the ap-

pointment of the Commission, respondent No. 2 on 8th of Sept., 1979 had asked the petitioner to resign or proceed on leave, that as the petitioner was unwilling to go on leave, respondent No. 2 had made a statement which appeared in the press on 10th of Sept., 1979, that the petitioner who was unwilling to go on leave, was being suspended and that an Ordinance was got promulgated by respondent No. 2 which empowered the Chancellor to suspend the Vice-Chancellor, to change the terms and conditions of his appointment and to terminate Vice-Chancellor's services on three months' notice or on payment of three months' salary.

100. On the basis of the aforesaid facts, the learned counsel urged that respondent No. 2 was ill-disposed and bore grudge against the petitioner.

101. On the other hand, it was submitted by the learned Advocate-General that the allegations of mala fide which have been made against respondent No. 2, are baseless and false, and have been made in an irresponsible and reckless manner. Coming to the individual cases, it was urged that admittedly the petitioner had increased the seats and had admitted Mohinder Singh Bishnoi. In this situation, it could hardly be believed that respondent No. 2 would bear grudge against the petitioner who on his own showing had increased the number of seats and carried out the wish of the Chief Minister by admitting Mohinder Singh Bishnoi. Regarding the case of Sanjiv Mehta, respondent No. 2 has shown his inability to remember if he ever made any recommendation about him to the petitioner. Coming to the case of Miss Sunita Rani, it was contended that one seat was reserved for the nominee of the Chief Minister and that on compassionate grounds, he had nominated Miss Sunita Rani against that one seat and in this situation to say that the nominee, on merit, did not deserve to be nominated is meaningless.

102. Regarding giving of the list of candidates, the learned Advocate-General drew our attention to the reply of respondent No. 2 which reads as under:—

"In regard to the allegation contained in Clause (c) of sub-para (iii) of para 11, it is wholly incorrect that the answering respondent had handed over a list of 13 students (Annexure P-16) to the petitioner.

The matter was thrashed out by the Division Bench which heard the case for about two weeks. My counsel before the Division Bench had brought to my notice that though

in the writ petition P/16 was shown as one document, the original had not been produced by the petitioner as was the requirement of the rules. Though the counsel had asked the Court for production of the original by the petitioner who at first pointed out that the original must be with the University. My counsel had contacted the University only to be told that the original of P/16 was not with the University authorities. It was, thus, that on 26-11-1980 the petitioner produced the two documents forming P/16. Before that date, the petitioner had not disclosed that P/16 was not one but two documents. The petitioner is highly educated man. He takes note of every slip that he received and preserved it. It is difficult to believe that he would forget about two slips and mentioning the two documents as one P/16. It is unbelievable that he will not realise this omission till the original was got produced from him by the Court on 26-11-1980.

Thus, it became inevitable for my counsel to find out from Shri Ram Narain, my P. A. as to how the slip attributed to him had come into the possession of the petitioner. Shri Ram Narain has disclosed (vide R-2/1) that he had been P. A. to Shri Hardwari Lal when he was a Minister. It was also disclosed that his services as P. A. were requisitioned by the petitioner at a different stage. It was also disclosed that Shri Ram Narain had personal cordial relations with the petitioner and that in that capacity he had given the slip for admission of a student known to him (Ram Narain) on his own behalf and not on behalf of Mrs. Bhajan Lal whose name was not on the slip at the time he had delivered it to the petitioner.

If the subsequent explanation is ignored, the assertion in the writ petition implied that the list P/16 had emanated from Mrs. Bhajan Lal.

The above narration leaves no manner of doubt that the petitioner prepared List P/16 to prompt his plea of mala fide which has otherwise no substance at all."

103. So far as the reinstatement of Dr. K. N. Garg is concerned, the learned Advocate-General contended that the petitioner was unnecessarily interfering with the affairs of the Medical College in spite of the fact that the same had been taken over by the State Government, that the petitioner had no business or control over the affairs of the Medical College and it was for the Governing Body which was to run the affairs of the Medical College, to decide about the reinstatement of Dr. K. N. Garg. Regarding

the giving of adverse remarks to faculty members, it was contended by Mr. U. D. Gour, learned Advocate-General that some of the adverse remarks which the petitioner had given to some of the faculty members, were not even conveyed by the petitioner and that when the same were conveyed, the aggrieved persons filed appeals and ultimately on consideration of the entire matter, the remarks were expunged.

104. Regarding the making of press statement by respondent No. 2, it was submitted by the learned Advocate-General that the same has been denied by respondent No. 2 and no reliance can be placed on such statements.

105. After giving our thoughtful consideration to the entire matter, we find that the petitioner has miserably failed to prove any allegation of mala fide against respondent No. 2. The instances which have been given are flimsy. Some of them are wholly extraneous and have even no relevancy. The petitioner takes offence even with regard to the matters with which he has no concern. The petitioner had recorded some adverse remarks against certain Lecturers of the Medical College as the Principal Executive Head of the Medical College, Rohtak up to Aug., 1978. The control of the Medical College had been transferred from the University to the State Government sometime in 1978. A representation was made to respondent No. 2 on behalf of the Haryana State Medical Teachers' Association that the decision of their cases of Efficiency Bar and redesignation be expedited. As the earlier Governing Body had been abolished a decision had to be taken as to which authority would deal with those cases. It was on this score that the matter was placed before the Governing Body for decision, which decided to convey the adverse remarks to the employees concerned and to deal with the individual cases.

106. In the wake of these facts, it is improper to impute any motive to respondent No. 2. It would be pertinent to observe that it was shown to us from the record that in some cases, the adverse remarks given by the petitioner were not even conveyed to the teachers concerned. After the taking over of the Medical College, the aggrieved persons knocked the doors of the Governing Body for the redress of their grievances. Surprisingly enough, the petitioner treats this to be an act of mala fide against respondent No. 2.

107. So far as the case of Dr. K. N. Garg is concerned, he has been reinstated without

any prejudice to the enquiry which has been instituted against him. But again, we fail to understand as to what grouse can the petitioner have with a matter with which he is not concerned. It appears that the petitioner expects everyone high or low to abide by his decision, wrong or right and in case anyone does exercise his discretion or jurisdiction, then that act of his is labelled as an act of mala fide.

108. Coming to the allegation of the petitioner that some lists were given by respondent No. 2 for getting certain candidates admitted, suffice it to observe that the same does not stand proved. Respondent No. 2 in his reply, reproduced in the earlier part of the judgment, has clearly exhibited that the petitioner has unnecessarily tried to involve respondent No. 2 and has produced certain lists with which the latter had no concern. The manner in which the two slips have been shown as one document, creates a suspicion in our mind about the genuineness of these lists. The affidavit filed by Ram Narain further makes it clear that it was he who because of his personal relations, had given some chit to the petitioner and that chit did not bear the signature of Mrs. Bhajan Lal. As earlier observed, the averments made by respondent No. 2 clearly belie the plea put forth in this respect by the petitioner.

109. Coming to the news items appearing in the newspapers, suffice it to observe that no reliance can be placed on them and have just to be ignored in view of the judgment of the Supreme Court in *Samant N. Balkrishna v. George Fernandez*, AIR 1969 SC 1201, wherein it has been observed thus (para 47):—

"A news item without any further proof of what had actually happened through witnesses is of no value. It is at best a second-hand secondary evidence. It is well known that reporters collect information and pass it on to the editor who edits the news item and then publishes it. In this process the truth might get perverted or garbled. Such news items cannot be said to prove themselves although they may be taken into account with other evidence if the other evidence is forcible."

Moreover, the making of these statements has been specifically denied by respondent No. 2.

110. So far as the allegations of mala fide against respondent No. 1 are concerned, the same have been made against him in his capacity as Chancellor and not as the Governor

of State. In this situation, it is not at all necessary to go into the merits of those allegations. However, even on merits there is no substance in those allegations. Respondent No. 1 has specifically denied these allegations. The petitioner has not been able to prove and substantiate any of these allegations. It may be observed, the petitioner has levelled some of the allegations in an irresponsible manner. Thus, we are constrained to hold that the petitioner has failed to prove the allegations of mala fide, both against respondent No. 1, as well as respondent No. 2.

111. Having adjudicated upon the merits of the controversy, I would now notice an important preliminary objection which had been raised on behalf of respondent No. 1. It was contended by Dr. Chitale, learned counsel, that Shri G. D. Tapase, Governor of Haryana, is the ex officio Chancellor of the University by virtue of his office and that no writ will, therefore, lie against him because of the protection under Article 361 of the Constitution of India. On the other hand, it was submitted by Shri Rao, learned counsel for the petitioner, that the immunity given by Art. 361 was confined to the exercise and performance of the powers and duties of the office of Governor under the Constitution and for acts done thereunder; that the office of the Governor is separate from that of the Chancellor; that while performing his duties the Chancellor does not act on the aid and advice of the Council of Ministers; that the office of the Chancellor is created under the Statute and that no immunity as envisaged under Art. 361 of the Constitution of India is available to the Chancellor.

112. Before examining the tenability of the arguments advanced by the learned counsel appearing for the parties, it is necessary to notice the provisions of Art. 361 of the Constitution of India, which read as under:

"(1) The President, or the Governor of a State, shall not be answerable to any Court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties:

Provided that the conduct of the President may be brought under review by any Court, Tribunal or body appointed or designated by either House of Parliament for the investigation of a charge under Art. 61:

Provided further that nothing in this clause shall be construed as restricting the right of any person to bring appropriate

proceedings against the Government of India or the Government of a State.

(2) No criminal proceedings whatsoever shall be instituted or continued against the President, or the Governor of a State, in any Court during his term of office.

(3) No process for the arrest or imprisonment of the President, or the Governor of a State shall issue from any Court during his term of office.

(4) No civil proceedings in which relief is claimed against the President, or the Governor of a State, shall be instituted during his term of office in any Court in respect of any act done or purporting to be done by him in his personal capacity, whether before or after he entered upon his office as President, or as Governor of such State, until the expiration of two months next after notice in writing has been delivered to the President or the Governor, as the case may be, or left at his office stating the nature of the proceedings, the cause of action therefor, the name, description and place of residence of the party by whom such proceedings are to be instituted and the relief which he claims."

An analysis of the aforesaid provisions which prescribe the limits of the Governor's immunity against civil and criminal proceedings would show that the framers of the Constitution have given personal immunity from legal action, whether during office or thereafter, to the President or the Governor of any act done or purported to be done in exercise of their powers and duties of their office as well as immunity from criminal proceedings or from arrest or imprisonment by or under any process of a Court during their term of office. In so far as civil action against the President or the Governor in their individual and personal capacity is concerned, whether those actions arose out of acts done before or after they entered upon their respective offices, there is no immunity from any action in a Court of law against them except the immunity from arrest under clause (3) of the Article, and the condition that a suit cannot be filed before the expiration of two months next after notice in writing has been delivered to them specifying the details mentioned in Cl. (4).

113. On the respective contentions of the learned counsel for the parties, the short question that needs determination is whether the immunity envisaged under Art. 361 (1) extends even to the exercise and performance of the powers and duties conferred on the Governor under any Act or the Statute not in his capacity as Governor but in a

different capacity held by him by virtue of his office as Governor.

114. Though various authorities were cited and lot of arguments were advanced yet as I look at the matter, I find that answer to the aforesaid question would solely depend on the true construction of the expression 'the exercise and performance of the powers and duties of his office' occurring in clause (1) of Art. 361.

115. The powers and duties of the office apparently embrace the powers of the Governor expressly conferred by the Constitution as well as those conferred by any law or statutory rules. Under the Constitution, there are some Articles which indicate the vesting of the entire executive power of the State in the Governor in respect of matters in regard to which the Legislature of the State has power to make law.

116. Under Art. 154 the executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. Article 161 provides that the Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends. Article 162 says that the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws. A combined reading of these three Articles clearly indicates that the entire executive power of the State vests in the Governor in respect of matters in regard to which the Legislature of the State has power to make laws. In regard to the same matters the Governor has also got the limited judicial powers, referred to above.

117. Our attention was also drawn to other Articles conferring some powers on the Governor. Article 165 gives power to the Governor to appoint the Advocate-General. Article 166 (3) gives power to the Governor to make rules for more convenient transaction of business of the Government of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion. Article 192 empowers the Governor to decide the question as to the disqualifications of members of the Legislature. Article 200 talks of the power of the Governor to give assent to a

Bill passed by the Legislature. Article 213 gives power to the Governor to promulgate Ordinance. Under Article 309 power is given to the Governor to make rules regulating the recruitment and conditions of service of persons serving the State. Under Article 316 the Governor is empowered to appoint members of the State Public Service Commission.

118. These are all powers expressly conferred by the Constitution. But besides these powers and duties, there may be powers and duties of the office which, though not expressly provided for by any Article of the Constitution, result from the working of several Articles in the Constitution. What I mean to say is that the Constitution may also enable other bodies or authorities to confer the powers or impose the duties on the Governor subject to the provisions of the Constitution. The other bodies may, therefore, make laws conferring certain powers on the Governor. Therefore, there are many ways by which a power may be conferred on the Governor qua Governor which will enable him to exercise that power by virtue of his office as Governor. There can be no gainsaying that all the powers exercisable by a Governor by virtue of his office can be exercised only on the advice of the Council of Ministers except in so far as the Constitution expressly or perhaps by necessary implication provides otherwise. See in this connection a passage from the judgment of the Supreme Court in *Samsher Singh v. State of Punjab*, AIR 1974 SC 2192, which appears at page 2202 of the report in para 48 and reads thus:—

"The President as well as the Governor is the constitutional or formal head. The President as well as the Governor exercises his powers and functions conferred on him by or under the Constitution on the aid and advice of the Council of Ministers, save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion. Wherever the Constitution requires the satisfaction of the President or the Governor for the exercise by the President or the Governor of any power or function, the satisfaction required by the Constitution is not the personal satisfaction of the President or Governor but the satisfaction of the President or Governor in the constitutional sense in the Cabinet system of Government, that is, satisfaction of his Council of Ministers on whose aid and advice the President or the Governor generally exercises all his powers and functions. The decision of any Minister on

officer under rules of business made under any of these two Arts. 77 (3) and 166 (3) is the decision of the President or the Governor respectively. These articles did not provide for any delegation. Therefore, the decision of Minister or officer under the rules of business is the decision of the President or the Governor."

In that very judgment it has further been observed in para 57 thus:—

"For the foregoing reasons we hold that the President or the Governor acts on the aid and advice of the Council of Ministers with the Prime Minister at the head in the case of the Union and the Chief Minister at the head in the case of State in all matters which vest in the executive whether those functions are executive or legislative in character. Neither the President nor the Governor is to exercise the executive functions personally."

119. Having adverted to the relevant provisions of the Constitution, it is now to be seen whether the powers exercised by the Chancellor have any relation to the exercise and performance of the powers and duties of the office of the Governor. Though earlier also I have referred to certain relevant provisions of the Act and the Statute, yet for facility of reference it is necessary to make mention of those provisions here again. Under Sec. 3 of the Act the first Chancellor of the University is appointed by the Government. Under Sec. 8 the Chancellor is mentioned as one of the officers of the University. Under sub-sec. (2) of S. 8, the Chancellor is empowered to appoint a person to be Pro-Vice-Chancellor on such terms and conditions as he may think fit. Under Sec. 19 the Chancellor is empowered to require or direct any officer or authority of the University to act in conformity with the provisions of the Act and the Statute, Ordinances and Regulations made thereunder. Under sub-sec. (2) it is further provided that the power exercised by the Chancellor under sub-section (1) shall not be called in question in any Civil Court.

120. Under the first Statutes of the University, Statute 2 provides that the Governor of Haryana shall be the ex officio Chancellor of the University. Statute 3 says that the Chancellor by virtue of his office will be the head of the University. In sub-clause (2) of Statute 3 it is provided that the Chancellor shall, if present, preside at the convocation of the University for conferring degrees and at all meetings of the Court. Under Statute 4 (6) complete power is given to the Chancellor to appoint a Vice-

Chancellor on such terms and conditions as he lays down. Under clause (8) of Statute 4 power is given to the Chancellor to fill in any casual vacancy in the office of the Vice-Chancellor. Statute 10 provides the constitution of the Court in which the Chancellor is mentioned as one of the ex officio members. Under Statute 26 power of relaxing any condition mentioned in the Statute is given.

121. As has been observed earlier, and that is the scheme of the Act and the Statutes, that in the University affairs there cannot be any interference from the State Government. The State Government is an authority quite distinct from the authority of the Chancellor. The State Government cannot advise the Chancellor to act in a particular manner. The University is a statutory body, autonomous in character. Under the Act and the Statutes, the Chancellor has been given certain powers exercisable by him in his absolute discretion without any interference from any quarter. For the appointment of the Vice-Chancellor or the Pro-Vice-Chancellor, he is not required to consult the Council of Ministers. It is correct that by virtue of his office the Governor becomes the Chancellor of the University but while discharging the functions of his office he does not perform any duty or exercise any power of the office of the Governor. While discharging the functions of the office, the Chancellor does not act on the aid and advice of the Council of Ministers. It would not be correct to say that as the Governor holds the office of the Chancellor of the University by virtue of his office, therefore, the powers and duties he exercises or performs under the relevant Act or the Statute, are the powers and duties of his office as Governor. The Governor is vested with certain powers and duties under the Constitution that normally are exercised or performed on the aid and advice of Council of Ministers and, therefore, it becomes necessary to give immunity to such person in the discharge of the duties of his office. But this is not the position in the case of the Chancellor as he, under the Act, has his own independent existence and exercises his power without any interference from any quarter. The office he holds is a statutory office and is quite distinct from the office of the Governor.

122. If immunity is extended to the Chancellor also, then it would lead to anomalous results, that is, that in respect of action of the Governor as the Head of the State executive, appropriate proceedings against

the State would be open, while it would not be permissible for any person to question the action of the Chancellor in any proceedings, for the reason that the Chancellor's action not being the action of the Governor as the Head of the State executive, the second proviso of Art. 361 (1) would have no applicability. In this view of the matter, I do not find any escape from the conclusion that the powers and duties exercised and performed by the Chancellor under the Act or the Statutes of the University have absolutely no relation to the exercise and performance of the powers and duties of the office of Governor.

123. Dr. Chitale had placed reliance on some judgments. The first case to which reference may be made is *Biman Chandra Bose v. Dr. H. C. Mukherjee*, Governor, West Bengal, AIR 1952 Cal 799. In that case, the Governor, in exercise of his power conferred by sub-clause (e) of clause (3) of Article 171 of the Constitution of India, read with clause (5) of the said Article, had nominated some persons as members of the Legislative Council of the State of West Bengal. The said nomination was challenged by one Biman Chandra Bose on the ground that he fulfilled all the conditions required for nomination under Art. 171 (5) and that none of the persons nominated by the Governor, fulfilled the requirements of the said Article. At the time of the hearing of the petition, a preliminary objection was raised by the Advocate-General, that because of the provisions of Art. 361 of the Constitution of India, the petition was not maintainable as against the Governor. On consideration of the entire matter, the learned Judge upheld the objection. The other case is *Laxman Singh v. Raj Pramukh of Madhya Bharat*, AIR 1953 Madh Bha 54 (Gwalior Bench). The facts of that case are that the petitioner who was a Jagirdar was not required under any law to introduce within his Jagir either Zamindari or Raiyatwari system of land administration and that, therefore, he had leased out in 1909, lands to the non-applicant tenants Nos. 4 to 31 under separate contracts. The leases were revised by the petitioner in 1938 and the rents enhanced. Since the revision of the leases, the tenants paid enhanced rent until 1949. In that year, on complaint by the tenants to the Madhya Bharat Government, the Jagir Commissioner passed an order directing the petitioner to realise rent according to the Pattas issued in 1908 and to refund to tenants the excess amount realised from them since the revision of rent in 1938.

The petitioner appealed to the Madhya Bharat Government against the said order of the Jagir Commissioner and the order was upheld in appeal. In the petition filed in the High Court, an objection was raised that the petition was not maintainable in so far as it seeks relief against the Rajpramukh in view of the provisions of Art. 361. This contention was upheld.

124. From the facts of the aforementioned two cases, it would be quite evident that the same are distinguishable and have no applicability to the facts of the case in hand.

125. The next case that needs detailed reference and on which both the learned counsel relied is *Dr. S. C. Barat v. Hari Vinayak Pataskar*, AIR 1962 Madh Pra 73. The facts of that case are that under Sec. 9 of the Jabalpur University Act, 1956, the Governor of Madhya Pradesh is the Chancellor. The Chancellor, by virtue of his office, is the Head of the University and the President of the Court, and when present is required to preside over the meetings of the Court and on any convocation of the University. The procedure for the appointment of the Vice-Chancellor is laid down in Section 9. According to that provision, the Vice-Chancellor is appointed by the Chancellor from a panel of not less than three names recommended by a Committee constituted in accordance with sub-section (2). This Committee is constituted by the Chancellor and consists of three persons. The Committee constituted under sub-section (2) is required to submit its panel within one and a half months from the date of its constitution. The Committee submitted a panel of names, Dr. S. C. Barat and another, petitioners in that case, challenged the validity of the constitution of the Committee and further pleaded that on the basis of the recommendation by that Committee, no person could validly be appointed as Vice-Chancellor to succeed Shri Kunjilal Dubey (the continuing Vice-Chancellor) on the expiry of his term. The petition was contested on behalf of the respondents. At the time of the hearing, a preliminary objection was raised, similar to the one with which we are concerned, by Shri K. A. Chitale, learned counsel appearing for the Chancellor, that the Court had no jurisdiction to entertain any proceeding whatever or issue any direction under Art. 226 whatever against the Chancellor. The objection rested on Article 361 and had been raised as the Governor of the State was the Chancellor of the University. The learned Judges, as would be evident from the judgment, con-

sidered the matter thoroughly in the light of the provisions of the Constitution and finally observed thus (para 9):

"When an Act confers power on the Governor not qua Governor but in a different capacity held by him by virtue of his office as Governor, the powers and duties so conferred are not the powers and duties of the office of the Governor. They are the powers and duties of a different office which the Governor holds by virtue of his office as Governor. It is altogether erroneous to say that as the other office is held by the person who is the Governor of the State by virtue of his office as Governor, therefore, the powers and duties he exercises or performs of that other office under the relevant Act are the powers and duties of his office as Governor."

The aforesaid observations clearly support the view which we are taking, but Dr. Chitale relied on the following observations of the Bench which appear in para 10 of the report:—

"Now, Sec. 9 of the Jabalpur University Act, 1956, does not make the Governor of the State the Chancellor of the University by virtue of his office as Governor. It says that the Governor of Madhya Pradesh shall be the Chancellor. The plain meaning of this provision is that the person who is for the time being the Governor of the State shall be the Chancellor. Section 9 (1) does not say that the Governor shall be the Chancellor by virtue of his office as Governor or that the Governor shall ex officio be the Chancellor. It is noteworthy that S. 10 (1) of the Act uses a different language in connection with the office of the Pro-Chancellor. It says that the Minister of Education shall ex officio be the Pro-Chancellor. Whereas under S. 9 (1) it is the prestige and personality of the person filling the office of the Governor that is made the basis of his appointment as Chancellor; under S. 10 (1) it is the office itself that is made the criterion for the appointment of the Minister of Education as the Pro-Chancellor.

The distinction between these two modes of appointment is a real one. Thus the powers and duties that the Chancellor exercises or performs under the Act are not any powers or duties conferred on the Governor qua Governor or of a capacity which he occupies by virtue of his office as Governor. They are the powers and duties of a public capacity held by the personage who is also the Governor. The Chancellor's powers under the Jabalpur University Act are thus not the powers and duties of the office of the Governor and consequently the protec-

tion provided by Art. 361 (1) cannot be invoked by the Chancellor in respect of the exercise and performance of the powers and duties of his office as Chancellor under the Jabalpur University Act."

On the basis of the aforesaid observations, it was sought to be argued by the learned counsel that in that case, the learned Judges rejected the preliminary objection on the ground that according to S. 9 of the Jabalpur University Act, the Governor of Madhya Pradesh shall be the Chancellor, but in the instant case the Chancellor is by virtue of his office as Governor, that is, that the Governor is the ex officio Chancellor of the University. It is correct that from the aforesaid observations, Dr. Chitale is justified in soliciting support for his contention but, with utmost respect, we are unable to agree with the learned Judges in S. C. Barat's case (AIR 1962 Madh Pra 73) (supra), that the distinction between the two modes of appointment, that is, where the Governor of a State shall be the Chancellor of the University and where the Governor by virtue of his office or as ex officio shall be the Chancellor, would make any difference. As has been observed earlier, the real test to be seen is whether while holding the office of the Chancellor, is the Governor performing any duties or is exercising any power relating to his office? Further, it has also to be seen whether by holding the office of the Chancellor, is the Governor not holding entirely a different office and in a different capacity? If the answer to these two questions is in the negative, then the Governor as Chancellor would not be exercising or performing any power or duty in his capacity as Governor nor would the exercise or performance of the power or duty of the office of the Chancellor would have any relation to the exercise or performance of the duty of the office of the Governor. It may be observed that except the observations made in para 10, the entire judgment in S. C. Barat's case (AIR 1962 Madh Pra 73) (supra) supports the contention of Mr. Rao and does not help the learned counsel for respondent No. 1.

126. This brings me to the next case in Jyoti Prasad Upadhyaya v. Kalka Prasad Bhatnagar, AIR 1962 All 128. The facts of that case are that the election of one Jyoti Prasad Upadhyaya to the Uttar Pradesh Legislative Council was called in question on the ground that he was holding an office of profit under the Government of the State of Uttar Pradesh, as he had been appointed as the Vice-Chancellor of the University of

Agra by the Chancellor under S. 9 of the Agra University Act, 1926, and that in view of the provisions of Art. 191 of the Constitution of India, was disqualified to be chosen to fill in the seat. The petition was contested on the ground that the office held by the Vice-Chancellor was under the University of Agra and not under the State Government and as such the office of the Vice-Chancellor was not an office of profit. The only point that needed determination, on the respective pleas of the parties, was whether respondent No. 1 held the office of profit under the State Government. On consideration of the relevant provisions of the Constitution and the University Act, Mathur, J., speaking for the Court, held as under (para 11):—

"The Act clearly envisages two distinct authorities, namely, the Chancellor and the State Government. When the Legislature intentionally made a differentiation between Chancellor and the State Government, no other opinion can be formed except that it was the intention of the Legislature not to regard the Chancellor to be a part of the State Government, and while exercising his powers the Chancellor was not exercising the executive powers of the State."

It was further held as under (para 13):—

"If the appointment of the Vice-Chancellor by the Chancellor of the University is not deemed to be an appointment made by the State Government, the Vice-Chancellor of the Agra University shall not be disqualified and can be chosen as a member of the U. P. Legislative Council. As already mentioned above, the Chancellor cannot be equated with the State Government and the two cannot be placed on the same footing and consequently an appointment made by the Chancellor cannot be deemed to have been made by the State Government."

Mr. Rao, learned counsel for the petitioner, had placed great reliance on the aforesaid observations and, in our view, rightly as the same lend full support to his contention and negative the plea of respondent No. 1.

127. The only other case relevant to the point which needs reference is M. Gnana-
mani v. Governor of Andhra, AIR 1954 Andhra 9. The facts of that case are that the petitioner was a B. E. of the Madras University. He was working in the Second Circle as an Assistant Engineer. On 15th of Jan., 1953, an order of Government dated 22nd of Dec., 1952, was served on him imposing a penalty of compulsory retirement. Against that order he preferred an appeal to the Governor of Madras.

After the Andhra State was formed, the papers were transferred to the Governor of Andhra for disposal. When the petitioner wrote to the Governor of Andhra for information, he received a reply from the Secretary that his petition was sent to the Secretary to Government, F. W. D., Andhra, for disposal. One of the grounds on which the petitioner claimed relief, was that the action of the Governor in asking the Government to dispose of the appeal was without jurisdiction and reduced the provisions for an appeal to a farce, as the very authority which passed the original order was asked to dispose of the appeal. One of the points that arose for consideration before the learned Judge was whether a writ would lie in the circumstances against the Governor of Andhra. On consideration of the entire matter, the learned Chief Justice on the question of immunity as envisaged under Art. 361, observed thus (para 13):—

“Under Art. 361 there is an absolute immunity for the first category of acts, but only a limited one in respect of the other two. In respect of the first he is not answerable to any Court of law. No Court can compel him to show cause or defend his action. In the case of official acts an absolute immunity from the process of Court is given and this immunity extends not only to his official acts but also to acts purporting to be done by him in exercise of the powers conferred on him, so long as he is not guilty of dishonesty or bad faith. But this will not preclude the acts of the Governor from being questioned if they can be done without issuing a process on him. Indeed Art. 361 itself recognises that this immunity would not restrict the right of any person to bring appropriate proceedings against the Government.”

128. From the aforesaid observations, it would be clear that three categories were formed by the learned Chief Justice in which the powers of Governor could fall. Regarding first category under which the powers exercisable by the Governor by virtue of his office fall, it has been held that absolute immunity is available. But with regard to other two categories, that is, where powers conferred on the Governor qua Governor, but in a different capacity though he occupies that capacity by virtue of his office as Governor; and where the Governor acts in his personal capacity, like he may commit breaches of contracts entered into with third parties, the learned Chief Justice has held that only limited immunity is available.

129. Viewing the facts of this case in the light of the observations reproduced above, it is quite evident that the same do not fall in first category. So far as second and third categories are concerned, it may be observed that Dr. Chitale, learned counsel for respondent No. 1, did not claim any limited immunity as his whole case was based on absolute immunity.

130. In this view of the matter, the decision in *M. Gnanamani's case* (AIR 1954 Andhra 9) (supra) does not help the learned counsel for respondent No. 1. Rather the observations reproduced in the earlier part of the judgment favour the stand taken by Mr. Rao.

131. There is no other relevant case which needs mention except *Dr. Bool Chand's case* (AIR 1968 SC 292) (supra) and that too, for this purpose only that in that case, the Chancellor was a party to the writ petition which had been filed by Dr. Bool Chand, questioning the legality of the order of the Chancellor and in that case at no stage right up to the Supreme Court, an objection was raised that the Chancellor could not be made a party as he enjoyed absolute immunity under Art. 361 of the Constitution.

132. As a result of the aforesaid discussion, I hold that no absolute immunity under Clause (1) of Article 361 of the Constitution is available to the Governor for the acts done in exercise of the power or in performance of the duties as Chancellor of the University. Hence the preliminary objection raised on behalf of the Chancellor must be and is overruled.

133. A preliminary objection had also been raised on behalf of the Advocate-General, Haryana, that certain allegations made in the petition were unnecessary and that the same deserved to be struck off under the provisions of O. 6, R. 16, Civil P. C. It is not necessary to deal with this preliminary objection as the learned counsel for petitioner during the course of arguments, did not refer to any unnecessary, scandalous, frivolous or vexatious allegations.

134. No other point relevant for the disposal of this petition remains on which it may be necessary to express any opinion.

135. As a result of the aforesaid discussion, I summarise my conclusions as follows:—

(1) Under clause (7) of Statute 4, the Chancellor is competent and has power to grant renewal of the term.

(2) It is quite evident that the Chancellor had acted within the scope of his authority

in laying down the term that the term of the petitioner will be renewed and that the petitioner had acted on that promise/assurance and had changed his position. In the instant case, estoppel will have to be sustained even if the same may be based on an assurance to the future because the promisor intended to be legally bound and intended his promise to be acted upon; with the result that it was so acted upon. It was a real promise — promise intended to be binding, intended to be acted upon and in fact acted upon.

(3) The provisions of S. 9-A are not only to apply to the persons who are appointed Vice-Chancellors after the promulgation of the Ordinance, but also to the persons who are in office on the date of promulgation.

(4) The words 'continue in if he has attained the age of 65 years' occurring in Section 9-A of the Ordinance and the Amendment Act are discriminatory and violative of Art. 14 of the Constitution as the same are designed to operate to the detriment of one and one person only, i.e. the petitioner whose term had to be renewed as a result of the promise/assurance with effect from 27th Oct., 1980.

(5) The petitioner has tried to establish the plea of mala fide purely on conjectures without laying any foundation for the same. The attack on the ground of mala fide thus must necessarily fail and the Ordinance and the Amendment Act do not suffer from any infirmity on this score.

(6) The powers and duties exercised and performed under the Statute by the Chancellor have absolutely no relation to the exercise and performance of the power and duties of the office of the Governor.

(7) No absolute immunity as envisaged in Clause (1) of Article 361 of the Constitution of India is available to the Governor for the acts done in exercise of the powers or in performance of the duties as Chancellor of the University.

In view of conclusions (2) and (4), the writ petition is allowed and a direction is issued to the Chancellor of the University, respondent No. 1, to issue notification renewing the term of the petitioner as Vice-Chancellor with effect from 27th Oct., 1980. In the circumstances of the case, I make no order as to costs.

S. C. MITAL, J.:— I agree.

RAJENDRA NATH MITTAL, J.:— I also agree.

Order accordingly.

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**S. S. SANDHAWALIA, C. J.,
PREM CHAND JAIN, S. C. MITAL, D. S.
TEWATIA, M. R. SHARMA, R. N.
MITTAL AND A. S. BAINS, JJ.***

Kalwa, Appellant v. Vasakha Singh and another, Respondents.

Second Appeal No. 67 of 1969, D/- 1-2-1982.**

(A) Punjab Pre-emption Act (1 of 1913), S. 15 (1) and (2) — Sub-section (2) overrides sub-sec. (1) — Judgment of five Judges Full Bench taking this view — Entitled to be affirmed on principle of stare decisis and also on soundness on principle and rationality. (Precedents — Stare decisis — Doctrine of).

Per Majority (Tewatia and Sharma JJ., dissenting):

The unanimous judgment of the Full Bench (consisting of five Judges) in the case of Karta Ram v. Om Prakash (AIR 1971 Punj & Har 423) (FB) laying down that sub-sec. (2) of S. 15 of the Punjab Pre-emption Act overrides the preceding sub-section (1) of S. 15 and that, therefore, the class of pre-emptors referred in S. 15 (1) cannot claim any right of pre-emption in cases falling under S. 15 (2) despite the fact that there may be no person who can claim such a right thereunder lays down the law correctly. The Full Bench decision in Karta Ram's case was not in isolation but only a culmination and re-affirmance of the longest line of unbroken precedent on this particular point within Punjab High Court. Ever since the Amending Act 10 of 1960 whereby tenants-at-will were also clothed with the right of pre-emption there has been total unanimity in Punjab High Court for two decades on the point. If numbers have some relevance, nearly twenty Judges of this

*In this case the Judges of the Full Bench differ in their views. The majority view is taken by S. S. Sandhawalia, C. J., P. C. Jain, S. C. Mital, R. N. Mittal and A. S. Bains, JJ. and the minority view by D. S. Tewatia and M. R. Sharma, JJ. The judgments are printed in the order in which they are given in the certified copy—Ed.

**Decided by Full Bench on order of reference made by M. R. Sharma, J. on 17-4-1980.

Court at varying times have unreservedly opined that sub-sec. (2) is an independent provision by way of exception to the preceding sub-section and in fact override the same. The long line of precedent should not be deviated from even for reasons of judicial propriety well-enshrined in the doctrine of stare decisis. The Full Bench decision in Karta Ram's case has to be affirmed not merely on the basis of stare decisis, but equally so on its soundness on principle and rationality.

(Paras 7 to 12 and 136)

(B) Punjab Pre-emption Act (1 of 1913), S. 15 (1) and (2) — Scope — Sub-sec. (2) is independent provision and overrides sub-section (1) — Case falling under sub-sec. (2) — Tenant or co-sharer has no right to pre-empt.

Per Majority (Tewatia and Sharma, JJ., dissenting):

Sub-section (2) of S. 15 is an independent self-contained provision and cannot be read as a mere proviso to the preceding sub-section (1). A tenant or a co-sharer has no right of pre-emption in cases falling squarely within sub-sec. (2) of S. 15 of the Act.

(Paras 46, 136)

The basic rationale underlying the law of pre-emption, is first to maintain the homogeneity and integrity of the agricultural tribe of the particular village community and to retain the property in accordance with the agnatic rule of succession.

(Para 5)

The right of pre-emption conferred on the tenant under S. 15 (1) by the Punjab Act 10 of 1960 was a pure creature of the Statute. It neither advances the agnatic theory of succession nor is conducive to the maintenance of the homogeneity of the agricultural tribe of the village community. In fact it runs directly counter to both of them because the tenant may be a rank stranger to the agnatic line and equally an alien to the agricultural tribe which may constitute the proprietary body of the village. The right was conferred in order to give protection to the tenant. (Para 20)

Sub-section (2) of S. 15 begins with a non obstante clause and is thus clearly by way of an exception to the general provisions of the preceding sub-sec. (1). Sub-section (2) is a special provision providing for the class of pre-emptors in sales made by female vendors only and further constricted by the qualification that the property sold should have been succeeded through a father or brother or a husband.

On the hallowed rule of construction that a special rule of law would override a general one it would be equally patent that in this context sub-sec. (1) cannot possibly have any place. The legislature having made its intent clear and categorical in sub-section (2), it is not for the Court to sit in judgment over the wisdom of its policy. The provision is reasonable and its language being clear and unambiguous, it should be given its plain meaning. Even assuming that two views are possible, pre-emption being a piratical right, construction in favour of such right must be avoided. (Para 23)

A tenant cannot claim any inherent right of pre-emption and his exclusion from sub-section (2) does not amount to infringement of Article 14 of the Constitution. (Para 24)

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C. B. Goel, for Appellant; S. K. Goyal, for Respondents.

S. S. SANDHAWALIA, C. J.:— Whether sub-section (2) of Section 15 of the Punjab Pre-emption Act, 1913 is an independent self-contained provision or is merely a proviso to the preceding sub-section (1) despite the non obstante clause with which it begins has come to be the spinal issue in this reference to a Bench of seven Judges.

2. It is because of a veiled doubt about the correctness of the settled law within this Court by a Bench of five Judges in *Karta Ram v. Om Parkash*, AIR 1971 Punj & Har 423 (FB) and a co-equal Bench in *Prithi Pal Singh v. Milkha Singh*, AIR 1976 Punj & Har 157 (FB), that this reference seems to have been necessitated. Because of this and indeed in view of an implied challenge to the very doctrine of precedent which it involves, the matter calls for an exhaustive and in-depth examination.

3. For issues so pristinely legal, the facts would invariably pale into insignificance. Yet law even in abstract must retain its connection with the terra firma of the factual matrix. It suffices, therefore, to advert to the facts relevant to the legal issue in *Kalwa v. Vasakha Singh and others*, R. S. A. No. 67 of 1969. Jagdish Chand was the original owner of the land in dispute, with other co-sharers. On his death, mutation No. 72 was sanctioned on May 21, 1965 in favour of his two sons — Inder Partap Singh and Ravi; Sarla Devi, Vijay Devi, Vijay Laxmi, his daughters; and Vidhya Wanti his widow, in equal shares. The heirs aforesaid sold the land to the vendees by a registered deed. Kalwa appellant brought a suit for pre-emption basing his claim on being a tenant of the land in dispute at the time of the sale and also being a co-sharer with the original owner Jagdish Chand and consequently with the vendors themselves. The suit was contested on behalf of the respondents and the material issues framed were Nos. (1) and (6):—

(1) Whether the plaintiff has got a preferential right of pre-emption? OPP.

(6) Whether sale made by the females is pre-emptible? OPP.

On these issues the trial Court held that the plaintiff-appellant was not entitled to pre-empt the sale made by the females who had inherited through their father or husband as sub-section (2) of Section 15 of the Punjab Pre-emption Act, 1913 (hereinafter called 'the Act') alone was applicable. However, it was held that the plaintiff-appellant could pre-empt the share of only one male co-sharer, namely — Inder Partap and in effect 1/12th share of the entire land on payment of the proportionate price thereof.

4. On appeal the learned Additional District Judge categorically affirmed the finding of the trial Court with regard to the sale made by the females (who had inherited the land from their father or husband) holding that the case fell squarely under Sec. 15 (2) of the Act and, therefore, the tenant or the co-sharer had absolutely no right of pre-emption thereunder. He further held that even with regard to the land sold by Inder Partap, the vendees also became co-sharers and therefore, Kalwa had no superior right of pre-emption in respect of this land as well. Allowing the appeal of the vendees and dismissing that of the appellant Kalwa, his suit was dismissed in toto.

5. The appellant-Kalwa then preferred the present regular second appeal which first came up for hearing before my learned

brother Sharma J., who entertained some doubt's with regard to the correctness of the ratio of the earlier Full Benches in Karta Ram, (AIR 1971 Punj & Har 423) and also Prithi Pal Singh's cases (AIE 1976 Punj and Har 157) (supra) and therefore referred the matter to a Bench of seven Judges.

6. Inevitably the controversy herein must revolve around the relevant provisions of the statute and indeed on the very words thereof. It is, therefore, apt to read the provisions of Section 15 of the Act at the very outset:—

"S. 15 (1) The right of pre-emption in respect of agricultural land and village immovable property shall vest—

(a) where the sale is by a sole owner — First, in the son or daughter or son's son or daughter's son of the vendor;

Secondly, in the brother or brother's son of the vendor;

Thirdly, in the father's brother or father's brother's son of the vendor;

Fourthly, in the tenant who holds under tenancy of the vendor the land or property sold or a part thereof;

(b) where the sale is of a share out of joint land or property and is not made by all the co-sharers jointly,

First, in the sons or daughters or sons' sons or daughters' sons of the vendor or vendors;

Secondly, in the brothers or brothers' sons of the vendor or vendors;

Thirdly, in the fathers' brothers or fathers' brothers' sons of the vendor or vendors;

Fourthly, in the other co-sharers;

Fifthly, in the tenants who hold under tenancy of the vendor or vendors the land or property or a part thereof.

(c) where the sale is of land or property owned jointly and is made by all the co-sharers jointly—

First, in the sons or daughters or sons' sons or daughters' sons of the vendors;

Secondly, in the brothers or brother's sons of the vendor;

Thirdly, in the father's brothers or father's brothers' sons of the vendors;

Fourthly, in the tenants who hold under tenancy of the vendors or any of them the land or property sold or a part thereof.

(2) Notwithstanding anything contained in sub-section (1)—

(a) where the sale is by a female, of land or property to which she has succeeded through her father or brother or the sale in

respect of such land or property is by the son or daughter of such female after inheritance, the right of pre-emption shall vest,—

(i) if the sale is by such female, in her brother or brother's son;

(ii) if the sale is by the son or daughter of such female, in the mother's brothers or the mother's brother's sons of the vendor or vendors;

(b) where the sale is by a female of land or property to which she has succeeded through her husband, or through her son in case the son has inherited the land or property sold, from his father, the right of pre-emption shall vest,—

First, in the son or daughter of such husband of the female;

Secondly, in the husband's brother or husband's brother's son of such female."

7. The questions which emerge and are projected from the respective stands and contentions of the learned counsel for the parties may now be formulated for the sake of clarity. These are—

1. Whether the unanimous view of the Full Bench in Karta Ram Mansa Ram v. Om Parkash Hirda Ram, AIR 1971 Punj and Har 423, is wrong and, therefore, should be overruled;

2. Whether the majority view of the Full Bench in Prithi Pal Singh v. Milkha Singh, AIR 1976 Punj & Har 157 is erroneous and calls for reconsideration;

3. Whether sub-section (2) of Section 15 of the Act is an independent self-contained provision or is merely a proviso to the preceding sub-section (1) despite the non obstante clause with which it begins and;

4. If so, whether a tenant alone, or both a tenant and a co-sharer can be clothed with the right of pre-emption in cases falling squarely in sub-section (2) of Section 15 of the Act by a process of judicial interpretation despite the conspicuous absence of any reference to both.

Adverting now to question No. 1 it straightway deserves highlighting that the ordinary tenants as a class of pre-emptors were introduced for the first time in the statute by the amendment in Section 15 brought about by Punjab Act No. 10 of 1960. Earlier this class of pre-emptors found not the least mention in the statute. At the very threshold is the fact that a Bench of five Judges has already unanimously pronounced upon this major controversy before us in Karta Ram's case to the effect that sub-section (2) overrides the preceding Section 15 (1) and,

therefore, the class of pre-emptors referred in S. 15 (1) cannot claim any right of pre-emption in cases falling under Section 15 (2) despite the fact that there may be no person who can claim such a right thereunder. Again Karta Ram's case was not in isolation but only a culmination and re-affirmance of the longest line of unbroken precedent on this particular point within this Court. Immediately after the amendment by Act 10 of 1960 this very issue arose before this Court with regard to a sale made on the 11th of August, 1960, and was unreservedly answered by Shamsher Bahadur, J., by relying on Budhan Choudhry v. State of Bihar, AIR 1955 SC 191, in the following words in Debi Ram v. Smt. Chambeli, (1963) 65 Pun LR 500 :—

" * * * * Likewise, in the present case, the clear effect of the words 'notwithstanding anything contained in sub-section (1)' is that the provisions of sub-section (1) of Section 15 giving right of pre-emption to a co-sharer under sub-clause (fourthly) of Cl. (b) must give way to what is provided for in sub-section (2). In the case of the property to which females have succeeded through their father, brother or husband, the right of pre-emption is given only to very close relations and certainly not to co-sharers." An identical view was then arrived at by D. K. Mahajan, J., in Santa Singh v. Hazara Singh, (1965) 67 Pun LR 132 with the added reason that the special provisions of Section 15 (2) with regard to the sales by females in the specific circumstances would exclude the general provisions of S. 15 (1). Later after referring to the aforesaid authorities Harbans Singh J. (as the learned Chief Justice then was) took an identical view in Surjit Singh v. Nazir Singh, (1965) 67 Pun LR 1108 and opined about the rationale of sub-section (2) of Section 15 in the following terms :—

"There is no difficulty in understanding the idea behind the provisions made in sub-section (2). A female may acquire property either by inheritance or by self-acquisition or by gift from others. In each of these cases, she may be a sole owner of the property. The idea is that if the property has come to her by inheritance from her father's side descendants of that side should alone have a right to pre-empt, and if she had inherited the property from her husband, it should be the husband's relations who should have a right to pre-empt."

The Division Bench in Jai Singh v. Mughla, (1967) 69 Pun LR 475 then set its seal of

approval on the aforesaid view in the following terms :—

" * * * * But sub-section (2) of Section 15 starts with a non obstante clause, and, therefore, the provisions of sub-section (1) have to be read subject to sub-section (2). If a case falls within both the sub-sections, it is sub-section (2) which would apply to it, irrespective of the fact that it could also be covered by sub-section (1)."

Later, in Mohinder Singh v. Balbir Kaur, (1968) 70 Pun LR 752 : (AIR 1968 Punj 545), Tek Chand, J. opined in similar terms by holding that sub-section (2) of Section 15 of the Act begins with a non obstante clause and is an exception to the rules laid down in sub-section (1). Therefore, where sub-section (2) is applicable the provisions of sub-section (1) would not operate. Consequently a Division Bench consisting of Chief Justice Mehar Singh and P. C. Jain, J. in Surja Singh v. Chhotto, 1972 Pun LJ 732 (The case was decided on May 6, 1969 though reported much later), took an identical view in line with the aforesaid earlier precedent.

8. It was the aforesaid long and unbroken line of precedent within this Court which the Full Bench affirmed in Karta Ram's case (AIR 1971 Punj & Har 423) (supra), in the following words with the observation that not a single authority taking a contrary view could be cited (at p. 427) :—

"There is no merit in this contention. The view taken by this Court consistently is that if a sale falls under Section 15 (2) (a) of the Pre-emption Act, the application of Section 15 (1) is excluded. In my opinion, the language employed in Section 15 (2) (a) is capable of no other interpretation. It says that in spite of anything that has been mentioned in Section 15 (1) where the sale has been made by a female and of property to which she has succeeded through her brother, then the right of pre-emption shall vest in her brother or brother's son. In other words, the right of pre-emption qua such a sale will not vest in anybody else, in spite of what has been stated in sub-section (1) of Sec. 15 of the Pre-emption Act. The language of the statute being clear and capable of no other interpretation, it is idle to suggest that in the absence of the persons who have a right of pre-emption under sub-section (2) (a) of Section 15, other persons referred to in sub-section (1) of Section 15 of the Pre-emption Act would also have a right to pre-empt.

The persons mentioned in sub-section (1) of Section 15 of the Pre-emption Act in such a

case have no right of pre-emption is now well settled so far as this Court is concerned."

Again there has been no hint of dissent after the aforesaid authoritative enunciation of the law which was followed by the Division Bench consisting of Gurdev Singh and Gopal Singh, JJ. in *Smt. Birjee v. Pirthi*, AIR 1973 Punj & Har 289 and by C. G. Suri, J. in *Amar Nath v. Smt. Nirmal Kumari*, 1973 Pun LJ 321; C. S. Tiwana, J. in *Anup Singh v. Ilam Chand*, 1978 Pun LJ 328 and lastly by J. V. Gupta, J. in *Chander v. Cho Khan*, 1980 Pun LJ 7, apart from a host of unreported decisions taking the same view both before and after the rendering of the judgment in *Karta Ram's* case.

9. It is manifest from the above that apart from the rationale the doctrine of stare decisis is at once attracted here. Ever since the amending Act 10 of 1960 whereby tenants-at-will were also clothed with the right of pre-emption there has been total unanimity in this Court for two decades on the point. If numbers have some relevance, nearly twenty Judges of this Court at varying times have unreservedly opined that subsection (2) is an independent provision by way of exception to the preceding subsection and in fact overrides the same. What deserves particular highlighting in this context is the fact that the very concept of the right of pre-emption has now been abolished within the State of Punjab. The Punjab Pre-emption Act stands wholly repealed and wiped off the statute book by Act No. 11 of 1973. As yet the pre-emption law remains in force in Haryana but even there sometimes rumblings are raised about the advisability of retaining it or the statute book. It is in this context that one has to examine whether this long line of settled law (except for the solitary and minority view of my learned brother Sharma, J. in *Prithi Pal Singh's* case (AIR 1976 Punj & Har 157) (FB), culminating in the categorical observations of Pandit J., speaking for a unanimous Bench of five Judges, should now be given the go-bye, and thus completely unsettling the same and putting it in a ferment afresh. I am clearly of the view that the aforesaid long line of precedent should not now be deviated from even for reasons of judicial propriety well-enshrined in the doctrine of stare decisis. In a similar situation the Division Bench in *Mukhdeo Singh v. Harakh Narayan Singh*, AIR 1931 Patna 285 observed as follows:—

" * * * My other ground for adhering to the *cursus curiae* of this Court is substantially what has been pointed out recently by a Full Bench of this Court in *Tribeni Prasad v. Ram Asray Prasad*, AIR 1931 Patna 241, and what has been expressed by Mukerjee J., in the case of *Kedar Nath Hazra v. Manindra Chandra Nandy*, (1910) 5 Ind Cas 309, in these words:—

'The Courts must always hesitate to overrule decisions which are not manifestly erroneous and mischievous, which have stood for many years unchallenged and which from their nature may reasonably be supposed to have affected the conduct of a large portion of the community in matters relating to rights of property (*Young v. Robertson*, (1862) 4 Macqueen 314).'

I have already said that I am unable to hold that the view which has been held in this Court so far, is manifestly erroneous and it is obvious that it is the very opposite of being unjust or mischievous."

Again in *C. Varadarajulu Naidu v. Baby Ammal*, AIR 1964 Mad 448, it was rightly highlighted that the evil of unsettling consistent judicial opinion would be much greater than the evil of laying down what is alleged to be bad law and that the Full Bench decisions should, as far as possible, be held to be binding unless they are glaringly bad or patently contrary to the statute itself. In this very vein H. R. Khanna J., in *Maganlal Chhaganlal (P.) Ltd. v. Municipal Corporation of Greater Bombay*, AIR 1974 SC 2009 has observed as follows (at p. 2043):—

"So far as the question is concerned about the reversal of the previous view of this Court, such reversal should be resorted to only in specified contingencies. It may perhaps be laid down as a broad proposition that a view which has been accepted for a long period of time should not be disturbed unless the Court can say positively that it was wrong or unreasonable or that it is productive of public hardship or inconvenience." Lastly in this context is the affirmation of the rule in *Waman Rao v. Union of India*, AIR 1981 SC 271 in the following terms (at p. 288):—

"It is also true to say that for the application of the rule of stare decisis it is not necessary that the earlier decision or decisions of long standing should have considered and either accepted or rejected the particular argument which is advanced in the case on hand. Were it so, the previous decisions could more easily be treated as binding by applying the law of precedent and it

will be unnecessary to take resort to the principle of stare decisis. It is, therefore, sufficient for invoking the rule of stare decisis that a certain decision was arrived at on a question which arose or was argued, no matter on what reason the decision rests or what is the basis of the decision. In other words, for the purpose of applying the rule of stare decisis, it is unnecessary to enquire or determine as to what was the rationale of the earlier decision which is said to operate as stare decisis."

10. Following the aforesaid authoritative enunciation of the doctrine, it must necessarily be concluded that the view in Karta Ram's case (AIR 1971 Punj & Har 423) (FB) (supra) should now be unreservedly followed and upheld.

11. However, I am not affirming the said view merely on the basis of stare decisis, but equally so on its soundness on principle and rationality. Indeed, Mr. C. B. Goel, the learned counsel for the appellant was unable to assail the ratio in Karta Ram's case (supra), by any meaningful argument apart from the one that there did not appear to be an exhaustive discussion of principle therein. This argument loses sight of the fact that the Full Bench in Karta Ram's case (supra) was affirming a long line of unbroken precedent in Court which had earlier given various rationales therefor and against which not a single contrary judgment could be cited as stands expressly noticed therein. Nevertheless, it was observed categorically therein apparently that because of the non obstante clause, the language of S. 15 (2) of the Act was capable of no other interpretation except that if a sale falls under Section 15 (2) of the Punjab Pre-emption Act, the application of Section 15 (1) of the Act would be wholly excluded. Earlier judgments had noticed the fact that sub-sec. (2) dealt specially with female owners. Not only this, it pertained to the special class of female owners who had inherited the property either through their fathers or brothers or through their husbands. Therefore, the sound canon of construction that a special provision would exclude and override a general one, was equally attracted in interpreting Section 15 (2) of the Act. The basic idea underlying the enactment by the legislature of sub-section (2) had again been analysed in various judgments to be that of retaining such property within the family of the last male holder only and that too within his relatively close relations alone. I do not find any reason whatsoever to differ and

disagree with the aforesaid premises which equally underlie the ratio in Karta Ram's case (supra). With the greatest respect, not only am I unable to agree that the observations of their Lordships in Channan Singh v. Smt. Jai Kaur, AIR 1970 SC 349 in any way detract from or erode the ratio of Karta Ram's case (supra), but in effect buttress the same so unreservedly as to conclude the matter beyond any shadow of doubt. In Channan Singh's case (supra), Grover, J. speaking for the Bench analysed Section 15 (2) of the Act as follows (at p. 351):—

"... .. The entire scheme of sub-section (2) of Section 15 is that the right of pre-emption has been confined to the issues of the last male holder from whom the property which has been sold came by inheritance. Looking at Clause (a) of sub-section (2) where the property which has been sold has come to the female from her father or brother by succession the right of pre-emption has been given to her brother or brother's son. As has been observed in Mota Singh v. Prem Parkash Kaur, ILR (1961) 2 Punj 614 at p. 627, the predominant idea seems to be that the property must not go outside the line of the last male holder and the right has been given to his male lineal descendants. Where the sale is by the son or the daughter of such female the right is given to the mother's brothers or their sons. The principle which has been kept in view is that the person on whom the right of pre-emption is conferred must be a male lineal descendant of the last male holder of the property sold. This is so with regard to Clause (a) of sub-section (2). Coming to Clause (b) where the sale is by a female of land or property to which she has succeeded through her husband or through her son in case the son has inherited the same from his father the right of pre-emption is to vest firstly in the son or daughter of such female and secondly, in the husband's brother or husband's brother's son of such female. Now if the son or daughter of the female who has sold the property could refer to her son or daughter from a husband other than the one from whom the property devolved on her, it would be contrary to the scheme and purpose of sub-section (2) which essentially is to vest the right of pre-emption in the lineal descendants of the last male holder.

"... .."

It is manifest from the above that their Lordships have now authoritatively laid

down that the intent of the legislature in enacting Section 15 (2) of the Act was the twin one of confining the right of pre-emption to the issue of the last male holder through whom she had succeeded to the property and to vest the right of pre-emption in the lineal descendants of the last male holder. After this authoritative enunciation, can it possibly be said that a tenant could possibly fit-in into the scheme of the lineal descendants of the last male holder in a sale by a female owner falling within Section 15 (2) of the Act?

12. In the ultimate analysis, it must be concluded on question (1) that the judgment in Karta Ram's case (AIR 1971 Punj & Har 423) (FB) (supra) lays down the law correctly and must continue to hold the field and is hereby affirmed.

13. Coming now to question (2), it perhaps suffices to notice that there was common consensus that the issue of the correctness of the majority view in Prithi Pal Singh case (AIR 1976 Punj & Har 157) (FB) (supra) does not now directly arise here. Indeed, Mr. C. B. Goel, the learned counsel for the appellant did not raise a single argument against the same. This is even otherwise plain on a bare reference to the said judgment. The primary issue therein was — whether a Hindu female, who had acquired a limited estate prior to 1956, which was enlarged into full ownership by virtue of Section 14 (1) of the Hindu Succession Act would succeed through the last male holder or not? The majority view affirmed the earlier judgment of the Division Bench in Jai Singh's case (1967-69 Pun LR 475) (supra), to hold that a widow who originally succeeds to her husband's property as a limited owner under the Hindu law is not deemed to have succeeded through her husband to the absolute and full ownership of the estate but did so by virtue of S. 14 (1) of the Hindu Succession Act. As a result of this finding the majority view categorically was that the sales by such a widow were pre-emptible only under sub-sec. (1), and sub-section (2) had no application to her case. Consequently any question with regard to the interpretation or applicability of sub-section (2) would not arise at all and therefore was not even gone into far from being answered, by the majority.

14. It is obvious that herein no question whatsoever of any enlargement of the estate under Section 14 (1) of the Hindu Succession Act by a female succeeding to a limited estate prior to 1956, even remotely arises. Therefore, the ratio of the majority judg-

ment in Prithi Pal Singh's case (supra) cannot at all be attracted. Equally it calls for notice that the issues of the enlargement of a limited female owner's estate inherited before 1956 under Section 14 (1) of the Hindu Succession Act has now become wholly academic after the passage of more than 25 years of its enactment. As noticed earlier, no challenge having been raised thereto, I see no reason to differ from the majority view in Prithi Pal Singh's case to which I was a party and the same is hereby affirmed. Question No. (2) supra is, therefore, answered in these terms.

15. Now a plain look at questions Nos. (3) and (4) would show that they would so dovetail into each other that it is obviously wasteful to deal with them separately because the issues relevant thereto overlap heavily. It is, therefore, proposed to deal with them together. Inevitably in construing these meaningful issues, the historical perspective of both the intrinsic concept of the right of pre-emption as also the relevant legislation thereon within this jurisdiction cannot possibly be avoided. The modern lawyer need go no further beyond the classic exposition of the purposes and the nature of the law of pre-emption in India by Mahmood, J. in *Gobind Dayal v. Inayatullah*, (1885) ILR 7 All 775 (FB). Therein it was observed as follows:—

“.....It is unnecessary to quote any more passage from the original Arabic text of the Hedaya, which distinctly go to show that the cause of foundation of the right of pre-emption is the conjunction of the pre-emptive tenement with the pre-emptional tenement, that its object is to obviate the inconvenience or disturbance which would arise by the introduction of strangers, that the right exists antecedently to sale, and that sale is a condition precedent, not to the existence of the right, but only to its enforceability.”

In this particular jurisdiction the rationale of the custom of pre-emption was noticed in the following terms by Sir James M. Douis in para No. 127 of the Punjab Settlement Manual (4th Edition):—

“The members of the proprietary body in a true village community are often united by real or assumed ties of kinship. The admission of strangers into the brotherhood was always, in theory at least, a thing to be guarded against, and village customs in the matter of inheritance and pre-emption are founded on this feeling.”

This was again more authoritatively laid down by Sir John Edge in delivering the

judgment in *Kumar Digamber Singh v. Ahmad Sayeed Khan*, AIR 1914 PC 11, in the following words:—

“But in all cases the object is, as far as is possible, to prevent strangers to a village from becoming sharers in the village. . . .”

A Full Bench of this Court in upholding the constitutionality of the Punjab Pre-emption Act in *Uttam Singh v. Kartar Singh*, AIR 1954 Punj 55, held that the main objects underlying Sections 15 and 16 were:—

(1) to preserve the integrity of the village and the village community;

(2) to implement the agnatic theory of the law of succession; and,

(3) to avoid fragmentation of holding.

The seal of approval to this view has been given in *Ram Sarup v. Munshi*, AIR 1963 SC 553, in the following words:—

“... The grounds for upholding Section 15 (a) as reasonable and in the interest of the general public therefore finally resolve themselves into two:

(1) to preserve the integrity of the village and the village community; and

(2) to implement the agnatic rule of succession.”

It would be manifest from the above that the basic rationale underlying the law of pre-emption, under this jurisdiction, is first to maintain the homogeneity and integrity of the agricultural tribe of the particular village community and to retain the property in accordance with the agnatic rule of succession.

16. Adverting now to the legislative history of the pre-emption law within this jurisdiction, it suffices to mention that the rules relating thereto were first enacted in the Punjab Civil Code of 1854. This was later replaced by the Punjab Laws Act (Act No. 4 of 1872) which in turn was amended in 1878. With regard to these provisions it suffices to notice that apart from the basic classes of agnatic pre-emptors only the occupancy tenant found a marginal mention at the bottom of the list of pre-emptors. Those well versed with the incidence of the rights of occupancy tenants need have no doubt that it virtually bordered on ownership. Ultimately by the Punjab Occupancy Tenants (Vesting of Proprietary Rights) Act 1953, this situation was accepted and they were clothed with the rights of ownership. That occupancy tenants form a class entirely apart from the ordinary tenants-at-will or other contractual tenants needs little elaboration. Significantly, therefore, both these classes found not the least mention in the

earliest statutory laws of pre-emption. The first Pre-emption Act was enacted in 1905 and Sections 11 to 15 therein deal with the right of pre-emption. A reference to the Statements of Objects and Reasons of the said Act would show that herein again it was the primary concern for the homogeneity of the agricultural tribes and the maintenance of the agnatic theory of the law of succession which has led to this enactment for the statutory recognition and regulation of the pre-emption law as such. Significantly in the whole of the statute the tenant-at-will or other contractual tenants found not the least place. This Act was then repealed by the present Punjab Pre-emption Act 1913. Herein again, as originally enacted, the tenants as a class of pre-emptors do not figure anywhere and this position continued for well-nigh half a century till the year 1960.

17. Meanwhile cosmic changes took place in the rural life of the region in the wake of the partition of the country in 1947. This engendered the efflux of the Muslim landholders of the region and the corresponding influx of refugees from West Pakistan as also the agrarian Legislation that followed soon thereafter and the changes in inheritance Laws by the Hindu Succession Act, 1956. Apart from the preceding Ordinances the Punjab Tenants and Security of Tenures Act, 1950 and the Punjab Tenants (Security of Tenures) (Amendment) Act, 1951, were hurriedly brought on the statute book and then repealed and substituted by the Punjab Security of Land Tenures Act, 1953. This legislation apart from introducing the concept of a ceiling on land holdings also conferred a modicum of a security of tenures on the tenants and a right of purchase in them accruing from long-standing tenancies. However, experience showed that this beneficial legislation in favour of the tenants was sought to be set at naught by the dubious use of the piratical right of pre-emption by unscrupulous landlords. Lands under tenancy were transferred by collusive sales and then pre-empted by agnatic relations under the Punjab Pre-emption Act. It was to protect the tenants from this misuse of the Pre-emption Act that Section 17 of the Punjab Security of Land Tenures Act was brought on the statute book. A bare look at this provision would show that in a very limited field and hedged by a number of qualifications tenants who had been in a continuous occupation of land exceeding four years were clothed with a right of pre-emption below

the descendants of the vendor's grandfather patently to protect them from the abuse of a predatory right which had set at naught the benefits of a secured tenure and the ultimate right to purchase the areas comprised in their tenancies. It was in this context that for the first time a special class of tenants was allowed to enter the fields of pre-emptors primarily to protect them. However, Section 17 of the Punjab Security of Land Tenures Act standing by itself was unable to provide an adequate cloak against the dubious practices on the part of the landlords. The Legislature had, therefore, to resort to amendment of the statute. The reasons for doing so authentically stated are instructive and deserve notice in extenso:—

"Statement of Objects and Reasons.

It has come to the notice of Government that landowners who are not competent to eject their tenants from lands comprising their tenancies under the Punjab Security of Land Tenures Act, 1953, are circumventing the provisions of that Act by executing mala fide transactions of sales and mortgages with possession in respect of such lands in favour of the tenants. Subsequently such a sale is pre-empted under the Punjab Pre-emption Act, 1913, by an eligible pre-emptor with the connivance of the vendor (erstwhile landlord) and the pre-emptor takes possession of the land comprising the tenancy likewise, such a mortgage is redeemed by the mortgagor (erstwhile landlord), and in either case the tenant is duped and deprived of his tenancy. Government have decided to safeguard the rights and interests of tenants against such mala fide transactions; their tenancies will not be disturbed, and if these have been disturbed already, they will be restored to them by a summary procedure. The tenant (erstwhile vendee) will have also the option to claim, by a summary procedure, restoration of rights of ownership in respect of the pre-empted land on payment of the price paid to him by the pre-emptor." To effectuate the aforesaid purpose S. 17-A and Section 17-B were inserted in the Punjab Security of Land Tenures Act, 1953.

18. It is with the aforesaid legislative back-ground that the amendment of Sec. 15 of the Punjab Pre-emption Act by Act No. 10 of 1960 after the passage of 47 years of its original enactment falls into proper perspective. Thereby whilst the long list of the agnatic class of pre-emptors was considerably slashed the tenants had to be clothed with the right of pre-emption at the

bottom of the agnatic claimants. This was obviously consequential to the earlier provisions of Sections 17, 17-A and 17-B of the Punjab Security of Land Tenures Act. A reference to the Objects and Reasons of Act No. 10 of 1960 makes it manifest that this was not done because of any special concern of conferring a right of pre-emption on a tenant but primarily for affording a modicum of protection to the tenant against the piratical right of pre-emption which was being offensively used against him and to protect his right of purchase granted by Section 18 of the Punjab Security of Land Tenures Act as also to reflect the changes in the Inheritance Laws brought about by the Hindu Succession Act. It is instructive to quote the relevant part thereof:—

"There has been a continuous demand from the public to modify the Punjab Pre-emption Act, 1913, village life has been very considerably affected owing to the resettlement of displaced persons hailing from different places, who have since been given lands on quasi-permanent basis but this Act maintains distinction between these persons and local landowners. The Act also hampers private transfers of property to landless persons who are harassed by pre-emption suits after they have settled on the lands and reclaimed them. This also affects the distribution among the tenants of land rendered surplus as a result of ceiling imposed on holdings. Further, restrictions on the sale of immovable property not only prevent developmental activities but are also inconsistent with the present democratic set up. In order to remove these serious defects it is essential to amend the Punjab Pre-emption Act, 1913. The Bill aims at achieving these objects."

19. It would be obvious from the above that the legislature itself looked with great disfavour at the Pre-emption Law and the object of the amendment was to constrict the same which was effectuated by materially slashing a large class of pre-emptors existing in the earlier Sec. 15. It was in this context that for the first time the tenants entered the list of pre-emptors and that too at the bottom rung of the agnatic class as also of the co-sharers so as to have virtually a minuscule and residuary right in their absence. It would thus be manifest that the ordinary tenant who is obviously a foreigner to the classic concept and the purpose of pre-emption law had to be introduced as a pre-emptor only because of the very peculiar

necessities delineated above and particularly to protect him against the very threat to his right of tenancy and the consequential right of purchase conferred by Sec. 18. A reference to the subsequent Punjab Act No. 13 of 1964 introducing an amendment in paragraph first of clause (b) of sub-section (2) of S. 15 is again instructive whereby the step-son of the female vendor was inserted in preference to and in exclusion of her own son by another husband, which highlighted the emphasis on the agnatic theory as also the primary purpose of sub-sec. (2) to confine the right of pre-emption thereunder to the lineal descendants of the last male-holder only. That this was the recognised larger purpose of the Pre-emption Act, is manifest from Sec. 14 thereof which is as follows:—

“No person other than a person who was at the date of sale a member of an agricultural tribe in the same group of agricultural tribes as the vendor shall have a right of pre-emption in respect of agricultural land sold by a member of an agricultural tribe.”

Lastly came the Punjab Act No. 11 of 1973 which wiped the whole of the Pre-emption Act off the statute book within the State of Punjab lock stock and barrel thus climaxing the great disfavour with which it had been looked upon, by its total repeal.

20. It would thus be manifest both from the nature of the right of pre-emption as also the history of the statutory law on the point that the clothing of a tenant with the right of pre-emption by Act No. 10 of 1960 was by way of a clear exception to the fundamental ideas underlying the concept of pre-emption itself. It neither advances the agnatic theory of succession nor is conducive to the maintenance of the homogeneity of the agricultural tribe of the village community. In fact it runs directly counter to both of them because the tenant may be a rank stranger to the agnatic line and equally an alien to the agricultural tribe which may constitute the proprietary body of the village. Learned counsel for the respondents was, therefore, on a firm footing that conferring the right of pre-emption on a tenant was entirely statutory and because of the peculiar necessities of the post-partition situation though in fact it ran against the basic tenants and objects of pre-emption. It calls for reiteration that the right of pre-emption conferred on the tenant under Section 15 (1) in 1960 was a pure creature of the statute. The real issue in this context, therefore, is whether this purely statutory

conferment and that too by way of an exception to the very concept of pre-emption should now be extended and fictionally read into sub-section (2) as well where such a pre-emptor is conspicuous by its absence and where the clear language of the provision does not at all warrant it.

21. Now the true principle for the construction of pre-emption statutes is not in doubt and is well-settled beyond cavil by binding precedents within this Court as also of the final Court. These have totally tilted to the view that in essence the right of pre-emption is a piratical right and a fetter and a clog on the right of ownership which merely has its roots in out-moded custom and archaic history which had to be countenanced as a relic of a feudal past. The Division Bench in *Jai Singh v. Mughla* (1967-69 Pun LR 475) (supra) categorically opined:—

“* * *. The right of pre-emption is undoubtedly a restriction on the aforesaid fundamental right, though it is no doubt saved by clause (5) of Art. 19 of the Constitution, as authoritatively held by the Supreme Court, nevertheless, the right of pre-emption being piratical in nature, must be strictly construed so as not to confer on any person a right of pre-emption which is otherwise destructive of the fundamental right of property, which right has not been specifically conferred on the intended pre-emptor by the legislature. Even from this point of view, the consideration placed by me on Sec. 15 (2) (b) of the Pre-emption Act, has to be preferred.”

The seal of approval on this then has been set in the following words by the final Court in *Radhakishan Laxminarayan Toshniwal v. Shridhar Ramchandra Alshi*, AIR 1960 SC 1368 (para. 12):—

“* * *. The right to pre-empt the sale is not exercisable till a pre-emptible transfer has been effected and the right of pre-emption is not one which is looked upon with great favour by the Courts presumably for the reason that it is in derogation of the right of the owner to alienate his property. It is neither illegal nor fraudulent for parties to a transfer to avoid and defeat a claim for pre-emption by all legitimate means. In the Punjab where the right of pre-emption is also statutory the Courts have not looked with disfavour at the attempts of the vendor and the vendee to avoid and accrual of right of pre-emption by any lawful means and this view has been accepted by this Court in *Bishan Singh v.*

Khazan Singh, 1959 SCR 878 : (AIR 1958 SC 838), where Subba Rao, J., observed :—

'The right being a very weak right, it can be defeated by all legitimate methods, such as the vendee allowing the claimant of a superior or equal right being substituted in his place.'

and again (para 13) —

"There are no equities in favour of a pre-emptor, whose sole object is to disturb a valid transaction by virtue of the rights created in him by statute. To defeat the law of pre-emption by any legitimate means is not fraud on the part of either the vendor or the vendee and a person is entitled to steer clear of the law of pre-emption by all lawful means."

Again a powerful and picturesque enunciation of this rule of construction appears in the recent Full Bench judgment of this Court in Than Singh v. Nandu, 1978 Cur LJ (Civil) 25 : (AIR 1978 Punj & Har 94), wherein Bains, J., in his order of reference styled the pre-emption law as an outmoded one in the modern changed socio-economic conditions because it created a clog on the right of owner to alienate his property to the person of his own choice and was, therefore, to be strictly construed. Later speaking for the unanimous Full Bench he held that if two views are possible then the one which defeats the right of pre-emptor has to be accepted and finally concluded (at p. 98) :—

"* * *. The vendor can by all legitimate means defeat the right of the pre-emptor. Pre-emption law is a relic of feudalism. It has been repealed in the State of Punjab. It creates a clog on the right of the owner to alienate this property to a person of his own choice. Even if two interpretations of a document are possible, the one which defeats the right of the pre-emptor is to be accepted."

22. In view of the aforesaid settled judicial approach can it now be said that one should lean to a strained construction in order to extend this piratical right even when the legislature has chosen to constrict it categorically in sub-section (2) of Sec. 15 of the Act? One can some time appreciate the eagerness of judicial conscience to extend and liberally interpret socially beneficent legislation but surely piracy, outmoded custom, and feudalism, are not to be set at large by a process of interpretation.

23. With the aforesaid clear canon of construction in the context of pre-emption law one can now proceed to construe the

plain provisions of sub-section (2) of S. 15 of the Act. The language thereof is crystal clear. Indeed it calls for notice that at no stage it was, and perhaps can ever be suggested, that there is any obscurity in the provisions thereof. The sub-section begins with a non obstante clause and is thus clearly by way of an exception to the general provisions of the preceding sub-sec. (1). The effect of a non obstante clause for purposes of construction of statute is too well known to call for any elaboration. This sub-section was plainly intended by the legislature to provide for sales made by female owners and further only that class of female owners who had succeeded to the property either through their fathers or brothers or through their husbands. Specifically the legislature made a special provision for this class of vendors excluding them from general category. The plain purpose evident from the provisions of sub-section (2) is that it confined the right of pre-emption in this context, to the lineal descendants of the last male-holder (to the exclusion of the relations of the female vendor herself) and further constricted this right to the closest of relations only. It is unnecessary to elaborate this aspect because the same has been authoritatively laid down by their Lordships of the Supreme Court in Channan Singh v. Smt. Jai Kaur, AIR 1970 SC 349, in paragraph 4 of the report. Again in this context it must be highlighted that sub-section (2) is a special provision providing for the class of pre-emptors in sales made by female vendors only and further constricted by the qualification that the property sold should have been succeeded through a father or brother or a husband. On the hallowed rule of construction that a special rule of law would override a general one it would be equally patent that in this context Section 15 (1) cannot possibly have any place. To my mind the legislature having made its intent clear and categorical in sub-section (2), it is not for the Court to sit in judgment over the wisdom of its policy, nor do I entertain any doubt about the reasonableness of this provision. The basic and the fundamental postulate of judicial construction is that where the language is clear it should be given its plain meaning and it is not for the Court to read something into it which is conspicuous by its absence. This hallowed rule is so well-settled that it is unnecessary to buttress it with authority.

24. It becomes necessary to advert to a faint suggestion on behalf of the appellants that unless the tenant is inserted as a class

of pre-emptors in Section 15 (2) of the Act, its provisions would be violative of Article 14 of the Constitution. This contention was not seriously pressed at the bar but because of certain observations in the minority judgment in Prithi Pal Singh's case (AIR 1976 Punj & Har 157) (FB) (supra) it has to be taken notice of. Firstly, in this context it calls for notice that the constitutionality of the Pre-emption law was meticulously challenged in this Court and was upheld and that view has been unreservedly affirmed by their Lordships of the Supreme Court without any qualification. Therefore to contend that the plain provisions of Section 15 (2) are in any way violative of Article 14 is contrary to binding precedent. As has already been noticed, it was for the first time by Act No. 10 of 1960 that the legislature severely slashed the class of pre-emptors and because of the historical and peculiar necessities was compelled to introduce the tenants therein, though at the bottom rung of pre-emptors, in S. 15 (1). It is patent that there is no fundamental or inherent right to pre-empt sales under the law and prior to 1960 the ordinary tenant did not fall in this class. No person, therefore, can lay claim to any inherent right of pre-emption unless it is conferred by recognised custom or expressly by statute. The question of discrimination or violation of the equality clause in the Article, therefore, cannot even remotely arise, in my view, nor would it be open to anyone to negatively challenge the law on the ground that because it gives the right of pre-emption to certain other categories he would be equally entitled to the same. If these considerations were to be introduced in law then probably the landless residents of the village community would be equally discriminated against because the right of pre-emption had not been conferred upon them by statute. Why not even the Harijans who may be both landless and otherwise a weaker section of the community be not clothed with a similar right, and that matter why not other weaker sections of the community on basically financial grounds or poverty? In my view these are considerations entirely for the legislature and not for the Courts. No Court need come forward to declare that the right of pre-emption should be conferred on a tenant on larger grounds of policy even where the legislature has not chosen to do so. It may be pointed out that no other judgment apart from the solitary observations in the minority view in Prithi Pal Singh's case (AIR 1976 Punj & Har 157) (FB) has so far held

that the conferment or refusal of the right of pre-emption on a class would violate the equality clause. I am inclined to the view that no issue whatsoever of the violation of Article 14 can arise merely by the factor of the conferment, exclusion, extension or diminishing of the right of pre-emption of any class by the legislature in its wisdom. Therefore the argument that to avoid any infraction of Art. 14 — a strained construction be adopted in order to preserve the constitutionality of S. 15 (2) — must be altogether abandoned.

25. Now the core of the argument on behalf of the appellant is that sub-section (2) should be read as a proviso to sub-sec. (1) and by a process of virtually re-writing the statute it be held that in case the class of pre-emptors in S. 15 (2) is exhausted, resort be made afresh to sub-section (1) either by introducing all the classes of pre-emptors therein or by selectively adding the tenant alone thereto. In view of the vehemence with which this argument was pressed it becomes necessary to analyse it in some detail.

26. On the aforesaid argument the crucial issue of construction which arises is whether a non obstante clause framed in classic and categoric terms can by a process of interpretation be whittled down to a proviso. Learned counsel for the respondents raised a twin argument in rebuttal of the stand of the appellant, firstly that it was totally impermissible to read a clear non obstante clause as a mere proviso and secondly that even if it were possible to do so, no compelling reason or exigency arises herein to do any such violence to the clear language of the statute.

27. On the first aspect it was forcefully pointed out that sub-section (2) of S. 15 is on the face of it not a part or a clause of the preceding sub-section (1) but has been clearly labelled *seriatum* as an independent one by itself. *Prima facie*, therefore, it is a self-contained sub-section and to read it as a proviso or as an explanation to sub-section (1) is not warranted by any canon of construction. The sound argument raised was that it is clearly labelled as an independent sub-section and because of the added fact that it opens with the words 'notwithstanding anything contained in sub-sec. (1)' it would in effect become analogous to a separate section. Indeed it was argued with plausibility that sub-section (2) may well have been labelled as either S. 15-A or Section 16 and the mere fact that it has been made a part of Sec. 15 is no ground for making it subservient or a mere appendage to the preceding sub-section.

28. The impact and the true legal import of a non obstante clause are so well-settled by principle and precedent that it is not now easy to deviate therefrom. It is unnecessary to elaborate on principle because there is a virtual unanimity of precedent, both in the High Courts and in the final Court itself on the point. In *K. Parasuramaiah v. Pokuri Lakashmamma*, AIR 1965 Andh Pra 220, the Division Bench succinctly stated the rule as follows (at p. 223):—

“ * * * It must be understood that a non obstante clause is usually used in a provision to indicate that that provision should prevail despite anything to the contrary in the provision mentioned in such non obstante clause. In case there is any inconsistency or a departure between the non obstante clause and another provision one of the objects of such a clause is to indicate that it is the non obstante clause which would prevail over the other clause.”

To the same effect are the observations in para 35 of the report in *Shree Ganesh Trading Co. v. State of Madhya Pradesh*, 1972 MPLJ 864 : (AIR 1973 Madh Pra 26) (Full Bench). Even a more categorical and classic highlighting of the effect of a non obstante clause appears in the following words in *Nawab Bahadur of Mursidabad v. Rameshwarlal Ganeriwalla*, AIR 1949 Cal 323 :—

“ * * *, it seems to me to be only reasonable to suppose that the words ‘notwithstanding anything contained in any law for the time being in force’ which appear in Section 30 refer only to general statutes which by their terms might be construed to impose upon the borrowers a liability exceeding the limits contemplated by that section. The form of the words used may be regarded merely as a convenient method of repealing inconsistent provisions of such statutes as the Interest Act or the Contract Act without making any express reference thereto.”

29. The final Court is equally emphatic and on the high authority of Chief Justice Patanjali Shastri, C. J., in *Aswini Kumar v. Arabinda Bose*, AIR 1952 SC 369, the rule has been enunciated as follows :—

“It should first be ascertained what the enacting part of the section provides on a fair construction of the words used according to their natural and ordinary meaning, and the non obstante clause is to be understood as operating to set aside as no longer valid anything contained in relevant existing laws which is inconsistent with the new enactment.”

The aforesaid observations received express affirmation later in *A. V. Fernandez v. State of Kerala*, AIR 1957 SC 657. Lastly in *Budhan Choudhry's case* (AIR 1955 SC 191) (supra) their Lordships were construing sections 28 and 30 of the Code of Criminal Procedure and had this to say with regard to the last section which begins with a non obstante clause (at p. 194):—

“ * * * Further, the text of Section 30 itself quite clearly says that its provisions will operate ‘notwithstanding anything contained in S. 28 or S. 29’. Therefore, the provisions of S. 28 and the second schedule must give way to the provisions of S. 30.” Following the aforesaid authoritative and binding enunciation in the present case, the clear effect of the words ‘notwithstanding anything contained in sub-section (1)’ is that the provision of the said sub-section must completely give way to what is provided for in sub-section (2). Or to put it in other words it is a convenient mode of virtually repealing the earlier provisions of sub-section (1) for the purposes of the construction of the later sub-section (2).

30. On the second aspect it has been rightly submitted that even assuming entirely for the sake of argument that in an extreme situation it may be perhaps permissible to do so in the present one there is neither any compelling, factual or legal warrant for this resort of a fictional conversion of a clear non obstante clause into a proviso. The language of sub-section (2) is precise and plain. At no stage, the learned counsel for the appellant could even suggest that there was any obscurity therein which could possibly warrant the straining of its plain words. The three settled canons of construction, therefore at once are attracted. Where the language of the provision is clear and categorical it has to be given its plain grammatical meaning and it is unwarranted to supplant one's own ideas in preference to the considered wisdom of the legislature expressed in the clearest terms. Only where the language of the statute is obscure or capable of different meanings would it be permissible to go to other arenas like the Objects and Reasons of the enacting statute; its preamble; and the pre-existing law; the mischief which Parliament wished to provide for and the intent of the ultimate remedy spelled out. In other words, the well known rule in *Heydon's case* (1584-3 Co Rep 76) may well be attracted but these considerations also arise only if the language is obscure but certainly capable of being given a precise meaning. It is, however,

well-settled lastly that if in a statute, obscurity borders on unintelligibility and indeed unworkability then it is not within the province of the Courts to legislate in their garb of interpretation or to re-write the provision according to their own likes or dislikes and the true remedy, therefore, lies with the legislature alone. It is obvious that neither of these basic rules of interpretation of statutes can here be possibly brought in to convert a sub-section opening with a categoric non obstante clause into a proviso.

31. Learned counsel for the appellant Mr. C. B. Goyal had attempted to place reliance on *Vaddeboyina Tulasamma v. Vaddeboyina Sesha Reddi*, AIR 1977 SC 1944 for buttressing his argument that a non obstante clause may be read as a proviso. Therein their Lordships were construing the provision of S. 14 of the Hindu Succession Act. To appreciate the argument it is, therefore, necessary to quote Section 14:—

“14. (1) Any property possessed by a female Hindu whether acquired before or after the commencement of this Act shall be held by her as full owner thereof and not as a limited owner:

Explanation: In this sub-section ‘property’ includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act.

(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a Will or any other instrument or under a decree or order of a Civil Court or under an award where the terms of the gift, Will or other instrument or the decree, order or award prescribe a restricted estate in such property.”

Now a plain look at the aforesaid provisions would show that the contention on behalf of the appellant suffers from a double fallacy. The scheme of Sec. 14 is entirely different. Sub-section (1) is immediately followed by an exhaustive explanation which gave the widest amplitude to the word ‘property’ used in sub-sec. (1). It was to slightly curtail this wide amplitude that

sub-section (2) follows the explanation to indicate that property acquired by way of gift or under a Will or other instrument etc. where the terms thereof expressly prescribe a restricted estate in such property would be excluded from the ambit of S. 14 (1) and its explanation. In effect it is a provision clarificatory to the explanation and with regard to the applicability of sub-section (1) in a certain situation. It is in the aforesaid peculiar context that the observations in *Vaddaboyina Tulasamma’s* case have been made. In the present case, there is neither any explanation to sub-section 15 (1) nor is there any attempt to clarify any such explanation etc. and the aforesaid observation would, therefore, be hardly applicable.

32. Again it is plain that the aforesaid sub-section (2) does not *stricto sensu* begin with a non obstante clause. The known and the classic language of ‘notwithstanding anything contained in the section’ has manifestly and designedly not been used by the legislature here. Indeed it is in essence a saving clause. It was only intended to limit the application of the explanation which had given the word ‘property’ in sub-section (1) a very extended meaning. It does not lay down that barring the provision of sub-section (1) or de hors it, what the state of the law should be. It merely specifies the modus of its application. Therefore both in letter and spirit sub-section (2) is not in the nature of a non obstante clause.

33. Secondly what deserves notice in this context is that in construing Section 14 of the Hindu Succession Act, their Lordships found such obscurity in its meaning that they were compelled to observe as under:—

“* * * This is a classic instance of a statutory provision which, by reason of its inapt draftsmanship, has created endless confusion for litigants and proved a paradise for lawyers.”

It was in the aforesaid context that the inevitable judicial search for rendering a meaning to an ill-drafted provision had to be launched. It deserves reiteration that herein it is virtually the common case that the language of S. 15 (2) is crystal clear. I would, therefore, conclude that the analogy sought to be raised with regard to the observation in *Vaddeboyina Tulasamma’s* case (AIR 1977 SC 1944) in the context of the peculiar provisions and the scheme of Section 14 of the Hindu Succession Act is wholly wide off the mark here and indeed irrelevant to the issue before us.

34. Having held on the basic tenets of construction that here there is no warrant for converting of a categoric non obstante clause into a mere proviso, it appears to me that the fallacy of the argument on behalf of the appellant becomes even more manifest by the startling results that would ensue, if such an interpretation is superimposed on the two sub-sections of S. 15. We may first take the case of a female vendor who is the sole owner and has succeeded to the property through her father or brother. In such a case, by virtue of sub-section (2) the right of pre-emption has been severely limited to her brother or brother's son with a purposeful and clear exclusion of her husband or even her own sons or daughters from the class of pre-emptors what to say of other relations. If on the exhausting and the failure of the claimants specified under sub-section 2 (a) (i), clauses First, Secondly, Thirdly and Fourthly of sub-section (1) (a) are brought into play then curious results would flow therefrom. Doing so would import in the preferential class of pre-emptors the sons or even daughters or the son's son or the daughter's son of such a female vendor when the whole and obvious purpose of sub-section (2) was to exclude this class of relations. Again the brother or the brother's son of the vendor herein would come after the aforesaid claimants whereas in sub-section (2) the brothers or the brother's sons were the primary and indeed the sole class of pre-emptors. Equally under clause Thirdly even the vendor's brother or the vendor's brother's son of such a female vendor could also come in as a class of pre-emptors in preference to the tenants. Now this would lead to a patent absurdity because as has already been shown and authoritatively held the whole concept underlying S. 15 (2) is that in the case of sales by female owners of property which they have succeeded through male owner, the same should remain in the lineal descendants of the last male owner through whom it was derived. The moment clause (a) of sub-section (1) is made applicable such a female vendor would become a fresh stock of descent for the purposes of pre-emption with the result that the property would pass even to her remote relations to the total exclusion of the similar relations of the last male owner. The very purpose and concept of the agnatic succession and the maintenance of the homogeneity of the agricultural tribe of the village would thus be completely blasted. In a way the whole thrust of the enactment of sub-section (2)

would be set at naught by such a construction.

35. Even more glaring are the anomalies of such a construction where the sale is made by a female who is the sole owner of the property and has succeeded to the same through her husband or through her son. Taking up first the case of succeeding through her husband the law is dogmatic under sub-section (2) (b) (First) to the exclusion of her own flesh and blood by giving preference to the son or daughter of the husband over her own progeny. It deserves recalling and reiteration that the statute had to be amended by Act No. 13 of 1964 to make the intent clear that the property was not to be allowed to go out of the stock of the last male holder, namely, the husband and his sons and daughters who have the pre-eminent right of pre-emption. In such a situation if sub-section (1) (a) is brought into play, then even though the property had been succeeded through the husband the preferential class of pre-emptors would first be the son or the daughter of the female vendor from another husband (which were in terms excluded under sub-section (2) (b)) and further even the son's son or daughter's son of such a female vendor from the second husband. This apart even in property to which she has succeeded through her husband the right of pre-emption will under sub-clauses Secondly and Thirdly, then pass on to her brother or brother's son or even to her father's brother or father's brother's son who would be totally alien to the village community where her husband's land would be located and would equally violate the concept of the maintenance of agnatic succession. Thus, what the Legislature clearly intended and effectuated by the amendment introduced, the Punjab Act 13 of 1964 would be completely negated.

36. The more one examines this aspect the acuter grow the anomalies as a result of fictionally converting sub-sec. (2) as a proviso to sub-sec. (1). Take now the case where the sale is made by a female owner of a share out of joint land to which she has succeeded either through her father or brother or through her husband or son. What would be the class of pre-emptors in such a situation in the event of the exhausting of those mentioned in sub-section (2) would raise even a more acute conundrum. If clause (b) of sub-section (1) is also later to come into play then a co-sharer would also be in the class of pre-emptors. It was not disputed at the bar that in a particular

case a co-sharer may be a rank stranger to the family stock. Herein under S. 15 (1) (b) he ranks above the tenant in the class of pre-emptors. The whole concept of the retention of property in the agnatic line or the maintenance of the homogeneity of the agricultural community is given a go-by the moment such a construction is adopted.

37. In a flanking attempt to evade the aforesaid anomaly, it was then sought to be suggested on behalf of the appellant that the class of relations in sub-section (1) should be excluded and on the failure of the heirs under sub-section (2) the tenant alone may be added as a residuary class of pre-emptors. This curious attempt to exclude the blood-relations in sub-section (1) who are the primary and the preferential class of pre-emptors can be justified on no modicum of reasoning and little justification could be raised as to why the blood relations should be denied the right of pre-emption despite the whole concept of the agnatic theory underlying the pre-emption law. In fact, this would be glaringly discriminatory betwixt relations inter se. Under S. 15 (2), agnatic relationship would be the primary source for the class of pre-emptors, whilst blood relations under Section 15 (1) are now sought to be excluded altogether to give pre-eminence to the tenant who otherwise figures at the bottom of all the classes of pre-emptors in sub-section (1). A construction of this nature would reduce the law of pre-emption herein to a jigsaw puzzle beyond the pale of solution.

38. Faced with the unending contradictions and anomalies resulting from such a stand. Mr. C. B. Goel, learned counsel for the appellant, was apparently in a quandary and unsure of his ground. It was first his stand that after the preferential class of pre-emptors mentioned in sub-sec. (2) are exhausted then clauses First to Fourthly of sub-section (1) (a) would come into play in the case of a sole female owner who succeeds to the property through male owners. Similarly, in case of sale of share out of the joint land by such a female owner clauses First to Fifthly of sub-sec. (1) (b) would again apply thus bringing in the co-sharer in the class of pre-emptors as well. A similar stand was sought to be taken with regard to clause (c) of sub-section (1) as well. However, this position was then sought to be retracted from to contend that in all the aforesaid clauses (a), (b) and (c), the relation pre-emptors should be selectively cut out and the tenant and the co-sharer, as the case may be, should alone be added as

a class of pre-emptors. At a later stage the counsel was unsure whether the co-sharers under clause (b) should be allowed to come in or not, because in such a situation he would defeat the claim of the tenant even though he might well be a rank stranger to the agnatic stock. With the greatest respect, I am unable to see on what principle such a scissors and paste operation on the statute can be performed and the same re-written selectively by a fictional process of interpretation. The attempt at such a construction appears to me as a patent trespass into the field of legislation under a veiled cloak and garb of its interpretation. To obliterate the non obstante clause and to start reading a sub-section as a proviso to another and further to selectively exclude some provisions thereof from their plain and natural application appears to me as not even remotely the province of interpretation but plain violence to the language of the statute and a deliberate obliteration of its purpose and provisions.

39. Much ado was then raised with regard to the provisions of Ss. 17 and 17-A of the Punjab Security of Land Tenures Act, 1953. Herein, what one has to keep in mind at the threshold is the cardinal rule that in interpreting a self-contained statute like the Punjab Pre-emption Act, 1913, it would not be permissible to go to the definitions or provisions of an altogether different Act enacted 40 years after the same for seeking a clue to the former's interpretation. This apart, there first seems to be a patent misapprehension of the purpose and import of Sec. 17 of the Punjab Security of Land Tenures Act, 1953. The detailed reasons which impelled the legislature to bring in these provisions have already been delineated in paras Nos. 17 to 19 of this judgment. This provision was incorporated in the Act primarily for protecting the tenant against the devious use of the pre-emption right for ousting him from his tenancy and thus from the back door take away the security of tenure and the right of purchase which was sought to be conferred upon him by Agrarian Legislation. Section 17 was certainly not enacted for any larger purpose of inducting the ordinary tenant as a necessary class of pre-emptors. Indeed, if this was the object then the provision would have been straightway made in the Punjab Pre-emption Act and not deviously in an altogether different statute confined primarily to Agrarian Legislation. Equally what deserves highlighting in this context is that by Section 18 of the Punjab Security

of Land Tenures Act, 1953 and the predecessor legislation, a statutory right had been conferred for the first time on tenants to purchase the land under their tenancy on the satisfaction of the conditions prescribed therein. Actual practice, however, showed that this ultimate benefit of acquiring the right of ownership was being nullified by collusive transfers made by landlords followed by the exercise of the pre-emptive right by their agnatic relations, whereby the very tenancy itself was jeopardised. Equally, the sale of the land under his tenancy by the landlord to his tenant was liable to be pre-empted by a very large class of agnatic pre-emptors under the unamended Sec. 15 of the Punjab Pre-emption Act, 1913 and it was in order to protect the tenant from this predatory right. Section 17 of the Punjab Security of Land Tenures Act, 1953 was introduced. A plain look at the provisions of Section 17 shows that it begins with a reference to Section 18 and by bringing the tenants in a class of pre-emptors, it is sought to protect them from the predatory right of pre-emption from the relations of co-sharers of the vendors. A tenant had to be in the class of pre-emptors to enable him to better defend himself against the long line of the agnatic pre-emptors existing under the earlier unamended S. 15. The rest of the provisions of S. 17 would further indicate that the right was given only with regard to the land comprised in the surplus area in the hands of big landowners. Again, this right was conferred only on tenants who had held the land in continuous occupation for four years or more. There were innumerable further qualifications attached primarily with an eye to protect the tenancy. It is obvious that Section 17 had conferred a very limited right for a very limited purpose on the tenant below the primary class of agnatic pre-emptors for the peculiar purposes of Agrarian Legislation and for the protection of his tenancy which was sought to be undermined by the devious practices of instituting pre-emption suits through agnatic relations after a collusive sale by the original big landowners.

40. Coming now to Section 17-A of the Punjab Security of Land Tenures Act, 1953, which was inserted by Punjab Act No. 14 of 1959, in the statute, it deserves highlighting that there was apparently a patent misapprehension in the reading of Section 17-A by the learned counsel for the appellant as

if it conferred a right of pre-emption on the tenant. Plainly, it does not do so and is indeed far from putting the ordinary tenant in the class of pre-emptors. The reasons and objects for its insertion have already been referred to in paragraphs Nos. 17 to 19 of this judgment. All that Section 17-A did was to raise a defence in favour of the tenant against the piratical right of pre-emption vested in others against him when a sale was made in his favour. Truly construed, Section 17-A therefore, is indeed the constriction of the pre-emptive right and in derogation of such rights conferred by the Punjab Pre-emption Act rather than any extension thereof. It in no way confers any right of pre-emption on a tenant as such. To put it in other words, it only provides a shield to the tenant against the sword of pre-emptive right vested in the agnatic claimants. To say that because the legislature has chosen to protect a tenant under Section 17-A, then he should be clothed with the self-same piratical right as well and in particular with regard to sales made by female vendors who have succeeded to the property through their fathers, brothers or husbands, appears to be neither logical nor warranted.

41. I am clearly of the view that Sections 17 and 17-A of the Punjab Security of Land Tenures Act, 1953 cannot give the least handle to the tenants to claim an inherent right to enter the class of pre-emptors against sales covered by Section 15 (2) of the Act by a process of interpretation when the legislature has not chosen to place them therein.

42. Before parting with this aspect of the case, it becomes necessary to reiterate the twin postulate which underlies the enactment of sub-section (2) of Section 15 of the Act. It is obvious that the legislature deliberately classified female vendors succeeding through their fathers, brothers, husbands or sons into a particular class and expressly treated them favourably or in any case differently from the ordinary run of male-vendors as also of female vendors of self-acquired properties or categories other than those specified in sub-section (2). Historically, it deserves recalling that the particular class of the Hindu Women's Estate which was liberated from the fetters of such ownership by Section 14 of the Hindu Succession Act was sought to be treated specially and favourably against the piratical right of pre-emption. Secondly, what is writ large over Section 15 (2) of the Act is

the legislative intent to keep the alienated property which had been succeeded through the male-owner within the lineal descendants of the male-owner to the total exclusion of the line of female-owner. This intention was in line with the earlier custom which pervades throughout the spirit of the pre-emption law. Indeed this is made wholly manifest when an analytical eye is turned on the amendment of Section 15 (2) of the Act by Punjab Act 13 of 1964. Prior to that, doubts had arisen whether under sub-section (2), the son of a female vendor from another husband would be within the class of pre-emptors or not. The legislature set its face totally against any diversion of the alienated property out of the lineal descendants of the original owner. It made no secret of its intent or what according to it was the clear purpose of sub-section (2). This appears in the following words of the Objects and Reasons of the amending Act:—

"It appears that the intention of the Legislature in enacting Section 15 (2) of the Punjab Pre-emption (Amendment) Act (Punjab Act No. 10 of 1960) was to vest the right of pre-emption in the offsprings of the husband in regard to the property to which a female had succeeded through such husband. But this intention is not clear from the words used in Clause (b) of Sec. 15 (2). The clause as it now stands may well include the son or daughter of such female by some other husband as also the brother or brother's son of a husband of such female other than the one through whom she succeeded to the property.

Another flaw in the provision is that the offspring of the same husband through another wife are excluded by the wording used in existing provisions which seems to have resulted inadvertently.

The amendment has been made retrospective in effect so as to extend the benefit of this amendment to such persons as may have become entitled to it since the enactment of Act 10 of 1960 but for the inadvertent flaw in the drafting of the Clause (b) of Section 15 (2). Hence this Bill."

By the Amending Act it was the former husband's son from another wife who was given the right of pre-emption not only in preference to but even to the total exclusion of such female vendor's own sons and daughters. Now if the legislature has chosen to exclude her own flesh and blood namely,

her son or daughter from another husband from the class of pre-emptors, would it stand to reason that a mere tenant of such a female vendor should now be inducted in the class of pre-emptors by a process of interpretation? The pointer is clear that the whole brooding spirit of Section 15 (2) of the Act is to keep the alienated property in the lineal descendants of the last male-holder and to confine the pre-emptive right to the closest relations. It is significant that under sub-section (2) even the distant relations of the last male-holder are excluded (in sharp distinction to the long line of agnatic claimants under sub-section (1)), and the relations of the female vendor succeeding through a male-owner are totally excluded with the clear purpose of preventing her from becoming a fresh stock for the purposes of pre-emption. Under sub-sec. (2), the legislature has deliberately limited and diminished the class of number of pre-emptors. The whole object seems to be to cut down the number of pre-emptors in the case of female vendors who have succeeded to the property through the specified class of male-owners. Against this glaring intention of the legislature to turn the opposite way and extend the list of the class of pre-emptors by thrusting the whole lot of relations in sub-section (1) as also the co-sharers or tenants therein is, in my view, frustrating the very object and the intent of the legislature in enacting sub-section (2) and thus treating female vendors succeeding through specified class of male-owners as a distinct class of its own in whose case the number of pre-emptors was to be diminished and reduced rather than extended.

43. Again, it would appear that even if entirely for argument's sake the stand of the appellant's counsel were to be accepted, it would again hardly make any difference in construing sub-section (2) of Section 15 of the Act. If sub-section (2) is to be read as a proviso and consequently the word "provided" were to be substituted for the words "notwithstanding anything in sub-sec. (1)" in the very opening part thereof (as has been contended on behalf of the appellant), the resultant interpretation would normally still be the same. Even when so read, it would be plain that sub-section (2) would still deal with a special class of vendors, namely; female vendors only and not only that, but with the further clarification that the property alienated must have been succeeded to through a father, brother or husband. Clearly, therefore, such a proviso would override the preceding general provisions and would be by way of an exception there-

to since the former deals only with male vendors generally as also with female vendors who have not come into the property through the specified class of male-owners.

It would appear consequently that even if sub-section (2) is read as a proviso, it would exclude the special class of female-vendors as an exception out of the general provisions of sub-section (1), which would have no application.

44. Lastly, though the contention projected on behalf of the appellant in terms was that sub-section (2) is to be read as a proviso to the preceding sub-section (1), a fuller and deeper analysis of the stand of the appellant discloses that its true practical effect would be to read sub-section (1) curiously as a proviso to sub-section 15 (2) of the Act. It was not even remotely the appellant's case that in the case of a female vendor who had succeeded to the property through her father, brother or husband, the provisions of Section 15 (1) would be attracted in the first instance. It was the clearest stand that in such a case, it is sub-section (2) which has to be necessarily invoked and applied. Only after all the classes of pre-emptors mentioned in sub-section (2) are exhausted, it would be then alone that resort may be made to the class of pre-emptors in the earlier sub-section (1). In essence, therefore, the construction sought to be canvassed was to first apply sub-sec. (2) and thereafter, if necessary, to selectively make resort to sub-section (1). Plainly, therefore, sub-section (1) can come into play only later after all the classes of pre-emptors in sub-section (2) are exhausted. Therefore, the earlier sub-section (1) is sought to be converted into a proviso to the primarily applicable provisions of sub-section (2) in the particular class of female vendors succeeding through male-owners. With the greatest respect, this would be what is proverbially called to put the cart before the horse. The result of the appellant's stand is that the earlier provision of sub-sec. (1) is sought to be made a proviso to sub-sec. (2) against the settled canons of construction that a proviso would inevitably follow the main clause and obviously cannot precede the same.

45. In the ultima ratio, the stand on the part of the appellant can only be effectuated by fictionally reading into sub-section (2) a detailed added clause thereto in somewhat following terms:—

“15 (2) — (a) — (b)

(c) If no person having a right of pre-emption under Clause (a) or clause (b) afore-

said exists or seeks to exercise it, then the right of pre-emption in respect of the agricultural land and village immovable property shall vest:—

(i) where the sale is by a sole female-owner who has succeeded to the property through her father, brother, husband or son, in persons, specified in sub-clauses, first, secondly, thirdly and fourthly of Sec. 15 (1) (a);

(ii) where the sale is by a female-owner who has succeeded to the property through her father, brother, husband or son, of a share out of the joint land or property and is not made by all the co-sharers jointly in persons, in sub-clauses, first, secondly, thirdly, fourthly and fifthly of S. 15 (1) (b);

(iii) where the sale is by a female-owner, who has succeeded to the property, through her father, brother, husband or son to property owned jointly and is made by all the co-sharers jointly, in persons, specified in sub-clauses, first, secondly, thirdly and fourthly of Section 15 (1) (c).

The spinal question is whether one can rewrite the statute in the above terms and insert all the aforesaid clauses therein which the legislature has advisedly not chosen to do. It was said more than seven decades ago by Lord Mersey in *Thompson v. Goold and Company*, 1910 AC 409:—

“It is a strong thing to read into an Act of Parliament words which are not there and in the absence of clear necessity, it is a wrong thing to do.”

Therefore, the issue herein is whether reading whole clauses into the statute would not amount to a naked usurpation of a legislative function in the thin guise of interpretation. I am second to none in being alive to the dangers of an overly strict literal construction which may sometimes thwart and hamstring the intention of the legislature. A Judge faced with the difficulty of interpreting an obscure statute has not to fold his hands, but must proceed to the task of finding the true intent of the legislature, but nevertheless this exercise is limited by the texture of the statute and as was said by Denning, Lord Justice in *Seaford Court Estates Ltd. v. Asher*, (1949) 2 KB 481 — “A Judge must not alter the material of which it is woven but he can and should iron out the creases”. Keeping that analogy in mind, it seems to me that herein to convert a categoric non obstante clause into a proviso and insert a whole Clause (c) of Section 15 (2) is not ironing out a crease, but weaving canvas into silk. Judicial activism within limits is undoubtedly a meritorious

trait. However, carried to extreme lengths; it has within it the seeds of judicial anarchy. Herein as also in other walks of life, the falsehood of extremes has to be avoided. It is well in this context to recall the classic rebuke of Lord Simond to Denning, L. J. in *Magor and St. Mellons Rural District Council v. Newport Corporation*, 1952 AC 189 (House of Lords) in the following terms:—

“... .. The duty of the Court is to interpret the words that the legislature has used; those words may be ambiguous, but, even if they are, the power and duty of the Court to travel outside them on a voyage of discovery are strictly limited: see, for instance, *Assam Railways and Trading Co. Ltd. v. Inland Revenue Commr.*, (1935 AC 445) and particularly the observations of Lord Wright.

The second part of the passage that I have cited from the judgment of the learned Lord Justice is no doubt the logical sequel of the first. The Court, having discovered the intention of Parliament and of Ministers too, must proceed to fill in the gaps. What the legislature has not written, the Court must write. This proposition, which restates in a new form the view expressed by the Lord Justice in the earlier case of *Seaford Court Estates Ltd. v. Asher* (to which the Lord Justice himself refers), cannot be supported. It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation. And it is the less justifiable when it is guesswork with what material the legislature would, if it had discovered the gap, have filled it in. If a gap is disclosed, the remedy lies in an amending Act.” However, the limits placed on judicial law reform by the nature of the forensic process and the somewhat dangerous consequences of unrestrained judicial law making, are well epitomised in the following classic words of Lord Scarman in *Duport Steels Ltd. v. Sirs*, (1980) 1 WLR 142:

“Legal systems differ in the width of the discretionary powers granted to judges; but in developed societies limits are invariably set, beyond which the judges may not go. Justice in such societies is not left to the unguided, even if experienced, sage sitting under the spreading oak tree.

Within these limits, which cannot be said in a free society possessing elective legislative institutions to be narrow or constrained, judges, as the remarkable judicial career of Lord Denning MR himself shows, have a genuine creative role. Great Judges are

in their different ways judicial activists. But the Constitution's separation of powers, or more accurately functions, must be observed if judicial independence is not to be put at risk. For, if people and Parliament come to think that the judicial power is to be confined by nothing other than the Judge's sense of what is right (or, as Selden put it, by the length of the Chancellor's foot), confidence in the judicial system will be replaced by fear of it becoming uncertain and arbitrary in its application.”

46. To conclude the discussion on questions Nos. (3) and (4) (formulated in para No. 7 above), it is held that sub-section (2) of Section 15 is an independent self-contained provision and cannot be read as a mere proviso to the preceding sub-section (1). As a necessary consequence, the answer to question No. (4) is rendered in the negative and it is held that a tenant or a co-sharer has no right of pre-emption in cases falling squarely within sub-section (2) of Sec. 15 of the Act.

47. In the light of the answers rendered to the four basic questions aforesaid, it is plain that the appellant must fail in *Kalwa v. Wasakha Singh*, R. S. A. 67 of 1969. The right of pre-emption therein was claimed primarily on the ground of being a tenant with regard to sales made by female-owners who had succeeded to the agricultural land from their father or husband. As regard the claim to pre-emption on the basis of a co-sharer, no meaningful argument was addressed against the rationale of the judgment of the first appellate Court. This appeal is, therefore, dismissed with no orders as to costs, in view of the rather intricate issues involved.

48. It was the stand of the learned counsel for the appellants that apart from the basic issue which has necessitated this reference to the larger Bench, other questions also arise for determination. We accordingly direct that these appeals be now placed before a learned single Judge for disposal in accordance with the answers rendered to the legal questions.

D. S. TEWATIA, J. (Minority view):—

49. I have had the privilege of perusing the judgment prepared by the learned Chief Justice and despite the great regard and esteem in which the views expounded by him are held by me, with respect, I find it difficult to concur in the view herein taken by him and, therefore, the separate opinion that follows hereafter.

50. Whether the right of pre-emption of all or of only some of the persons enume-

rated as pre-emptors under Section 15 (1) of the Punjab Pre-emption Act (Act 1 of 1913, hereinafter referred to as the Act, stands excluded by virtue of sub-section (2) in regard to a sale dealt with by the said sub-section (2), even in the event of failure to avail the right by the persons enumerated as pre-emptors under sub-section (2), is the significant question of law that requires answering.

51. The solitary fact bearing upon the question posed and which needs noticing to view the legal proposition in right perspective is that the pre-emptors in all the four R. S. As. Nos. 67 and 97 of 1969, 538 of 1979 and 2596 of 1980 — tenants in R. S. As. 67 and 97 of 1969 and 2596 of 1980 and the sons of the two of the joint vendors in R. S. A. 538 of 1979 — are from the category of pre-emptors listed under Sec. 15 (1) of the Act, while the sales sought to be pre-empted by them are alleged to have been made by persons and of property mentioned in sub-section (2) of Section 15 of the Act. Sharma, J. by his order dated 17-4-1980 has referred those appeals for a decision by a larger Bench of seven Judges and that is how these appeals are before us.

52. The provisions of Section 15 of the Act took the present shape as a result of amendment effected thereto by the Punjab Pre-emption (Amendment) Act, 1960. From then on, the question posed above has cropped up for consideration before this Court, not once but a number of times, and the Court, whether speaking through a Judge in Chamber or through larger Benches, has spoken with one voice in answering the question in the affirmative. Despite such unanimity of opinion in the Court over a long period, a nagging doubt has persisted as to the correctness of the view and the doubts have unquestionably been sustained by a genuine conviction that the legislature could not have intended such illogical a result, as would emerge if the answer to the question posed is to be in the affirmative, as would be presently shown.

53. First the bird's eye view of the decisions rendered by this Court and reasoning employed therein in support of the conclusion that the provision of sub-section (2) of Section 15 of the Act is exhaustive of the pre-emptors having right to pre-empt the sale mentioned therein and that even in the event of persons mentioned in sub-sec. (2) thereof failing to seek pre-emption, the persons mentioned in sub-section (1) thereof as pre-emptors would not be entitled to do so.

54. In *Debi Ram v. Smt. Chambeli*, (1963) 65 Pun LR 500, Shamsher Bahadur, J. (as he then was) sitting singly while dealing with the scope of Section 15 (2) of the Act regarding the right of co-sharers to pre-empt a sale by a female, held that—

“The words ‘notwithstanding anything contained in sub-section (1)’ as used in sub-section (2) of Section 15 of the Punjab Pre-emption Act, indicate that whatever is stated in sub-section (2) would prevail over the rights recognised in sub-section (1). Sub-section (2) deals with the sale of properties belonging to females to which they have succeeded either paternally or through their husbands. In either event, the co-sharers do not come into the picture at all as possible pre-emptors. They are excluded, even if the khata is joint, from exercising the right of pre-emption to which they are entitled under sub-section (1), clause (b) fourthly of Section 15”.

In *Santa Singh v. Hazara Singh*, (1965) 67 Pun LR 132, D. K. Mahajan, J. (as he then was) in considering the provisions of sub-sections (1) and (2) of Section 15 of the Act adopted the criterion that a specific provision would exclude a general provision. He treated sub-section (2) as specific provision and provisions of sub-section (1) as general provision and held that provisions of sub-section (2) excluded the application of the provisions of sub-section (1) to the subject dealt with by the former provision.

55. In *Mohinder Singh v. Mohinder Kaur*, (1966) 68 Pun LR 839, D. K. Mahajan, J. (as he then was) merely followed his earlier decision in *Smt. Joginder Kaur v. Jasbir Singh*, (1965) 67 Pun LR 1158.

56. In *Jai Singh v. Mughla*, (1967) 69 Pun LR 475, Narula, J. (as he then was), while delivering the opinion for the Division Bench — to which Mahajan J. (as he then was) was a party — made a reference to the fact that sub-section (2) of Section 15 of the Act starts with a non obstante clause and, therefore, the provision of sub-section (1) had to be read subject to sub-section (2). If a case fell within both the sub-sections, it was sub-section (2) which would apply to it irrespective of the fact that it could also be covered by sub-section (1). He was also of the view that even if the provision was capable of two possible interpretations, as indeed it does appear at first sight, he would have preferred to construe the same in such a way as to preserve to the vendor and the vendees their fundamental right guaranteed under Article 19 (1) (f) of the Constitution.

to acquire, hold and dispose of property. The right of pre-emption was, undoubtedly, a restriction on the aforesaid fundamental right, though it was, no doubt, saved by Clause (5) of Article 19 of the Constitution, as held by the Supreme Court, nevertheless, the right of pre-emption being piratical in nature, must be strictly construed so as not to confer on any person a right of pre-emption which was otherwise destructive of the fundamental right of property, which right had not been specifically conferred on the intended pre-emptor by the legislature.

57. Pandit, J., while delivering the opinion for a Full Bench of five Judges in *Karta Ram v. Om Prakash*, 1970 Pun LJ 815 : (AIR 1971 Punj & Har 423) after favourably referring to the consistent view taken by this Court in cases *Debi Ram* (1963-65 Pun LR 500) (supra); *Santa Singh* (1965-67 Pun LR 132) (supra); *Jai Singh*, (1967-69 Pun LR 475) (supra) and *Mohinder Singh v. Balbir Kaur*, (1968) 70 Pun LR 752 : (AIR 1968 Punj 545), observed that (at p. 427 of AIR)—

“In my opinion, the language employed in Section 15 (2) (a) is capable of no other interpretation. It says that in spite of anything that has been mentioned in Sec. 15 (1) where the sale has been made by a female and of property to which she has succeeded through her brother, then the right of pre-emption shall vest in her brother or brother's son. In other words, the right of pre-emption qua such a sale will not vest in anybody else, in spite of what has been stated in sub-section (1) of Section 15 of the Pre-emption Act. The language of the statute being clear and capable of no other interpretation, it is idle to suggest that in the absence of the persons who have a right of pre-emption under sub-section (2) (a) of Section 15, other persons referred to in sub-section (1) of Section 15 of the Pre-emption Act would also have a right to pre-empt.”

Mehar Singh, C. J. in *Surja v. Smt. Chhotto*, 1972 Pun LJ 732, after favourably referring to the earlier decisions, merely followed the earlier decisions in *Debi Ram* (1963-65 Pun LR 500) (supra); *Santa Singh* (1965-67 Pun LR 132) (supra) and *Surjit Singh v. Nazir Singh*, (1965) 67 Pun LR 1108.

58. In *Surjit Singh's* case, *Harbans Singh*, J. (as he then was) also held to the same effect, as in the earlier decisions.

59. In *Amar Nath v. Smt. Nirmal Kumari*, 1973 Pun LJ 321, *Suri*, J. merely followed the earlier decisions. So also *Bains*, J. in *Mohinder Singh v. Har Kishan*, 1976 Pun LJ 605; *C. S. Tiwana*, J. in *Anup*

Singh v. Ilam Chand, 1978 Pun LJ 328 and *J. V. Gupta*, J. in *Nand Ram v. Pehlad Singh*, 1979 Pun LJ 307 and *Chander v. Chao Khan*, 1980 Pun LJ 7.

60. The inadequacy of the decisions referred to above shall come out in bold relief when viewed in the light of indicia well-settled by authoritative text and judgments in regard to the interpretation of statutes. Notice may be taken, in the first instance, of the following passage from the celebrated text of ‘Statutory Construction’ by Crawford at pages 269 and 270 — highlighting the fact that it is the intent of the legislature which constitutes the law of any statute which should be given effect to, even if it necessitates supplying of omissions.

“But, inasmuch as it is the intention of the legislature which constitutes the law of any statute and since the primary purpose of construction is to ascertain that intention, such intention should be given effect, even if it necessitates the supplying of omissions, provided, of course, that this effectuates the legislative intention. It would seem that the only time the omitted case might be included within the statute's operation, would be when the legislature intended to include it but actually failed to use language which would, on its face, cover the omitted case. The inclusion would then be justified, if from the various intrinsic and extrinsic aids, the intent of the legislature to incorporate the omitted case, could be ascertained with a reasonable degree of certainty”

Lord Blackburn in *Bradlaugh v. Clarke*, (1883) 8 AC 354, expounded the same view in the following words:

“All statutes are to be construed by the Courts so as to give effect to the intention which is expressed by the words used in the statute. But that is not to be discovered by considering those words in the abstract, but by inquiring what is the intention expressed by those words used in a statute with reference to the subject-matter and for the object with which that statute was made; it being a question to be determined by the Court, and a very important one which was the object for which it appears that the statute was made. The meaning of the words is to be found not so much in strict etymological propriety of language, or even in popular use, as in the subject or occasion on which they are used and the object that is intended to be attained. The subject-matter with which the legislature was dealing, and the facts existing at the time with respect to which the legislature was legislat-

ing, are legitimate topics to consider in ascertaining what was the object and purpose of the legislature in passing the Act."

In *Shaikh Gulfan v. Sant Kumar Ganguli*, AIR 1965 SC 1839, it has been observed in this connection by their Lordships as follows:

"Very often in interpreting a statutory provision, it becomes essential to have regard to the subject-matter of the statute and the object which it is intended to achieve. That is the reason why in dealing with the true scope and effect of the relevant words, the context in which the words occur, the object of the statute in which the provision is included, and the policy underlying the statute, become relevant and material"

Lord Coke in a celebrated case; *Heydon's case* (1584) 3 Co Rep 7b, handed down the following dictum in this regard:

"To arrive at the real meaning, it is always necessary to get an exact conception of the aim, scope, and object of the whole Act; to consider (1) what was the law before the Act was passed; (2) what was the mischief or defect for which the law had not provided; (3) what remedy Parliament has appointed; and (4) the reason of the remedy." A further and relevant concept that every clause of a statute should be construed with reference to the context and the other clauses of the Act, so as, so far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject-matter, had the forceful backing of Lord Davey in *Canada Sugar Refining Co. v. R.*, (1898) AC 735.

61. Lord Viscount Simonds, while delivering his opinion in *Attorney-General v. Prince Ernest Augustus of Hanover*, 1957 AC 436 (at page 461), underlined with greater emphasis the above concept in the following words:

"I conceive it to be my right and duty to examine every word of a statute in its context, and I use the word 'context' in its widest sense ... as including not only the enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in *pari materia*, and the mischief which I can, by those and other legitimate means discern the statute was intended to remedy."

In *Karta Ram's case* (AIR 1971 Punj & Har 423) (FB) (*supra*), what was till now the binding precedent, there is no discussion whatsoever — it merely approved the earlier view which had run, no doubt, consistently. In the earlier case, *Mahajan, J.*, as already

observed, took the view by believing that to a provision of this nature, the well-known canon of construction that specific excludes the general was applicable and, therefore sub-section (2) being specific excluded sub-section (1) which was general in nature. Narula, J. additionally sought to shore up the above view by adding that where two constructions were possible, one that went against the pre-emptor had to be adopted.

62. With great respect, the learned Judges, who have so far happened to construe the provisions of Section 15 of the Act, have taken rather too simplistic a view of the provisions and have altogether avoided consideration of the consistencies and incongruities that arise from the construction that they have put on sub-section (2) of Section 15 of the Act.

63. Now let us see as to how an answer in the affirmative to the question posed leads to illogical results in the application of the provisions of Section 15 (1) and (2) of the Act.

64. The analysis shall, however, have to be attempted in the light of the objectives underlying the right of pre-emption. These objectives have been underlined by the legislature both while framing the Act or attempting an amendment thereto and by the Court; whenever a challenge happened to be posed to the constitutionality of the Act or a given provision thereof.

65. To have the correct perspective, a look back on the historical past of this provision would be rewarding. Right of pre-emption in this part of India was first put in concrete shape in Section 13 of the Punjab Civil Code of 1854. Section 13 was replaced by Sections 9 to 20 of the Punjab Laws Act of 1872. The Act of 1872 gave primacy to a co-sharer, as would be clear from the provisions of sub-section (a) of Sec. 12 of the said Act, which were in the following terms:

"12. If the property to be sold or the right to redeem which, to be foreclosed is situate within or as a share of a village, the right to buy or redeem such property belongs, in the absence of a custom to the contrary,

(a) first, in the case of joint undivided immovable property, to the co-sharers;

* * * * *

66. Basic object of right of pre-emption in so far as it concerned the village, being to prevent the incursion into the community of strangers in race and religion and thus protect compactness of village communities and for that reason, this right was consider-

ed a mere corollary of the general principles regulating the succession to and power of disposal of land and since it was the last means by which a natural heir could retain ancestral property in the family when he was unable to altogether prevent an act of alienation by the holder of the estate, the 'Punjab Laws Acts' appeared to be failing in the avowed object, as these laws merely regarded the village as it stood without any great regard to its historical foundation inasmuch as it gave all co-sharers similar footing subject to the proof of some special custom. Consequently, under the general law, that is, where no special custom was proved, an agnate of the vendor, merely as such, had no special preference over a non-agnate, even if the agnate was a son of the vendor and the family or tribe tie which underlay the whole scheme of pre-emption, as it does other restrictions on the power of alienation, was lost sight of. The result, to some extent, was, instead of strengthening the cohesion of the village, to weaken it, inasmuch as a co-sharer, for example, a money-lender, who had no real connection with the agricultural community, was in a better position than an actual blood-relation or tribe's man of the vendor, who held separate land in the village.

67. The Act of 1905, which replaced the provisions of Sections 9 to 20 of the Punjab Laws Act of 1872 and, later on, the Act of 1913, which replaced the Act of 1905, first aimed at reshaping the family or the tribal base of the village; where that failed, they aimed at preserving the integrity of the village as it stood at the time the Acts were passed and when that again failed, they aimed at securing the land to the agriculturists. New legislation on the subject was also necessitated by the passing of the Land Alienation Act, 1900, enacted to put a stop to the gradual passing of the proprietary rights from agriculturists to non-agriculturists in satisfaction of debts or otherwise — a process much hastened by the famine of 1897 and by the enormous growth of population resulting in extreme sub-division of the land.

68. A Full Bench of this Court in *Uttam Singh v. Kartar Singh*, AIR 1954 Punj 55, distilled from the above history the following four as the objectives underlying S. 15 of the Act:

- (1) to preserve the integrity of the village and the village community;
- (2) to avoid fragmentation of holdings;
- (3) to implement the agnatic theory of the law of succession; and

(4) to reduce the chances of litigation and friction and to promote public order and domestic comfort.

All but the last one of them had been underscored by their Lordships of the Supreme Court in *Ram Sarup v. Munshi*, AIR 1963 SC 553.

69-70. It is these objectives, that the legislature intended to achieve that dictated from time to time the choice of instruments in achieving these objectives — that is, the persons, who were selected to exercise the right of pre-emption. Such persons were to be those by whose exercise of this right the underlying objectives of the Act or the provision in question were to be promoted. Two objectives, viz. objectives (1) and (3) above, were sought to be achieved by conferring the right upon such persons as were entitled to succeed the vendor under the personal law applicable to such a vendor. To achieve objective (2) above, the co-sharer was also clothed with the right of pre-emption.

71. The order in which different categories of pre-emptors have been enumerated by the legislature is indicative of its priority or preference for the achieving of the given objective.

72. The co-sharer all through, barring the Punjab Laws Act of 1872, has been mentioned after exhausting the persons who, but for the sale, would have been entitled to succeed to the agricultural land of the vendor. Since this is so even after the amendment of 1960, that means that the achieving of objectives (1) and (3) above were given priority by the legislature over the achieving of objective (2).

73. An occupancy tenant, who being almost as good a member of the village agricultural community as any other land-owning agriculturist appeared in the list of pre-emptors, though placed at the fag-end, right from 1872, but the inclusion of tenant-at-will in the list of pre-emptors advanced none of the aforementioned objectives, and, therefore, a tenant-at-will did not figure till 1960 in the list of pre-emptors.

74. It was as a result of the amendment effected in 1960 that the tenant-at-will also was given right to pre-empt. The inclusion of the tenant in the list of pre-emptors as such was not dictated by the objectives that had inspired till then the framing of the pre-emption legislation. The inclusion of the name of the tenant was, on the other hand, dictated by the awareness of the fact that a tenant in actual cultivation of the land ex-

pends labour and capital on the land and makes at times non-arable land arable and an arable land more fertile and that if his tenure is placed on more secure basis or he is given a hope of securing the ownership of the land under his tenancy, he is likely to exert more in the aforesaid direction and food production would receive impetus. Hence, in the event of the land under the tenant being sold by the owner, the former's claim to purchase the same was given statutory recognition. In so providing, the legislature had fallen in line with the concept that the land should belong to the tiller, an idea which had earlier inspired the enactment of Security of Land Tenures Act, 1953, Vesting of Proprietary Rights Act 1953 and the Village Common Lands Act of 1953. The inclusion of the name of the tenant in the list of pre-emptors through the amending Act of 1960 was, in some measure, pointedly goaded by the provisions of Sections 17 and 17-A of the Security of Land Tenures Act, where, under the former provision, the tenant's right to pre-empt the sale was recognised for the first time and, under the latter provision, the legislature went to the extent of making a sale in favour of a tenant non-pre-emptible.

75. If, as observed earlier, the objectives that the legislature had set for itself to achieve, governed the selection of the person who had to be invested with the right of pre-emption to achieve these objectives, then, at least so far as a co-sharer and a tenant is concerned, it would be absolutely immaterial whether the land, that was to be pre-empted, had been sold by a male or the sale was by a female or her son or daughter, and whether the land had been inherited by her from her father or brother or from her husband or son, or it happened to be self-acquired. In the event of the pre-emptors in the sequence of priority coming above them, either not availing of their right or being non-existent, the co-sharer or the tenant, as the case may be, would have a right to assert his right of pre-emption — the co-sharer to achieve the objective of avoidance of fragmentation of holdings and the tenant to promote noble objective of securing land to the tiller and the related objective of 'grow more food'. To hold otherwise is to uphold an incongruous situation that if the sale had been effected by the last male-holder, that is, father and brother in one case and husband and son in another case of the female, then both the co-sharer and the tenant, after the list of persons, under sub-section (1) of Section 15 of the

Act, whose right to pre-empt is based upon their agnatic connection with the vendor, is exhausted, can pre-empt the sale, but not so when sale of that very property is effected by the female heir or her son and daughter of the last male-holder of the property in dispute, if the list of persons, under sub-section (2) of Section 15 of the Act, claiming pre-emption on the basis of their agnatic connection with the last male-holder is exhausted.

76. If the view so far voiced by this Court is accepted to be the correct view, then an intention would have to be attributed to the legislature, which goes contrary to the objectives that the legislature had intended to achieve by enacting the legislation in question and framing the list of pre-emptors and also thereunder fixing the sequence of priority.

77. It does not stand to reason that the concern of the legislature for avoiding fragmentation of holdings by giving a right of pre-emption to a co-sharer suddenly disappeared when it faced the question of pre-emption by a co-sharer of a land, sale whereof happened to be effected by a female, who had inherited that property from the source envisaged in sub-section (2) of the Act. Equally, one might again wonder as to what happened to those noble ideals that inspired the legislature to include, for the first time, the tenants in this list of pre-emptors enabling them to pre-empt the sale in a given event effected by a male-owner, whatever may have been the sources of his acquisition of the said land and of a female owner of a land, of which she became the owner without inheriting from the two sources specified in sub-section (2), when it came to giving a right to a tenant to pre-empt a sale effected by a female or her son or daughter, of a property that they had succeeded to from the sources mentioned in sub-section (2). Should one attribute to the legislature, a loss of memory when it took up for enacting the provision of S. 15 (2) or should we take it that by then the concern for the tenants suddenly took leave of the authors of the legislation? I am of the view that it would be uncharitable to attribute such an inconsistency and irrationality to the legislature. It may be a different matter if somehow the language used in the provision by the legislature is somewhat inadequate by reason of inadvertent omission. But then, if the literal reading of the language of a statute runs counter to the avowed intention animating the authors of the legislation to enact the given provision

and if the Court is clear in its mind about the legislative intent which the language used in the provision as a vehicle to convey the same has failed, then the provision be made worthy of conveying that intent, even if a word or two, here or there, is added or subtracted or even if a whole sentence is added or subtracted therefrom. The following observations in this regard of Venkata-rama Ayyar, J. in *Tirath Singh v. Bachittar Singh*, AIR 1955 SC 830, clearly underscore the desirability of the above indicated course of action in the given situation of textual inadequacy of the given provision (at p. 833):—

"It is argued that if the language of the enactment is interpreted in its literal and grammatical sense, there could be no escape from the conclusion that parties to the petition are also entitled to notice under the proviso. But it is a rule of interpretation well established that, 'Where the language of a statute', in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence."

In order to have some idea as to the true intent of the legislature, the Court would have regard to the objective that the legislature wished to achieve by amending in 1960 the sub-section (1) of S. 15 and recasting the existing 'explanation' thereto into sub-section (2) thereof. However, before dealing with the above aspect a reference to the provisions of S. 15, as it stood before and after the amendment, would be desirable:

Section 15 before the amendment of 1960:

"15. Subject to the provisions of Sec. 14 the right of pre-emption in respect of agricultural land and village immovable property, shall vest—

(a) where the sale is by a sole owner or occupancy tenant or, in the case of land or property jointly owned or held, is by all the co-sharers jointly, in the persons in order of succession, who but for such sale would be entitled, on the death of the vendor or vendors, to inherit the land or property sold;

(b) where the sale is of a share out of joint land or property and is not made by all the co-sharers jointly,—

firstly, in the lineal descendants of the vendor in order of succession;

Secondly, in the co-sharers, if any, who are agnates, in order of succession;

thirdly, in the persons, not included under firstly or secondly, above, in order of succession, who but for such sale would be entitled, on the death of the vendor, to inherit the land or property sold;

fourthly, in the co-sharers;

(c) if no person having a right of pre-emption under clause (a) or clause (b) seeks to exercise it,—

firstly, when the sale affects the superior or inferior proprietary right and the superior right is sold, in the inferior proprietors, and when the inferior right is sold, in the superior proprietors;

secondly, in the owners of the Patti or other sub-division of the estate within the limits of which such land or property is situate;

thirdly, in the owners of the estate;

fourthly, in the case of a sale of the proprietary right in such land or property, in the tenants (if any) having rights of occupancy in such land or property;

fifthly, in any tenant having a right of occupancy in any agricultural land in the estate within the limits of which the land or property is situated.

Explanation.— In the case of sale by a female of land or property to which she has succeeded on a life tenure through her husband, son, brother or father, the word 'agnates' in this section shall mean the agnates of the person through whom she has so succeeded."

Section 15 after the amendment of 1960:

"15. (1) The right of pre-emption in respect of agricultural land and village immovable property shall vest—

(a) where the sale is by a sole owner,—

First, in the son or daughter or son's son or daughter's son of the vendor;

Secondly, in the brother or brother's son of the vendor;

Thirdly, in the father's brother or father's brother's son of the vendor;

Fourthly, in the tenant who holds under tenancy of the vendor the land or property sold or a part thereof;

(b) where the sale is of a share out of joint land or property and is not made by all the co-sharers jointly,—

First, in the sons or daughters or sons' sons or daughters' sons of the vendor or vendors;

Secondly, in the brothers or brothers' sons of the vendor or vendors;

Thirdly, in the fathers' brothers or fathers' brothers' sons of the vendor or vendors;

Fourthly, in the other co-sharers;

Fifthly, in the tenants who hold under tenancy of the vendor or vendors the land or property sold or a part thereof;

(c) where the sale is of land or property owned jointly and is made by all the co-sharers jointly,—

First, in the sons or daughters or sons' sons or daughters' son of the vendors;

Secondly, in the brothers or brothers' sons of the vendors;

Thirdly, in the fathers' brothers or fathers' brothers' sons of the vendors;

Fourthly, in the tenants who hold under tenancy of the vendors or any one of them the land or property sold or a part thereof;

(2) Notwithstanding anything contained in sub-section (1),—

(a) where the sale is by a female of land or property to which she has succeeded through her father or brother or the sale in respect of such land or property is by the son or daughter of such female after inheritance, the right of pre-emption shall vest,—

(i) if the sale is by such female, in her brother or brothers' son;

(ii) if the sale is by the son or daughter of such female, in the mothers' brothers or the mothers' brothers' sons of the vendor or vendors;

(b) where the sale is by a female of land or property to which she has succeeded through her husband, or through her son in case the son has inherited the land or property sold from his father, the right of pre-emption shall vest.—

First, in the son or daughter of such husband of the female;

Secondly, in the husbands' brother or husbands' brothers' son of such female."

The objective in enacting the Amending Act of 1960 and reshaping the provisions of existing S. 15 (1) of the Act, besides the one of taking note of the changes witnessed by the society between the years 1913 and 1960, like the partition of the country leading to the settling of the displaced persons in villages thus loosening in consequence the compactness of the village society, the amelioration of the conditions of the tenants, as already observed, by giving them right in the land which they tilled, was to shorten the list of the pre-emptors and remove therefrom such persons whose inclusion therein, of course, had earlier been partly dictated

by the Land Alienation Act, 1900, which, when it was enacted, was intended to safeguard the interest of the agriculturists, who were rapidly being bought out by the money-lending classes, and turned into mere surfs and partly to maintain the tribal homogeneity of the village. This objective was sought to be achieved by subjecting Sec. 15 to the provisions of Section 14, which provision is in the following terms :

"14. No person other than a person, who was at the date of sale, a member of an agricultural tribe, in the same group of agricultural tribes, as the vendor, shall have a right of pre-emption in respect of agricultural land sold by a member of an agricultural tribe."

Now let us focus attention on the objectives that the legislature intended to achieve by moulding the existing explanation to S. 15 into sub-section (2) thereof.

78. The legislature had recognised much earlier the necessity of dealing specifically with the sale effected by a female of the property to which she had succeeded through her husband or son or father or brother. In the Punjab Act of 1905, the 'explanation' added to Section 12 was in the following terms :

"Explanation II.— In the case of sale by a female of property to which she has succeeded through her husband, son, brother or father, the word 'agnates' in this section shall mean the agnates of the person through whom she has so succeeded."

A perusal of this explanation shows that it conferred right of pre-emption upon the 'agnates' of the specified last male-holder, whether the female vendor had succeeded to the property absolutely or only got a life tenure therein. However, the explanation to Section 15 of the Act, which replaced explanation to Section 12 of 1905 Act above, brought about one fundamental change, that is, it limited the rights of 'agnates' of the specified last male-holder to the pre-emption of sale by the females only of such a property, wherein she had acquired by inheritance only a 'life tenure'. If, for instance, she, under the existing law, was entitled to succeed to the aforesaid male-holder absolutely, then the expression 'agnates' would be taken in the sense in which it has been used in the earlier part of the provision of amended Section 15, that is, 'agnates' of the female vendor. When so viewed, obviously her 'agnates' would not be in her husband's family, but in her father's family. That means, in the event of failure of pre-emptor's have preferential right of pre-emption in

sequence of priority over the 'agnates', it would not be the agnates of husband or son, who would have a right of pre-emption, even though the female vendor has succeeded to the agricultural land from her husband or son (sic).

79. The phenomenon that she could succeed absolutely to her husband or son or father or brother was no longer in the realm of speculation as, after the passing of the Hindu Succession Act of 1956, a female held all her properties, of which she was legally possessed, absolutely and, after the operation of the said Act, she as a matter of right, so far as the intestate succession was concerned, succeeded to the property whether coming from one source or the other, absolutely.

80. Apparently, the explanation, as it stood under Section 15 of the Act, to an extent, went against the object that underlay the right of pre-emption, that is, to keep the property in the family of the last male-holder, in so far as it related to the agricultural property, to which the female had succeeded through her husband or son and, therefore, the explanation in question required to be recast. Yet another reason for recasting the 'explanation' to Section 15 was that it provided for the 'agnates' to assert their right of pre-emption only when the female was the vendor of agricultural land to which she had succeeded through her husband, son, brother or father, but not when that very land happened to be sold by her son or daughter, who had succeeded through her to her husband or son or her father or brother, as the case may be. Further, since from Section 15 (1) the expression 'agnate' had been removed by 1960 amendment, so the expression in the explanation thereto 'the word agnate in this section' would have conveyed no sense, as after amendment of sub-section (1), the word 'agnate' occurred in Section 15 (1) nowhere except in the explanation itself. Yet another reason that warranted recasting of the existing explanation to Section 15 was to bring it in line with the preceding provision of sub-section (1) in regard to the number of pre-emptors. The legislature having restricted the number of pre-emptors in the agnatic line to vendor's father's brother and father's brother's son and if the explanation to Section 15 had been allowed to stand as it was, then the result would have been that while in regard to the sale of the self-acquired property of the female, the blood-relations only of a certain degree could lay claim to pre-

emption, but in regard to property to be succeeded to through either of the two sources, the agnates of any degree could lay claim to pre-emption. Hence, it was to remove these illogicalities that the explanation was re-constructed in the form of the present sub-section (2) of Section 15 of the Act.

81. From the above, it is clear that the reasons for moulding the existing explanation to Section 15 of 1913 Act into sub-section (2) of Section 15 after the amending Act of 1960 were those enumerated above and not the fact that the legislature intended thereby to limit the number of persons entitled to pre-empt merely to those who have been mentioned under sub-section (2) in regard to the sale dealt with in the said sub-section.

82. Having regard to the objectives behind the amendment of Section 15 of the Act and the literal and grammatical construction of sub-section (2) leading to illogical results and landing one in a welter of inconsistencies in the matter of application of the two sub-sections of Section 15, the irresistible inference that follows is that sub-section (2) was intended to serve the same purpose as the pre-amendment explanation to Section 15 which it replaced, that is of achieving the objective of agnatic principle of succession, that is, of giving primacy over others to the agnates of a limited degree of the specified last male-holder of the inherited property which the female or her son or daughter happens to sell. Hence, what the authors of the amendment of Section 15 of the Act intended by giving the existing explanation to Section 15, the shape it has acquired in sub-section (2) of Section 15 of the Act was to place the pre-emptors mentioned in sub-section (2) at number one in sequence of priority over the pre-emptors listed under sub-section (1) of Section 15 of the Act.

83. This alone could be the intention of the legislature and if this construction of sub-section (2) is adopted, then sub-sec. (2) would have to be read as under:—

"(2) Notwithstanding anything contained in sub-section (1)—

(a) where the sale is by a female of land or property to which she has succeeded through her father or brother or the sale in respect of such land or property is by the son or daughter of such female after inheritance, the right of pre-emption, in the first instance, shall vest—

(i) if the sale is by such female, in her brother or brother's son;

(ii) if the sale is by the son or daughter of such female, in the mother's brothers or the mother's brother's sons of the vendor or vendors;

(b) where the sale is by a female of land or property to which she has succeeded through her husband or through her son in case the son has inherited the land or property sold from his father, the right of pre-emption, in the first instance, shall vest,—

First, in the son or daughter of such husband of the female;

Secondly in the husband's brother or husband's brother's son of such female."

It was, however, contended on behalf of the vendees that where two constructions are possible of the provisions in the Act, then one that defeats the right of pre-emptor should be preferred, as the right of pre-emption is piratical in nature. The aforesaid submission was sought to be sustained by pressing into service *Thana Singh v. Nandu*, 1978 Cur LJ (Civ) 25 : (AIR 1978 Punj & Har 94) (FB).

84. There is no dispute with the proposition that right of pre-emption does put a clog on the right of vendor to dispose of his property to anybody of his choice and of vendees to acquire it, but since the exercise of right of pre-emption and the relevant provisions of the Act supplying such a right had been held to be in public interest by their Lordships and were thus held to constitute a reasonable restriction on the constitutional right of the vendor and vendee and for that reason these provisions of the Act were held not to be suffering from the vice of unconstitutionality, so, to the extent the right of pre-emption which thus stands saved, being a statutory right is exercisable within the statutory limits. The ratio of the aforesaid judgment could be applicable where one is in doubt as to the legislative intent. But here is a case, where no two views about the legislative intent can be entertained. The legislature had merely intended the persons mentioned in sub-section (2) as the persons in the sequence of priority constituting the first group of pre-emptors above the persons listed as pre-emptors under sub-section (1) of Section 15 of the Act.

85. It was, however, argued before us that if the category of pre-emptors listed under sub-section (2) of Section 15 of the Act merely constituted a category of pre-emptors which, in point of preference, came above such pre-emptors as were listed in sub-section (1) of Section 15 of the Act then

even her own son or daughter or son's son or daughter's son would be brought in as pre-emptors, when they are from a husband other than the one whose property, after being inherited by her, was being put to sale, which was sought to be pre-empted, when the whole object of sub-section (2) (b) of Section 15 of the Act, as amended by the Punjab Act No. 13 of 1964, was to exclude such of her sons and daughters.

86. In my opinion, that would not be a correct way of reading the legislative intent (see para 42 of the present judgment for 'Objects and Reasons' of the Amending Act).

87. Previous to the amendment, S. 15 (2) (b) (i) was in the following terms :

"15 (2) (b) where the sale is by a female of the land or property to which she has succeeded through her husband or through her son, in case the son has inherited the land or property sold, from his father, the right of pre-emption shall vest—

(i) First, in the son or daughter of such female.

(ii) * * *

After the amendment, it read as under :

"15 (2) (b) where the sale is by a female of the land or property to which she has succeeded through her husband or through her son, in case the son has inherited the land or property sold, from his father, the right of pre-emption shall vest—

(i) First, in the son or daughter of such husband of the female.

(ii) * * *

The amendment was of merely a clarificatory nature. Their Lordships of the Supreme Court in *Channan Singh v. Smt. Jai Kaur*, AIR 1970 SC 349, held that, even without the said amendment, it was clear that the legislature had intended that only such son and daughter of the female vendor as bore agnatic relationship with her husband whose property, after being inherited, was being sold by her, were entitled to pre-empt the sale as forming the first category given in sub-section (2) (b) of Section 15 of the Act.

88. The legislature, however, did not intend that her own flesh and blood was to remain altogether excluded, even when close agnatic relations of her husband did not exist to pre-empt the sale. It is not without significance that unlike Clause (a), where the legislature listed only brother and brother's son of the female as pre-emptors, in Clause (b) when it came to provide the pre-emptors, for pre-empting sale of the property, of which the last male-holder was

the husband of the female, it did not remain content by mentioning son or daughter of such husband of the female, but in paragraph (ii) of Clause (b), it further mentioned her such husband's brother or brother's son as pre-emptors. The reason for this departure, in my view, was dictated by a concern on the part of the legislature that while in regard to pre-emption of the property dealt with in Clause (a), after the exhausting of pre-emptors mentioned in Clause (a), the relation-pre-emptors listed in sub-sec. (1), who were to stake their claim to pre-emption, bore close (agnatic) relationship to the last male-holder, that is, father or brother of the female, but in case of pre-emption to property dealt with in Clause (b), such would not have been the case and, therefore, the legislature provided, so to say, a second line of defence to keep the property within the agnatic relations of the last male-holder by naming as pre-emptors brother and brother's son of the husband of the female.

89. It may, however, be urged that the above rationale would fail in regard to Clause (a) of sub-section (2) if the vendor instead of being the female happened to be her son or daughter, in that after exhausting the list of pre-emptors mentioned in Cl. (a) of sub-section (2) if the pre-emptors listed in sub-section (1) are to be given the right to pre-empt, then such latter pre-emptors would bear no agnatic relationship with the last male-holder of the property, which was subject-matter of the sale and sought to be pre-empted.

90. It may be observed that in a case like this, where the property by succession had gone in the hands of maternal grand children, it had already gone beyond the circle of agnatic relations and, therefore, the legislature must have considered it sufficient to safeguard the interest of the maternal grand father's family by mentioning vendor's maternal uncle and maternal uncle's son as the pre-emptors, in the absence of whom it might have been considered more relevant that the effort should be to keep the property within the family of the vendor by availing the list of pre-emptors given in sub-section (1) of Section 15, for, as already observed, by the time the amendment of 1960 came to be effected, the original objective underlying the law of right of pre-emption to maintain the tribal homogeneity of the village had become impossible to be achieved as result of influx of a large number of people from West Pakistan after partition into the villages which now form part of the State of Haryana and, therefore, the legisla-

ture, by the amendment of 1960, removed the subjection of Section 15 to the provisions of Section 14 and in order to confine the right of pre-emption within the very close relations of the vendor, it pruned the list of the relation-pre-emptors and in doing so, it did not wholly keep in view the agnatic relationship, otherwise, in sub-sec. (1) of Section 15 in the first category, it would not have included daughter's son as one of the pre-emptors.

91. It was then argued that if the proposed construction of sub-section (2) of Section 15 of the Act is accepted, then its practical effect would be to read sub-section (1) curiously as a proviso to sub-section (2) of Section 15 of the Act which really tantamounts to putting the cart before the horse.

92. The argument, in my opinion, is bereft of any basis. In effect, sub-section (1) of Section 15 does not resume the place of the proviso to sub-section (2) of Section 15. The manner, in which I have interpreted the two sub-sections of Section 15, it is S. 15 (2) that, in a way, can be read as a proviso to sub-section (1) thereof and not vice versa.

93. Lastly, the argument, based on the doctrine of stare decisis.

94. As I observed in the very inception of the judgment that the view, correctness whereof has been debated before this larger Bench, had, no doubt, held the field for long and, therefore, the Court would be extremely averse to upturn it, unless the view under challenge is held to be manifestly erroneous or unreasonable or unjust or productive of public hardship or inconvenience.

95. In my opinion, the current view, when viewed in the light of foregoing discussion, with great respect, is manifestly erroneous, unreasonable, unjust and patently contrary to the statutory intent and, therefore, despite implicit respect that the doctrine of stare decisis commands, I cannot but hold that the current view no longer deserves to be adhered to.

96. Now reaches the stage to consider the partisan submission advanced on behalf of the tenant-pre-emptors that tenants alone from the list of pre-emptors under S. 15 (1) of the Act were entitled to pre-empt a sale dealt with under Section 15 (2) of the Act, in the event of failure of the pre-emptors listed under Section 15 (2) to do so. Mr. C. B. Goel appearing for the tenant-appellant in R. S. A. 67 of 1969 argued that the legislature by enacting sub-section (2) of Sec. 15 of the Act in any case had intended to exclude all but the tenant and the co-sharer,

in the event of persons listed as pre-emptors in sub-section (2) had either not availed of their right or were non-existent, that is, blood-relations of vendor listed in sub-section 15 (1) were alone intended to be excluded.

97. The learned counsel sought to sustain his contention by emphasising that sub-section (2) would be violative of Article 14 of the Constitution of India if an intention is spelled out therefrom that it envisaged the exclusion of the tenant from pre-empting a sale dealt with under sub-section (2), even in the absence of the pre-emptors mentioned therein and, therefore, this sub-section has to be read down in order to avoid a challenge to its constitutional validity based on Article 14 of the Constitution which, otherwise, clearly arises when regard is had to the fact that a tenant has a right to pre-empt the self-acquired property of a female, but he stands debarred from exercising the same right in respect of the land acquired by a female through her husband or father, which fact would amount to introducing invidious discrimination by a process of judicial interpretation. I am, however, unable to see any reason or logic in the contention.

98. The right of pre-emption is a creature of statute and anybody who enjoys it does so because it has been conferred upon him by the statute. If a person has been given right to pre-empt sale of a given property, he cannot come round and say that he should be entitled to pre-empt sale of another given property, even though a right to that effect had not been given to him by a given provision of the statute. He cannot say that the provision which had excluded him from asserting his right of pre-emption in regard to that other property is violative of Article 14, in that he had been discriminated against. For one thing, the discrimination arises when persons similarly placed are dissimilarly treated. Here, what the legislature has done is that it has categorised the land in two classes—in one class it has given right to all tenants and in the other it has excluded, say, all tenants from asserting their right of pre-emption. Surely, in regard to the other class of land, no tenant can say that he has been discriminated against.

99. What is more, if this argument is accepted to be valid one, then with what logic can it be said that the provision of sub-section (2) — if it is accepted as it is — suffers from vice of unconstitutionality only because it had excluded tenants from exercising right

of pre-emption in regard to sale covered by the said sub-section (2) even though he had the right to pre-empt under Section 15 (1) why would this provision not suffer from the same vice of unconstitutionality, because it had excluded some other persons too who had a right of pre-emption under sub-section (1) — a right which because of being higher in sequence of priority was superior to that of the tenants? So, if this argument of reading down the provision of sub-section (2) in order to save it from the vice of unconstitutionality has to be resorted to, then consistency and logic demands that it would have to be done not only because in its present state it discriminates against one of the persons listed as pre-emptors under sub-section (1), that is, tenants, but because it discriminates against all persons, who were listed as pre-emptors under Sec. 15 (1) of the Act, more tellingly so because such other pre-emptors happened to be placed above the tenants in the sequence of priority under Section 15 (1).

100. I am, therefore, clearly of the opinion that no such distinction can be drawn between the persons listed as pre-emptors under sub-section (1) while examining their right to pre-empt a sale effected by a female of a property that she had succeeded to through sources mentioned under sub-sec. (2).

101. It was then argued by Mr. Goel that since the ushering of the socialistic pattern of society and the concept of 'land should belong to the tiller' as one of the hallmarks of that pattern had inspired the legislature to include the tenant in the list of pre-emptors, so the tenant-pre-emptor fell in a category apart from the relation-pre-emptors and, therefore, the exclusion of tenant could not have been contemplated by the legislature while enacting sub-section (2). Basing himself on this hypothesis, the learned counsel maintained that the exclusion from the ambit of sub-section (2) of only the relation-pre-emptors should be presumed and not of the tenant. The exposing of speciousness of this argument requires no more effort than pointing out that if socialistic fervour alone had guided the legislature in including the tenant as one of the pre-emptors under sub-section (1), how is it that they placed him as a pre-emptor at the fag-end of the list. It deserves highlighting that when it came to the pre-empting of a female's self-acquired land or such land, which she had come to own without inheriting it from either of the two sources mentioned in sub-section (2) the tenant figured in the order of priority at the last, but we are required to

believe that socialistic intent of the legislature suddenly registered effervescence of such a proportion that when it came to enact sub-section (2) it placed the tenant as one of the pre-emptors above not only the relation-pre-emptors, but also over the co-sharer in regard to the pre-empting of sale of the land mentioned in sub-section (2), in the event of failure of the pre-emptors mentioned in sub-section (2) to pre-empt. It deserves noticing that though in the Security of Land Tenures Act, the concern for tenants pulsated all through, even then the legislature while enacting Section 17 thereof did not jack up the right of the tenant to pre-empt the sale of the land which he tilled, above certain categories of the agnate relations of the vendors, as would be clear from Section 17 itself, which is in the following terms :

"17. Notwithstanding anything to the contrary contained in any law, usage or contract, and subject to the provisions of Section 18, tenant of a land-owner other than a small land-owner, (i) who has been in continuous occupation of the land comprised in his tenancy for a period exceeding four years on the date of the sale of the land or foreclosure of the right to redeem the land, or

(ii) in case of a sale or foreclosure that has taken place or shall take place within a period of three years from the commencement of this Act and there is no tenant who has acquired a right under Clause (i)

(a) and (b) * * * *

shall, in preference to the rights of other pre-emptors as provided in the Punjab Pre-emption Act, 1913 (Act I of 1913), except the descendants of vendor's grand-father, be entitled to pre-empt the sale or foreclosure of the land other than the land comprised in the reserved area of the land-owner in the manner prescribed in that Act within one year from the date of the sale or foreclosure, as the case may be :

* * * *

I am, therefore, of the view that an interpretation of the kind, as suggested by Mr. Goel, of sub-sections (1) and (2) of Sec. 15 of the Act is not in consonance with logic and bristles with the same inconsistencies, as have already been observed and shown while analysing the correctness of the view that the list of the pre-emptors given in sub-section (2) is exhaustive, that is, even if no pre-emptor mentioned under sub-section (2) is available, then too the sale could not be

pre-empted by the pre-emptors mentioned in sub-section (1).

102. For the reasons aforementioned, while answering the question posed in the negative I hold that in the event of failure for any reason whatsoever on the part of the pre-emptors listed under sub-section (2) of Section 15 of the Act to pre-empt the sale, the pre-emptors listed under sub-sec. (1) of Section 15 of the Act in the very sequence of priority would be entitled to lay a claim to pre-emption to a sale by vendors and of property envisaged in sub-section (2) of Section 15 of the Act.

103. The appeals be now placed before the learned single Judge for disposal in the light of the legal proposition enunciated above.

M. R. SHARMA J. (Minority view) :—

104. I have had the advantage of going through the judgments prepared by Hon'ble the Chief Justice and my learned brother D. S. Tewatia, J. With utmost respect to both of them, I agree with the conclusion arrived at by D. S. Tewatia, J., that S. 15 (2) of the Punjab Pre-emption Act, 1913 (herein referred to as the Act), does not debar a co-sharer and a tenant to exercise the right of pre-emption. Since the question is of some importance, I propose to deal with the matter at some length.

105. Section 15 of the Act is ill-punctuated, ill-divisioned and unhappily worded. Nevertheless, before the appearance of sub-section (2) on the scene in its present form, it was conceded that a co-sharer and a tenant did have a right to file a suit for pre-emption. In order to see what change has been brought about by sub-section (2), the section as a whole has to be subjected to a closer scrutiny. Under sub-section (1) right of pre-emption is available against the following classes of property :—

(1) property belonging to a male whether it is self-acquired or inherited from the father's side, or the mother's side.

(ii) property belonging to a female, whether self-acquired, or inherited from her husband's side, or from her parents' side.

(iii) property belonging to a male or a female, which he or she holds jointly with others.

106. For the purpose of the exercise of right of pre-emption, heirs, specifically mentioned in the section get a priority followed by co-sharers and tenants.

107. Then comes sub-section (2) which lays down that in spite of what has been stated in sub-section (1) a different set of

heirs shall have the right to file a suit for pre-emption in respect of property which has been inherited by a female. To be more precise, if the property is inherited by her from her father's side, the heirs from his family shall have the right of pre-emption, and if she has inherited the same through her husband the specified heirs of the husband's family shall have the right of pre-emption.

108. Even if we put a question to a layman about the change brought about by sub-section (2), he would indicate that this sub-section modifies the right of pre-emption only in respect of the property inherited by a female. I fail to see how persons learned and trained in the discipline of law can come to a different conclusion. It is pertinent to mention that it is conceded by both the sides that under sub-section (1) the right of pre-emption is available to a co-sharer and a tenant against the self-acquired property of a female. This conclusion can be arrived at only if the two sub-sections are read together and made to operate in their respective fields. It would be incorrect to urge that sub-section (2) can stand all by itself. I am not advocating this view for the first time that two parts of a section should be read together. This principle has been authoritatively laid down in *Madanlal Fakirchand Dudhediya v. Shri Changdeo Sugar Mills Ltd.*, AIR 1962 SC 1543, wherein it was observed (para 17)—

"The two sub-sections must be read as parts of an integral whole and as being interdependent; an attempt should be made in construing them to reconcile them if it is reasonably possible to do so, and to avoid repugnancy. If repugnancy cannot possibly be avoided, then a question may arise as to which of the two should prevail. But that question can arise only if repugnancy cannot be avoided."

109. The two sub-sections cannot be interpreted to mean that they are pulling apart and indeed it is not being done qua the self-acquired property of a female. The right of pre-emption is being made to vest in a co-sharer and a tenant under sub-section (1). If the Legislature intended to take away the right of pre-emption against the property sold by a female, it could easily have provided in sub-section (2) that in no other case right of pre-emption shall be available against the property sold by a female. While dealing with 'repugnancy', Maxwell on Interpretation of Statutes,

Eleventh Edition, at page 153, has dealt with the subject in the following words:—

"An author must be supposed to be consistent with himself, and, therefore, if in one place he has expressed his mind clearly, it ought to be presumed that he is still of the same mind in another place, unless it clearly appears that he has changed it. In this respect, the work of the Legislature is treated in the same manner as that of any other author, and the language of every enactment must be construed as far as possible in accordance with the terms of every other statute, which it does not in express terms modify or repeal. The law, therefore, will not allow the revocation or alteration of a statute by construction when the words may be capable of proper operation without it. It cannot be assumed that Parliament has given with one hand what it has taken away with the other."

110. The only way in which the two sub-sections can be harmonised is that sub-section (2) should be made to operate in its own field which is really a part of the whole field covered by sub-section (1). In spite of the word "notwithstanding" appearing in sub-section (2), it is in substance in the nature of a proviso. A statutory provision beginning with the word "notwithstanding" was indeed treated by the Supreme Court as a proviso in *Vaddeboyina Tulasamma v. Sesha Reddi*, AIR 1977 SC 1944. With utmost respect to the proponents of the opposite view, I maintain that my conclusion arrived at on this point in the minority judgment in *Prithi Pal Singh v. Milka Singh*, AIR 1976 Punj & Har 157 (FB), is correct. In coming to that conclusion, I had relied upon the following passage appearing in *Ram Narain Sons Ltd. v. Asst. Commr. of Sales Tax*, AIR 1955 SC 765 (at p. 163):—

"It is a cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other."

111. After doing so, I concluded as under (at p. 164):—

"That right of pre-emption granted under Section 15 (1) of the Act relates to various types of properties which are sold by an owner. The owner may be a male or a female. Sub-section (2) of this section comes into operation only when the sale of property is made by a female. It does not have the effect of abrogating or repealing or in

any way modifying the other provisions of the enacting clause. Its application must be restricted only to those matters governed by it regarding which the general provisions of the statute also cover the field. If these tests are applied to the case in hand to Section 15 of the Act, it becomes clear that Section 15 (2) of the Act only makes an exception in case of right of pre-emption to be exercised in respect of the sales made by female owners. In all other respects, Section 15 (1) of the Act remains untouched."

112. Even if sub-section (2) is treated as a non obstante clause, the result would not be any different.

113. In *Aswini Kumar Ghose v. Arabinda Bose*, AIR 1952 SC 369, it was laid down (para 27)—

"The enacting part of a statute must, where it is clear, be taken to control the non obstante clause where both cannot be read harmoniously; for even apart from such clause, a later law abrogates earlier laws clearly inconsistent with it. *Posterior leges priores contrarias abrogant* (Broome's Legal Maxims, Edn. 10 p. 347). Here Section 2 entitles every Advocate of the Supreme Court as of right to practise in any High Court in India."

114. All the parts of a statute have to be read together and assigned their due role. In short, harmonious construction is the rule and repeal by implication an exception.

115. Strangely enough, a clear non obstante clause was given a complete go-by in two Full Bench decisions of this Court which arose under the Sikh Gurdwaras Act, 1925 (hereinafter referred to as the 'Gurdwaras Act'). Under the Gurdwaras Act, a special machinery had been provided for settling disputes relating to the Sikh Gurdwaras. Under sub-section (1) of Sec. 7 of the Gurdwaras Act, 50 worshippers of a Gurdwara are entitled to file a petition with the State Government praying therein that the Gurdwara be declared a Sikh Gurdwara. Under sub-sections (3) and (4) of that section the State Government is under an obligation to publish such a petition in the Official Gazette and to send by registered post a notice of the claim to a person named in the petition and interested in the Gurdwara. Section 8 of the Gurdwaras Act lays down that after the publication of the notice under Section 7 (3) in respect of any Gurdwara, any hereditary office-holder or any 20 or more worshippers of the Gurdwara may file a petition claiming therein that the Gur-

dwara is not a Sikh Gurdwara. Section 16 (1) of the Gurdwaras Act reads as under:—

"Section 16 (1): Notwithstanding anything contained in any other law in force, if in any proceeding before a Tribunal it is disputed that a Gurdwara should or should not be declared to be a Sikh Gurdwara. The Tribunal shall, before enquiring into any other matter in dispute relating to the said Gurdwara, decide whether it should or should not be declared a Sikh Gurdwara in accordance with the provisions of sub-section (2)."

116. Under normal law, a discretion vests in a Court or a Tribunal to treat some of the issues arising in a cause as preliminary issues and to give a decision thereupon before adverting to the other issues arising therein. In the Gurdwaras Act, however, a special provision has been made that whenever the nature of a Gurdwara is disputed, the Tribunal shall first decide that issue. These provisions came up for consideration in *Mahant Hari Kishan v. Shiromani Gurdwara Parbandhak Committee, Amritsar*, ILR (1975) 2 Punj and Har 569 : (AIR 1976 Punj and Har 130) (FB). It was held therein that it was open to the Tribunal to hold that the petitioner Mahant who challenged the nature of the Gurdwara had no locus standi to file the petition because he was not a hereditary office-holder and that the petition filed by him could be dismissed without there being any decision on the point whether the Gurdwara in dispute was a Sikh Gurdwara or not speaking for the Full Bench, Dhillon, J., observed as under (at p. 136):—

"The provisions of Section 16 of the Act will not be attracted in a case where the petition is dismissed by the Tribunal holding that the person making the petition has no locus standi to file such a petition keeping in view the provisions of Section 8 of the Act. The provisions of Section 16 will only come into play where in any proceedings before the Tribunal it is disputed that a Gurdwara can or cannot be declared to be a Sikh Gurdwara, but where there is no competent petition making challenge to the institution being declared a Sikh Gurdwara, the provisions of Section 16 of the Act will not be attracted. If in every case, whether the petition is filed by the persons competent to file the same under the provisions of Section 8 or not, the Tribunal has to decide the question whether the institution in question is a Sikh Gurdwara or not, the provisions of Sections 8 and 9 would be virtually rendered nugatory. The issue of locus standi is a

preliminary issue and if raised, has to be decided first in the peculiar setting of the Act. If the petitioner has locus standi to file the petition, the provisions of Section 16 shall then be taken into consideration by the Tribunal to determine whether the institution in question is a Sikh Gurdwara or not, but if there is no competent petition, that is, in other words, there is no valid challenge to the notification issued under Section 7 within the frame work of Section 8, the provisions of Section 9 are bound to be complied with and once a Notification having been issued that the institution in question is a Sikh Gurdwara, there will be no question of the application of the provisions of Section 16 to such a case."

117. I need not advert to the manner in which the claim of the Mahant in that case regarding his being a hereditary office-holder was rejected. The fact, however, remains that he belonged to a religious denomination which was in possession of the Gurdwara, and he was divested of the Gurdwara without there being any adjudication on the point that the same was a Sikh Gurdwara. This is a classic example of a case wherein rights which were to be determined by a judicial tribunal had been adjudicated upon under the assumed fiat of the Legislature.

118. Earlier in *Mahant Lachhman Dass Chela v. State of Punjab*, L.R. (1968) 2 Punj and Har 499, an attack against the constitutional validity of this Act had been repelled by a Full Bench of this Court. While dealing with the argument based on Art. 26(c) and (d) of the Constitution, Narula, J., (as the learned Chief Justice then was), had observed—

"Regarding the last contention advanced on behalf of the petitioners, i.e., the alleged infringement of Article 26 of the Constitution, it was half-heartedly argued by Mr. Gupta that the Act provides for machinery for taking away non-Sikh institutions, or their property from the persons in their possession and to hand them over to the Sikhs. It appears to me that no argument under Article 26 can arise in these cases as there is no claim in any of these petitions on behalf of a denomination or even on behalf of any section thereof. Assuming, however, for the sake of argument that Lachhman Dass petitioner has come to this Court on behalf of Udasi Bhekh, it is significant to note that the Act does not even purport to deal with or touch any non-Sikh institution or its property. It is not disputed and in-

deed it has been so held repeatedly that Udasis are not Sikhs though even Udasis do not conform to any single type."

(Emphasis supplied).

119. These observations imply that before a Mahant is called upon to part with a Gurdwara, a finding has to be given that the same is a Sikh Gurdwara within the meaning of the Gurdwaras Act. This was the attitude adopted when the attack against the constitutional validity of the statute was repelled. However, in actual practice, the appellant in *Mahant Hari Kishan's case* (AIR 1976 Punj & Har 130) (FB) (supra) was deprived of the Gurdwara in dispute without there being any finding that the Gurdwara in that case was proved to be a Sikh Gurdwara. The approach made in the two cases was apparently contradictory. This contradiction was noticed by a Division Bench of this Court of which I was a member in first appeal (F. A. O. No. 263 of 1971) and the case was referred to a larger Bench. A Full Bench of five Judges was constituted and this time again the leading judgment was written by Dhillon, J., who repelled the argument based on Sec. 16 of the Gurdwaras Act with the following observations:—

"I am unable to agree with the contentions raised by the learned counsel for the appellant. As regards the argument regarding the non obstante clause in the provisions of S. 16 of the Act, it may be observed that the interpretation sought to be given to the words 'Notwithstanding anything contained in any other law in force', as contained in Section 16, to mean that no other provision of this Act even has to be taken into consideration, cannot simply be given keeping in view the scheme of the Act. It would be noticed that non obstante clause in the Act has been provided in many other provisions of the Act. Wherever the Legislature wanted that in applying a particular provision of the Act, the other provisions of the Act itself should be excluded from consideration, a specific provision in that regard has been made in the non obstante clause of the said sections of the Act. For instance, in S. 38 of the Act, it has been provided as follows:—

'38 (1): Notwithstanding anything contained in this Act or any other Act or enactment in force

Similarly, same language has been used in Section 127-A of the Act, where it has been specifically provided that notwithstanding anything contained in any other law for the time being in force or in this Act etc.

While enacting non obstante clause in Section 16, the Legislature designedly did not exclude the application of the other provisions of the Act. Faced with this situation, Mr. Sibal, the learned counsel for the appellant, then contended that the non obstante clause in Sec. 16 of the Act would preclude the application of the provisions of O. 14, Rr. 2 and 3 of the Code of Civil Procedure and, therefore, the question of decision of the issue regarding the locus standi need not be decided by the Tribunal. This argument is again without any merit. It is not because of the provisions of O. 14, Rr. 2 and 3 of the Code of Civil Procedure that the Tribunal is enjoined upon to decide the issue of locus standi, but it is because of the mandatory provisions of Sec. 8 read with the other provisions of the Act that such an issue, which the Legislature designedly left for the determination of the Tribunal, has to be decided by the Tribunal. It is not disputed that the Act being a Special Act, its provisions so far as they are not inconsistent with the provisions of the Code of Civil Procedure, have to prevail. This is so because of the provisions of sub-section (11) of S. 12 of the Act. It would thus be seen that the contention of the learned counsel for the appellant as regards non obstante clause in Sec. 16 of the Act is without any merit."

120. By a majority it was held that there was no conflict between the two Full Bench decisions. S. C. Mital, J., who delivered the minority judgment took the following view :

"By denying Mahant Tehal Dass the locus standi to prove that the institution is not a Sikh Gurdwara, the result of the decision of the Tribunal is that Tehal Dass has been deprived of his Mahantship and the religious denomination in question has been made to vest in the body created by Part III of the Act for the administration of the Sikh Gurdwaras. Thus, the argument of Mr. H. L. Sibal that Sec. 8 of the Act restricting the right of the religious denomination to protect itself through a hereditary office-holder as defined in S. 2 (4) (iv) of the Act, is ultra vires Art. 26 (d) of the Constitution, carries conviction."

121. In view of the rigid stand taken on behalf of the respondent in that case the learned Judge had no option to hold otherwise.

122. As I said earlier, if the majority view is allowed to prevail, then a Mahant can be deprived of his Gurdwara under the supposed fiat of the Legislature without

there being any judicial determination of the nature of the institution. This view runs counter to the rule of law laid down in *Smt. Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC 2299, which struck down clause (4) of Art. 329-A of the Constitution on the ground that it was a legislative judgment disposing of an election dispute. Mathew, J., observed (para 329) :—

"The result of the discussion can be summed up as follows : Our Constitution, by Art. 329 (b) visualises the resolution of an election dispute on the basis of a petition presented to such authority and in such manner as the appropriate legislature may, by law, provide. The nature of the dispute raised in an election petition is such that it cannot be resolved except by judicial process, namely, by ascertaining the facts relating to the election and applying the pre-existing law; when the amending body held that the election of the appellant was valid, it could not have done so except by ascertaining the facts by judicial process and by applying the law. The result of this process would not be the enactment of constitutional law but the passing of a judgment or sentence. The amending body, though possessed of judicial power, had no competence to exercise it unless it passed a constitutional law enabling it to do so. If, however, the decision of the amending body to hold the election of the appellant valid was the result of the exercise of an irresponsible despotic discretion governed solely by what it deemed political necessity or expediency, then, like a bill of attainder, it was a legislative judgment disposing of a particular election dispute and not the enactment of a law resulting in an amendment of the Constitution. And, even if the latter process (the exercise of despotic discretion) could be regarded as an amendment of the Constitution, the amendment would damage or destroy an essential feature of democracy as established by the Constitution, namely, the resolution of election dispute by an authority by the exercise of judicial power by ascertaining the adjudicative facts and applying the relevant law for determining the real representative of the people. The decision of the amending body cannot be regarded as an exercise in constituent legislative validation of an election for these reasons : firstly, there can be no legislative validation of an election when there is dispute between the parties as regards the adjudicative facts; the amending body cannot gather these facts by employing legislative process; they can be gathered only by judicial process. Secondly, the amending

body must change the law retrospectively so as to make the election valid, if the election was rendered invalid by virtue of any provision of the law actually existing at the time of election. Article 363 does not confer on the amending body the competence to pass any ordinary law whether with or without retrospective effect. Clause (4) expressly excluded the operation of all laws relating to election petition to the election in question. Therefore, the election was held to be valid not by changing the law which rendered it invalid. Thirdly, the cases cited for the appellant are cases relating to legislative validation of invalid elections or removal of disqualification with retrospective effect. Being cases of legislative validation, or removal of qualifications by Legislature, they are not liable to be tested on the basis of the theory of basic structure, which, I think, is applicable only to constitutional amendments. Fourthly, there was no controversy in those cases with regard to adjudicative facts: if there was controversy with regard to these facts, it is very doubtful whether there could be legislative validation of an election by changing the law alone without ascertaining the adjudicative facts by judicial process."

123. With utmost respect to the learned Judges who decided the aforementioned two cases, it might be observed that no effort was made by them to synchronise Ss. 16 and 8 of the Gurdwaras Act. These two sections could easily be reconciled by holding that the nature of the Gurdwara should be decided as a preliminary issue. Nor was there any justification to whittle down the effect of clear language employed in Sec. 16 of the Gurdwaras Act. The view taken by them cannot be regarded as good law and I hereby overrule the same. I am aware of the fact that in *Dharam Dass v. State of Punjab*, AIR 1975 SC 1063, constitutional validity of the Gurdwaras Act has been upheld by the Supreme Court of India but the observations made therein run counter to those made in *Smt. Indira Nehru Gandhi's case* (AIR 1975 SC 2299) (supra) decided by a larger Bench.

124. An argument is raised that right of pre-emption is in the nature of a piratical right and for that reason the provisions of the Act should be strictly construed. The law of pre-emption in its inception aimed at preserving the homogeneity of the village community. This right was originally conferred on close relations only and since it put fetters on the free alienation of land by

a land-owner, the Courts viewed with disfavour the exercise of this right. With the passage of time, things have materially changed. The Constitution has established a Social Democratic Republic in which citizens are entitled to have justice — social and economic. Pursuant to this policy, land reforms have been introduced almost in all the States of India. In some cases proprietary rights have been conferred upon the tenants and in others it has been made more convenient for the tenants to purchase land. The object of the land reforms is that the tenants who till the land should be able to reap the reward of their labour. It cannot be disputed that a landlord who gets his land cultivated from tenants in a way receives some benefit from the land which he does not really earn. When right of pre-emption is conferred upon a tenant, it really helps him in preventing the landlord from collecting this unearned interest. Such a right in essence fulfils an important social objective and cannot be regarded as a piratical right. Similarly, when right of pre-emption is vested in a co-sharer, the exercise of this right by him goes to consolidate the holdings and deserves to be lauded on the same ground.

125. Some doubts have been expressed for the proposition that if sub-section (2) is interpreted to negative the right of pre-emption vested in a tenant or a co-sharer, the interpretation shall violate the spirit of Article 14 of the Constitution. While dealing with this point in *Prithi Pal Singh's case* (AIR 1976 Punj & Har 157) (FB) (supra), I had observed as under (para 6):—

"If Ss. 15 (1) and 15 (2) of the Act were to be regarded as separate Codes, then, obviously, S. 15 (1) of the Act will have to be confined to the self-acquired property of a female. In case of such a property, the tenant and the co-sharer would, no doubt, have a right of pre-emption. On the other hand, if S. 15 (2) of the Act is held to apply to the property acquired by a female either through her husband or through her father, then only the persons mentioned in Section 15 (2) (b) will have any right of pre-emption. In that case, the tenant and the co-sharer would have to be ousted from the exercise of this right. It has already been noticed that in recent times there has been a tendency to augment and to enlarge the rights of the tenants in respect of the lands comprising their tenancies. If the sale of land is made to a tenant even the son and other near relations of the landowner would be debarred from exercising any right of

pre-emption in respect of such a sale. In view of Sec. 8-A of the Pepsu Tenancy and Agricultural Lands Act, 1955, and Section 17-A of the Punjab Security of Land Tenures Act, 1953, it is not imaginable that the Legislature which had manifested a clear intention of ushering in a socialistic pattern of society by placing the rights of the tenants on a higher pedestal would have debarred the tenants from exercising the right of pre-emption in respect of the property acquired by a female either through her husband or through her father. Further, to hold otherwise would be to introduce an element of invidious discrimination by a process of judicial interpretation. If the tenant has a right to pre-empt the self-acquired property of a female, it does not stand to reason why he should be debarred from exercising the same right in respect of the land acquired by a female through her husband or father. The aggrieved tenant would at once come forward with a plea that his right under Art. 14 of the Constitution has been violated. It is no doubt open to the Legislature to make classification in respect of laws, but the classification apart from being reasonable should have a nexus with the object sought to be achieved by the Legislature. So far as the tenants are concerned, the Legislature had manifested its intention in clearest possible terms to improve their rights. It would be wholly unreasonable to assume that the Legislature held different views qua the property acquired by a female through her husband or her father. If right of a co-sharer to pre-empt land is to be defended on the ground that it prevents fragmentation of holdings, the Legislature could not have ignored this consideration in case sale was made by a female inheriting land from her husband or from her father."

126. I hold the same opinion even now. To elaborate the matter further, I would like to observe that the basis for classification in case of a tenant is his relationship with the land as a tiller. This relationship becomes no different if he cultivates the self-acquired land belonging to a female or the land which she inherits from somebody. If differentiation is made qua the source of acquisition of land, it would have no relationship with the object of classification. Something which the Legislature cannot do because of the bar of Article 14 of the Constitution, a Court of law should not introduce by a process of interpretation. What is true about a tenant is equally true about

a co-sharer in whose case the basis for classification is joint ownership of land.

127. It is argued that the right of pre-emption is creature of statute and it is open to the Legislature to exclude tenants and co-sharers to exercise this right in respect of property inherited by a female. The argument tends to over-simplify the matter. The consideration of the question of discrimination arises only when the Legislature moves into action. If no law is passed on a particular subject, no one can complain of discrimination. However, when a law is passed, its application in various spheres becomes the subject matter of scrutiny. If such scrutiny reveals that the law differently treats various objects or persons, the basis for differential treatment is then analysed. If it has some relevancy with the object which the Legislature had in mind while passing the law, the differential treatment or the classification introduced is declared to be valid. On the other hand if the classification has no reasonable nexus with the object of the Legislature, the law is held to be violative of Art. 14 of the Constitution. Herein the Legislature has entered the field inasmuch as the right of pre-emption has been conferred on tenants under the enacting clause. The undoubted object of the Legislature in doing so was to make the tiller of the land its owner. The classification, if any, could only be made on the basis of this object. For instance, the Legislature could have said that the tenants cultivating land for a number of years as against the recent tenants alone shall have the right of pre-emption. Or, it could possibly have said that the tenants belonging to Scheduled Castes alone shall exercise this right. In these two cases, it could have been said that the classification based on the age of the tenancy or the one based on the peculiar status in life of the recipient of the benefit was valid. But if this right is conferred on all the tenants without any reservations under the enacting clause, the denial of this right under the proviso or the non obstante clause based on the source of acquisition of ownership rights would be wholly pugnacious. For, in that case, the affected tenant could urge that the classification on the basis of which he is being excluded has no nexus with the object which the Legislature had in mind. Again, it would be improper to intermingle the cases of tenants and heirs while considering the argument based on classification. The relations belong to an entirely different category and in their case the Legislature would be acting within its

right to make a classification on the basis that the right of pre-emption should vest in the members of the family from which the property has come.

✓ 128. The learned Chief Justice has drawn on the principle of stare decisis for affirming the earlier view. With utmost respect to him, I would like to observe that where the interpretation of a statute violates the letter and spirit of Art. 14 of the Constitution, it becomes the duty of the Court to reconsider and to correct the earlier view. For this reason as also for the observations made by D. S. Tewatia, J., on this point, I hold that it would not be proper to invoke the principle of stare decisis in this case.

129. For reasons aforementioned, my conclusions are —

(1) Section 15 of the Act has to be read as a whole.

(2) On a proper interpretation, sub-section (2) of this section does not debar a co-sharer or a tenant to exercise right of pre-emption regarding the property inherited by a female.

✓ (3) Sub-section (2) is in the nature of a proviso to sub-section (1) and cannot be interpreted to destroy the effect of sub-section (1).

(4) If co-sharers and tenants are disallowed to exercise the right of pre-emption by placing a contrary interpretation on sub-section (2), that interpretation would violate the spirit of Art. 14 of the Constitution.

(5) It would be wholly improper to take shelter behind the principle of stare decisis in the circumstances of this case.

✓ PREM CHAND JAIN, J. — 130. I have carefully gone through the judgments of the learned Chief Justice, brother Tewatia, J. and brother M. R. Sharma, J. I agree with the conclusions arrived at by my Lord the Chief Justice.

S. C. MITAL, J. — 131. I have gone through the judgments of My Lords, the Chief Justice, Tewatia, J. and Sharma, J.

132. For construing the non obstante clause in sub-section (2) of the S. 15 of the Punjab Pre-emption Act, with utmost respect to Sharma, J., I find it exceedingly difficult to draw an analogy from the non obstante clause in the provisions of the Sikh Gurdwaras Act.

✓ 133. I agree with My Lord the Chief Justice.

RAJENDRA NATH MITAL, J. — 134. I have perused the judgments of the Chief

Justice, Tewatia, J. and Sharma, J. I agree with the Chief Justice.

A. S. BAINS, J. — 135. I also agree with the Chief Justice.

ORDER OF THE COURT

136. In accordance with the view of the majority, Regular Second Appeal No. 67 of 1969 (Kalwa v. Wasakha Singh and others) is hereby dismissed with no order as to costs.

137. It is further directed that the remaining appeals be now placed before a learned single Judge for disposal in accordance with the answers rendered to the legal questions therein.

Order accordingly.

AIR 1982 PUNJAB AND HARYANA 519 FULL BENCH

S. S. SANDHAWALIA, C. J., P. C. JAIN
AND I. S. TIWANA, JJ.

Radhey Sham Gupta and others, Petitioners v. State of Haryana and others, Respondents.

Civil Writ Petn. No. 3755 of 1981 and Civil Misc. Nos. 2450 and 2451 of 1981 and 527 of 1982, D/- 4-8-1982.

(A) Land Acquisition Act (1 of 1894), Section 3 (b) — Constitution of India, Art. 226 — Proceedings for acquisition of land — Petition challenging proceedings — Locus standi to file — Purchasers of land after notification can file petition.

The statutory definition of a person interested under S. 3 (b) which is couched in wide terms and expressly includes within it any person claiming an interest in the compensation to be made on account of the acquisition and even includes within its ambit a person interested in any easement affecting the land. Therefore the petitioners by virtue of being the purchasers of the land are entitled to and in any case can claim to be interested in the compensation of the acquired land. They, therefore, fall clearly within the ambit of S. 3 (b) and on principle it would not be easy to hold that a person interested in the compensation is lacking in locus standi to challenge the acquisition. Again the ground that the petitioners cannot maintain the writ petition because they are merely the purchasers of the land after the issuance of the notification under S. 4 is not correct. It would be manifest that merely because the petitioners purchased the land after the notification, they are in no way put

on a pedestal lower than their predecessors-in-interest. AIR 1970 SC 802, Applied; AIR 1973 Punj 263, Foll. (Para 6)

Apart from this the continued non-action on the part of the respondent-State for well-nigh nine years had rightly led the earlier owner to believe that the land was no longer required for acquisition and stood tacitly released therefrom. Equally, the petitioners were thereby induced bona fide to accept this position and make purchases in Aug., 1980. In the meantime the High Court had opined in no uncertain terms on the invalidity of an acquisition which was tainted by long and unexplained delays thus further buttressing the petitioner's position. 1980 Pun LJ 414, Foll. (Para 6)

(B) Land Acquisition Act (1 of 1894), Ss. 4 and 6 — Constitution of India, Article 226 — Acquisition of land — Inordinate delay in finalisation of proceedings — Proceedings are vitiated as they become tainted with colourable exercise of power — Delay in filing writ petition — Effect. 1980 Pun LJ 414, Not good law in view of AIR 1974 SC 2077.

Long unexplained procrastination, either by itself and in any case coupled with other factors clearly tends to prove the lack of bona fides in the exercise of the power of acquisition. If it can be established beyond cavil that the real motivation behind the acquisition was not any specific public purpose and its expeditious execution but was a mere ruse to peg down the prices by an issuance of notification under S. 4 and thus holding the citizens to ransom for years at the whim and caprice of the State to finalise the acquisition proceedings when it chooses (if at all it is so done) is clearly a factor for establishing the colourable exercise of power. It must, therefore, be held that unexplained inordinate delay is certainly a starkly relevant factor if not a conclusive one for determining the colourable exercise of power or otherwise in the context of proceedings under the Act. (Paras 9, 16, 34)

It would follow logically that where the gross delays on the part of the State are themselves the foundations for assailing the proceedings, the petitioner cannot be non-suited in the writ jurisdiction for approaching it after a long period of time from the initiation of the acquisition. It is by now elementary that the writ jurisdiction is for the vigilant and the litigant who sleeps over his rights inordinately is to be frowned upon heavily within this forum. However, it seems to be equally plain that where the

cause of action itself stems wholly or in part from the allegations of unexplained delay and procrastination of the State, it can hardly lie in the mouth of the State to make a grievance thereof. Examining the matter in some detail, it may well be possible that when originally initiated, the acquisition proceedings may superficially appear to be well founded in the normal course. However, the absence of any meaningful public purpose or its expeditious execution may be plainly negated by gross inaction in finalizing the acquisition. Indeed such long procrastination and unexplained delay by the State would itself be a pointer to the conclusion that the initiation of the original proceedings far from being directed to an immediate or foreseeable public purpose and its execution, was but a device to misuse the provisions of S. 4 and peg down the prices of land in shadowy anticipation of some vague unspecified need which might arise in futuro. Indeed it will be such inordinate delays which will put in a lurid light what might originally have appeared as a bona fide exercise of power. It must, therefore, be held that where long unexplained delay is a foundation stone for the attack on the ground of colourable exercise of power, it would be vain for the respondent-State to claim that the writ petitioner should have approached the Court at the very inception of the acquisition proceedings, and in a way is an attempt to take advantage of its own wrong. Indeed in this context the very cause of action (namely, the colourable exercise of power) may well arise only by virtue of a long drawn out unexplained inaction of the State and far from providing a shield to the respondent-State, it would only sharpen the sword of attack on the basis of the taint of colourable exercise of power. It must, therefore, be concluded that in the peculiarities of this particular context the mere chronological delay in approaching the writ Court from the initiation of the acquisition proceedings cannot by itself non-suit the petitioners and indeed may well be a factor in their favour rather than against them. 1980 Pun LJ 414, Not good law in view of AIR 1974 SC 2077. (Paras 10, 11, 26)

The scheme of the Act visualises an expeditious finalization of the acquisition proceedings once they are commenced. Unexplained and inordinate delays which tend to hold the claimants at ransom, whose properties are sought to be acquired and are further denied compensation within a reasonable time would be sharp and pointed

pieces of evidence to establish the lack of bona fides for the exercise of power. The Court has, therefore, to take into consideration the whole spectrum from the initiation of the proceedings till the time of the challenge raised thereto by the petitioners in which delay may well be the most important, if not, the conclusive factor. Herein, the statutory period of three years provided for the exercise of the power of declaration under S. 6 does not provide any blanket protection to the respondent-State to rest on its oars. Though it must now be held that on the ground of delay alone, challenge to the notification under S. 6 cannot be raised, if it comes within the three years' period prescribed by the statute, it does not follow therefrom that this is to be entirely excluded from the overall delay that may follow the finalization of the proceedings after S. 6 notification as well. If, even after the notification under S. 6, the State procrastinates over a number of years, then the whole period from the corner-stone of the notification under S. 4 (1) has to be viewed in a larger perspective. The intervals between Ss. 4 and 6 notifications are, therefore, not irrelevant as a factor for examining the bona fides of the acquisition proceedings. To use a homely phrase, this period can certainly be tagged to other inordinate delays after the issuance of notification under S. 6 to examine the matter in a total perspective. (Para 26)

The proviso to S. 6 (1) now lays down a strict outer limit and even a day's delay beyond three years would bar the State from issuing a notification under S. 6 thus wiping off any earlier intention to acquire the land. It would thus appear that where the very initiation of the proceedings is rested on nothing more than an illusory need in the future, rather than immediate need for existing public purpose, the same can hardly be sustainable. Equally, a total unexplained inaction and procrastination in this context would lead to an inflexible presumption that in fact there was no immediate need for an existing public purpose and the exercise of the power of acquisition would thus be a colourable one. (Para 28)

(C) Land Acquisition Act (1 of 1894), Ss. 4 and 6 — Land acquisition — Delay between issuance of notification under S. 4 and that under S. 6 — Consideration by Court.

Prior to 1967, the Statute had provided no limit of time betwixt the issuance of notification under S. 4 and declaration visu-

alised under S. 6. It could not be contended that even if there was delay within the period of three years it would taint the proceedings. It is not possible for the courts now to still examine the justifiability or otherwise of the period of strict three years betwixt the notification under S. 4 and one under S. 6. AIR 1980 SC 64, Foll. (Para 20)

(D) Land Acquisition Act (1 of 1894), Ss. 6 and 9 — Acquisition of lands — Delay between notification under S. 6 and notices under S. 9 — Effect.

The delays betwixt notification under S. 6 and notices under S. 9 have to be viewed in the overall context from the initiation of the proceedings and not from the narrow terminus merely of the date of S. 6 notification. (Para 22)

It is plain that the legislature while adding the proviso to S. 6 (1) had only prescribed the outer limit for the exercise of the power of making the requisite declaration. That the object of the legislature was to minimise the delays in this context is evident from the fact that the moment the threshold of three years is crossed, the power to issue a notification under S. 6 would be exhausted. It is true that the time within this period of 3 years does not now taint the proceedings but this would certainly be relevant and would call for consideration in the context of any prolonged subsequent delays as well. It cannot, therefore, be said that the moment S. 6 notification is issued within the prescribed time, the total non-action and unexplained delay for the said period would be totally wiped out of consideration. (Para 22)

(E) Land Acquisition Act (1 of 1894), S. 9 — Acquisition of land — Issue of notice under S. 9 — Subsequent delay is also relevant in determining colourable exercise of power.

Inordinate delays even after the issuance of notice under Sec. 9 are equally relevant and fit for consideration in determining the basic issue of the colourable exercise of power. (Para 25)

There is no basic or qualitative difference betwixt proceedings under the Act up to the stage of issuing of notices under S. 9 and thereafter. Indeed, a look at Part-II of the Act in which Ss. 4 to 18 are contained, seems to indicate that all these provisions are only components of one integral whole. No artificial or finical line of distinction can be drawn with regard to proceedings up to S. 6 or to S. 9 and the provisions that follow thereafter. Right up to the proceedings

culminating in the rendering of the award by the Collector, the procedure prescribed by the Act is one integrated whole which cannot, or in any case should not, be artificially compartmentalized. (Para 25)

(F) Land Acquisition Act (1 of 1894), S. 4 — Challenge to notification under Section 4 on ground of colourable exercise of power — Petitioner can file petition forthwith.

No doubt the Proviso to S. 6 (1) now protects a notification under S. 6 issued within three years of initiation of proceedings. But there is no such limitation or protection in challenging the validity of the original notification under S. 4 itself. If the writ petitioner is in a position to establish conclusively that even at the very time of the issuance of the notification under Sec. 4, there was neither any public purpose in contemplation nor any need or plan for its expeditious execution then, it would be obviously open to the petitioner to challenge the notification under S. 4 forthwith. A long delay in issuing the notification under S. 6 would equally be a relevant factor in laying siege to the original notification under S. 4 itself. (Para 29)

(G) Constitution of India, Art. 226 — Land acquisition proceedings — Delay in finalisation of proceedings — Writ of certiorari can be issued and not mandamus. (Land Acquisition Act (1894), Ss. 4, 6).

If the writ petitioners are able to establish their case, a writ of mandamus far from being a remedy can only sanctify and enforce what in essence is challenged as a colourable exercise of power. Indeed, once the conclusion is reached that in fact the exercise of power was a mere abuse and a colourable one, then the only appropriate remedy is by way of writ of certiorari by quashing the impugned action. (Para 33)

A writ of mandamus can only issue where there is a clear public duty laid upon an authority and an equally clear right in the petitioner to enforce the same. The Land Acquisition Act does not provide any period of limitation within which acquisition proceedings have to be finalized from the date of the notification under S. 4. There is thus no statutory duty laid on the State to act within a strict prescribed time. Of course, the general duty on the State to exercise the power within a reasonable amount of time exists. Obviously, this must differ from case to case. Therefore, this unwritten premise cannot stricto sensu warrant the issuance of a writ of mandamus. Plainly enough, there-

fore, there is neither a statutory mandate to complete the acquisition proceedings within a time prescribed nor is there a corresponding inflexible right on the power of the claimant to such enforcement with any precision. Of course, Art. 226 empowers the writ Court to issue ancillary directions apart from the grant of a particular writ but that by itself is not the true equivalent of writ of mandamus. (Para 31)

The grievance, in the instant case, is that the writ petitioners have been denied a statutory right to get the market price of their land and it is actually sought to be taken over by a surreptitious device. The value thereof has been deviously pegged down to their disadvantage. A mandamus in such a situation can only ensure compensation at those very pegged down prices of which the petitioners make a grievance. (Para 33)

Cases Referred :	Chronological	Paras
AIR 1980 SC 64		20, 29
AIR 1980 SC 319		15, 26
1980 Pun LJ 414 : 1980 Rev LR 600	6, 12, 15	
AIR 1975 SC 2190		12
AIR 1974 SC 2077		12
AIR 1973 Punj 263 : 1972 Rev LR 651	6	
AIR 1970 SC 802	6	
AIR 1968 SC 1223	15, 26	
AIR 1966 SC 1593	15, 19, 26	

M. S. Jain with M. L. Sarin, I. C. Jain and A. L. Jain, for Petitioners; Harbhagwan Singh, Advocate General (Haryana) with R. P. Bali, for the State; J. K. Sibal with R. L. Handa, for Respondent No. 2.

S. S. SANDHAWALIA, C. J.:— Whether unexplained inordinate delay in the finalisation of the proceedings under the Land Acquisition Act might well taint them with the vice of a colourable exercise of power and thus wholly vitiate the same — is the meaningful issue which comes to the fore in this reference to the Full Bench.

2. Though the matrix giving rise to the aforesaid issue is not in serious dispute yet it calls for a somewhat detailed notice. Way back on the 8th Sept., 1972, the respondent-State issued two notifications (Annexures P.1 and P.2) under Section 4 of the Land Acquisition Act (hereinafter called the Act) for acquiring a huge compact area of 134 Acres 3 Kanals and 1 Marla situated in the two separate revenue estates of Ballabgarh and Ranhera for the specific purpose of the development of a Mandi Township astride the Delhi — Mathura road. Comprised therein was an area of 8 Kanals within the revenue estate of Ballabgarh

originally owned by Shri Nawal Singh who had sold the same on the 11th Sept., 1961, to one Jaswant Rai for setting up an industry and he enclosed the same by a boundary wall. However in the month of Aug., 1980 the said Jaswant Rai sold the said area to the three petitioners vide two separate sale deeds dated the 20th Aug., 1980 and 29th Aug., 1980 for a consideration of Rupees 50,000/- each. This area adjoins the boundary wall of the factory of respondent No. 3, Messrs Printers House (Private) Ltd. Meanwhile on the 29th Nov., 1972, a notification under Section 6 vide Annexure P 3 was issued in respect of an area measuring 10 Acres 4 Kanals in the revenue estate of Ballabgarh and 25 Acres 6 Kanals 7 Marlas in the revenue estate of Ranhera. Proceedings under Sec. 9 of the Act were duly initiated by the Land Acquisition Collector and an award therefor followed and later the Colonization Department got prepared precise plans for the Mandi area and even auctioned plots therein on the 21st March, 1974. On the 26th July, 1975, two more notifications under S. 6 (Annexures P.4 and P.5) were issued with regard to substantial areas within the revenue estates of Ballabgarh and Ranhera for the same purpose of the establishment of Mandi Township. Certain areas of respondent No. 3 which were covered by the aforementioned notification were released by the respondent-State on a representation made by them. However, respondent No. 3 approached the Colonization Department for the transfer of lands now owned by the petitioners in order to widen the frontage of their factory on the Delhi Mathura road and to effectuate that purpose a direction was issued to the Land Acquisition Collector to initiate proceedings for making the award in respect of the lands now owned by the petitioners and by Nawal Singh. On the 5th Aug., 1981, the Land Acquisition Collector purporting to act under Section 9 of the Act issued notice (Annexure P 6) to the predecessor-in-interest of the petitioners, namely, Jaswant Rai for appearing before him on the 21st Aug., 1981, for submitting a claim regarding the value of his land. The petitioners then preferred the writ petition to quash the impugned notice as also Annexures P 4 and P 5 in so far as they relate to the land of the petitioners. The gravamen of the petitioners' case is that the issuance of the impugned notice after well-nigh 9 years of the original notification under S. 4 is a colourable exercise of power motivated by considerations entirely extraneous and collateral to the original purpose

of the acquisition. It is also the stand that the land of the petitioners stood automatically released as it was not comprised within Section 6 notification issued on the 29th Nov., 1972, Annexure P 3.

3. In the return filed on behalf of respondents Nos. 1 and 2, a preliminary objection was raised that the challenge to the original notification after a lapse of about 9 years suffered from unexplained laches and therefore merited dismissal on that score alone. The broad outlines of the facts in the writ petition are not disputed and the respondent-State rests itself on the legalistic stand that no limitation being prescribed the land of the petitioners continued to be subject to the acquisition proceedings and consequently the notices under Section 9 as also the original notifications were valid qua them. Significantly not a hint of any explanation for a delay of 9 years in finalising the acquisition qua the land of the petitioners is even suggested.

4. In the written statement filed on behalf of respondent No. 3, a challenge to the very locus standi of the petitioners is raised on the ground that they had purchased the land in August, 1980 with the knowledge that the same was the subject matter of notifications under Ss. 4 and 6 and were, therefore, estopped from assailing the same. The plea of laches was also sought to be reiterated. Specifically it stands admitted that the land of the answering respondent was released from the acquisition proceedings vide notification dated 28th Nov., 1975 (Annexure R.2). The averments in para 9 of the writ petition have, however, been denied and it is stated that the acquisition proceedings had not been initiated at the instance of the answering respondent.

5. As the very locus standi of the petitioners and the consequent maintainability of the writ petition has been challenged, it is apt to first dispose of this preliminary issue. The stand of the respondents herein is that in essence the petitioners with their eyes open had purchased not property but litigation as mere speculators in land for claiming enhanced compensation. It was contended on their behalf that the petitioners knowing fully well that acquisition proceedings had been initiated in 1972 purchased the land in August, 1980 and within less than a year thereafter notices under Sec. 9 had been issued. Therefore they could hardly complain of any gross laches from the date of their purchase and the more so when the original land owner had not raised any objection thereto and must be deemed

to have waived or acquiesced therein. The petitioners, it was submitted could not claim a better or superior right than their predecessor-in-interest Jaswant Rai.

6. Despite the vehemence with which the locus standi of the petitioners was assailed, it appears to me that neither on principle nor precedent can they be non-suited on that ground alone. Reference in this connection is first called for to the statutory definition of a "person interested" under Section 3 (b) of the Act which is couched in wide terms and expressly includes within it any person claiming an interest in the compensation to be made on account of the acquisition and even includes within its ambit a person interested in any easement affecting the land. Now it is undeniable that the petitioners by virtue of being the purchasers of the land are entitled to and in any case can claim to be interested in the compensation of the acquired land. They, therefore, fall clearly within the ambit of Section 3 (b) and on principle it would not be easy to hold that a person interested in the compensation is lacking in locus standi to challenge the acquisition. Again the ground that the petitioner cannot maintain the writ petition because they are merely the purchasers of the land after the issuance of the notification under S. 4 stands well negated by the binding precedent in *Smt. Gunwant Kaur v. Municipal Committee, Bhatinda*, AIR 1970 SC 802. Therein also some of the petitioners had purchased the land more than three years after the issuance of the notification under S. 4. Nevertheless their Lordships upheld their right to assail the acquisition in the following terms (para 17):

"It was urged by Mr. Hazarnavis on behalf of the Municipal Committee, Bhatinda, that the three appellants were purchasers of the lands claimed by them after the notification under Section 4 was issued and they had no right to challenge the issue of the notification. If, however, the notification under Section 4 was vague, the three appellants who are purchasers of the land had title thereto may challenge the validity of the notification. The appellants have spent in putting up substantial structures considerable sums of money and we are unable to hold that merely because they had purchased the lands after the issue of the notification under Section 4 they are debarred from challenging the validity of the notification, or from contending that it did not apply to their lands."

The aforesaid enunciation of the law has been followed and applied in terms within this jurisdiction by the Division Bench in *Tulsa Singh v. State of Haryana*, 1972 Rev LR 651 : (AIR 1975 Punj 263), in the context of a purchase of land long after the original notification under S. 4. It would thus be manifest that merely because the petitioners purchased the land after the notification, they are in no way put on a pedestal lower than their predecessors-in-interest. Mr. M. S. Jain, the learned counsel for the petitioners had rightly relied on the recent pronouncements of the final Court exhibiting a clear trend against a narrow and technical view about locus standi. Apart from this, it was highlighted on behalf of the petitioners that herein the continued non-action on the part of the respondent-State for well-nigh nine years had rightly led the earlier owner Shri Jaswant Rai to believe that the land was no longer required for acquisition and stood tacitly released therefrom. Equally, the petitioners were thereby induced bona fide to accept this position and make purchases in Aug., 1980. Meanwhile in Feb., 1980 this Court in *Man Singh v. State of Punjab*, 1980 Pun LJ 414, had opined in no uncertain terms on the invalidity of an acquisition which was tainted by long and unexplained delays thus further buttressing the petitioner's position.

7. For the aforesaid reasons it seems to follow that the challenge to the very locus standi of the petitioners is untenable and has to be repelled and the maintainability of the writ petition must be upheld.

8. Equally apt it is to deal next with the preliminary objection pressed on behalf of the respondents on the ground of gross laches. It was strenuously submitted that the acquisition proceedings having been commenced in 1972, the challenge by way of this writ petition in 1981 is belated. It was sought to be contended that their predecessors-in-interest having not chosen to challenge the proceedings, the petitioners were either barred or in any case not on better footing in now raising the challenge on the ground of colourable exercise of power.

9. To rightly appraise the aforesaid objection, what pointedly falls for consideration is, whether gross unexplained delay is a factor or circumstance relevant for establishing the colourable nature of the exercise of power either by itself alone or in any case when added to other factors? The answer to this issue appears to me as being rather plainly in the affirmative. What perhaps calls for reiteration herein is the fact that the core of

the attack on behalf of the petitioners is the colourable exercise of power and not mere delay by itself. However, long unexplained procrastination, either by itself and in any case coupled with other factors clearly tends to prove the lack of bona fides in the exercise of the power of acquisition. If it can be established beyond cavil that the real motivation behind the acquisition was not any specific public purpose and its expeditious execution but was a mere ruse to peg down the prices by an issuance of notification under Section 4 and thus holding the citizens to ransom for years at the whim and caprice of the State to finalise the acquisition proceedings when it chooses (if at all it is so done) is clearly a factor for establishing the colourable exercise of power. It must, therefore, be held that unexplained inordinate delay is certainly a starkly relevant factor if not a conclusive one for determining the colourable exercise of power or otherwise in the context of proceedings under the Act.

10. Once it is held as above, it would seem to follow logically therefrom that where the gross delays on the part of the State are themselves the foundations for assailing the proceedings, the petitioner cannot be non-suited in the writ jurisdiction for approaching it after a long period of time from the initiation of the acquisition. It is by now elementary that the writ jurisdiction is for the vigilant and the litigant who sleeps over his rights inordinately is to be frowned upon heavily within this forum. However, it seems to be equally plain that where the cause of action itself stems wholly or in part from the allegations of unexplained delay and procrastination of the State, it can hardly lie in the mouth of the respondent-State to make a grievance thereof. Examining the matter in some detail, it may well be possible that when originally initiated, the acquisition proceedings may superficially appear to be well founded in the normal course. However, the absence of any meaningful public purpose or its expeditious execution may be plainly negated by gross inaction in finalizing the acquisition. Indeed such long procrastination and unexplained delay by the State would itself be a pointer to the conclusion that the initiation of the original proceedings far from being directed to an immediate or foreseeable public purpose and its execution, was but a device to misuse the provisions of Section 4 and peg down the prices of land in shadowy anticipation of some vague unspecified need which might arise in futuro. Indeed it will

be such inordinate delays which will put in a lurid light what might originally have appeared as a bona fide exercise of power. It must, therefore, be held that where long unexplained delay is a foundation stone for the attack on the ground of colourable exercise of power, it would be vain for the respondent-State to claim that the writ petitioner should have approached the Court at the very inception of the acquisition proceedings, and in a way is an attempt to take advantage of its own wrong. Indeed in this context the very cause of action (namely, the colourable exercise of power) may well arise only by virtue of a long drawn-out unexplained inaction of the State and far from providing a shield to the respondent-State, it would only sharpen the sword of attack on the basis of the taint of colourable exercise of power. It must therefore, be concluded that in the peculiarities of this particular context the mere chronological delay in approaching the writ Court from the initiation of the acquisition proceedings cannot by itself non-suit the petitioners and indeed as noticed earlier may well be a factor in their favour rather than against them.

11. Indeed, the matter here can be looked at from another refreshing angle. If, as it has been held above, unexplained inordinate delay by the respondent-State, either by itself or coupled with other factors furnishes the cause of action to the writ petitioner then in essence, there is no delay on his part to approach the writ Court. Indeed, the petitioners, in such a case knocks at the door of the Court soon from the arising of the cause of action or a part of it. The real terminus for determining delay in such cases is not from the initiating of proceedings, but from the long inaction of the respondents in finalizing the acquisition proceedings which would taint it with a colourable exercise of power. Therefore, it can hardly be said that the writ petitioners have in any way not been vigilant in seeking relief within a reasonable time.

12. However, a strong note of caution must be sounded in this field. Learned counsel for the petitioners had gone to the extreme length of contending that delay in challenging the validity of the acquisition proceedings on any ground is irrelevant in the writ jurisdiction. Particular reliance was sought to be placed on para 9 of the report in Man Singh's case (1980 Pun LJ 414) (supra) for submitting that the Bench had on an ancillary ground struck down the notification under Section 4 on the ground of its non-publication in the locality after a

period of more than 6 years. I, however, regret my inability to subscribe to any such doctrinaire stand. A reference to the judgment in Man Singh's case would show that the issue of laches in approaching the Court was not even remotely raised nor this question was canvassed or pronounced upon. Again the challenge to the notification under Section 4 for non-publication in the locality was merely an ancillary ground, to the main issue of the colourable exercise of power on which the writ petition was allowed. It was only as an additional ground that the observations were made with regard to the issue of the violation of S. 4 (1) of the Act. Nevertheless if the observations in Man Singh's case are projected as a warrant for the proposition that delay in approaching the writ Court on any ground whatsoever for quashing the acquisition proceedings is irrelevant, then this is plainly contrary to binding precedent. In *Aflatoon v. Lt. Governor of Delhi*, AIR 1974 SC 2077, their Lordships have held in unequivocal terms as follows (para 11):—

" * * * A valid notification under Section 4 is a sine qua non for initiation of proceedings for acquisition of property. To have set on the fence and allowed the Government to complete the acquisition proceedings on the basis that the notification under Section 4 and the declaration under Section 6 were valid and then to attack the notification on grounds which were available to them at the time when the notification was published would be putting a premium on dilatory tactics. The writ petitions are liable to be dismissed on the ground of laches and delay on the part of the petitioners."

And again in *State of Mysore v. V. K. Kangan*, AIR 1975 SC 2190, the same view has been reiterated as follows (para 16):—

"The notification under Section 4 was published on 13-4-1967. Objections were filed by the respondent under Section 5-A of the Act. The Deputy Commissioner submitted his report to the Government. The Government overruled the objections. The notification under Section 6 was published in the gazette on 19-10-1968. The writ petition challenging the validity of the notifications was filed some time in July or August, 1969. We do not think that the respondent was entitled to challenge the validity of the notification under Section 4 of the Act as the writ petition challenging the notification was filed after an unreasonable lapse of time." It is plain from the above authoritative

enunciation that the question of laches in approaching the writ Court is always a material and sometimes a crucial factor. I would, however, wish to make it clear that for the detailed reasons delineated hereafter I would unhesitatingly affirm the view in Man Singh's case on the other issue of the colourable exercise of power.

13. Before adverting to the merits, it deserves highlighting that in pristine essence the challenge on behalf of the petitioners (and even more lucidly advanced by Mr. M. L. Sarin on behalf of the interveners) is rested solely on the ground of colourable exercise of power and not mere delay. Indeed, gross unexplained delay is only one factor or evidence to establish the basis of the attack, namely, that the original notification under Section 4 and the subsequent acquisition proceedings was a mere colourable exercise of power, the real intent whereof was not so much to acquire for an immediate public purpose but to merely peg down the prices for some remote unforeseeable contingencies in the future.

14. Herein the main stay of the learned counsel for the petitioners is that the scheme of the Act enjoins a duty on the respondent-State to act with expedition in finalizing the acquisition proceedings. Once that duty or obligation is deviated from and there is wholly unexplained delay in the proceedings, then prima facie the exercise of power of eminent domain from acquisition becomes unreasonable and arbitrary. Counsel contended with plausibility, that reasonableness in exercising the power vested by the Act was inherent in the statute itself and in the peculiar context reasonableness herein, in essence, means acting within reasonable period of time, even though no specific limitation has been prescribed. In the converse it was argued that merely because no limitation has been prescribed, it would not give a licence or a carte-blanche to the State to act at any time, however, remote after the promulgation of the notification under S. 6. Consequently, it was contended that unexplained delay is the plainest indicia in the absence of any public purpose either in the present or in a foreseeable future which conclusively establishes that the original exercise of power was a colourable one and thus fit to be quashed.

15. The issue at once arises at the threshold — whether writ jurisdiction warrants the quashing of acquisition proceedings on the ground of colourable exercise of power? There appears to be so long a line of unbroken enunciation of principle and equally

of precedent that colourable exercise of power would vitiate every action that it seems unnecessary to launch on a long dissertation. As a general principle, it was not even contested before us on behalf of the respondents that if the writ Court comes to the conclusion that any action under the statute is not bona fide but only a misuse or abuse of the power conferred, then it has the power of quashing the same and indeed is duty bound to do so. Within the specific field of acquisition proceedings, under the Act, the final Court, though originally not saying so in terms, has made consistent observations which are a pointer to the view that such proceedings would be vitiated if they are tainted by a colourable exercise of power. This first emerges from the tenor of the judgment in *State of Madhya Pradesh v. Vishnu Parsad Sharma*, AIR 1966 SC 1593, whereby it was held categorically that it was not open to the appropriate government to issue successive notifications under Section 6 of the Act with respect to land comprised within one notification under Section 4 (1) of the Act and once a declaration under Section 6 has been made, the earlier declaration under Section 4 (1) would be exhausted for it has served its purpose. As is well known, this judgment then led to an amendment of Section 6 by Act No. 13 of 1967 and the insertion of the proviso expressly specifying a period of three years for a declaration under Section 6 from the date of the notification under S. 4 (1). More forthright observations in this context, however, were made in *Ambalal Purshottam v. Ahmedabad Municipal Corpn. of the City of Ahmedabad*, AIR 1968 SC 1223 (at p. 1227) in the following terms:—

“... .. We are not hereby to be understood as suggesting that after issue of the notifications under Sections 4 and 6 the appropriate Government would be justified in allowing the matters to drift and to take in hand the proceedings for assessment of compensation whenever they think it proper to do. It is intended by the scheme of the Act that the notification under Section 6 of the Land Acquisition Act must be followed by a proceeding for determination of compensation without any unreasonable delay. But on the facts of the present case, it does not appear that there was any scope for holding that with a view to prevent the land-owners or the persons claiming derivative title from them from getting the benefit of the rise in prices, notifications under Sections 4 and 6 were issued without any inten-

tion to take steps for acquisition of the lands.”

However, the final seal of approval to the proposition that acquisition proceedings under the Act would be vitiated if they lack bona fides and are only a colourable exercise of power, has been set by the recent judgment of their Lordships in *State of Punjab v. Gurdial Singh*, AIR 1980 SC 319, while dismissing a Special Leave Petition against a judgment of this Court. In no uncertain terms, it was observed as under (para 9):—

“... .. When the custodian of power is influenced in its exercise by considerations outside those for promotion of which the power is vested the Court calls it a colourable exercise and is undeceived by illusion. In a broad, blurred sense, Benjamin Disraeli was not off the mark even in law when he stated, “I repeat — that all power is a trust — that we are accountable for its exercise — that, from the people, and for the people, all springs and all must exist.” Fraud on power voids the order if it is not exercised bona fide for the end designed. Fraud in this context is not equal to moral turpitude and embraces all cases in which the action impugned is to affect some object which is beyond the purpose and intent of the power, whether this be malice-laden or even benign. If the purpose is corrupt the resultant act is bad. If considerations, foreign to the scope of the power or extraneous to the statute, enter the verdict or impels the action mala fide or fraud on power vitiates the acquisition or other official act.”

Within this Court, the Division Bench in *Man Singh's case* (1980 Pun LJ 414) (supra) has, in terms, held that where the notifications were issued not for the bona fide purpose of acquisition but for the collateral purpose of pegging down the prices and preventing the petitioners from securing benefit, then the same must be quashed. I would notice that though the correctness of the aforesaid judgment was sought to be assailed on behalf of the respondents on certain other aspects, yet on the specific issue that the writ Court has the power to quash acquisition proceedings once the conclusion has been reached that it involved a colourable exercise of power, was never disputed either on behalf of the respondent-State or by Mr. J. K. Sibal on behalf of the private respondents.

16. I would, therefore, conclude that a colourable exercise of power would vitiate acquisition proceedings under the Act thus warranting the writ Court to quash the same.

17. Having held as above, one may now revert back to the main issue of the un-

explained inordinate delay in the finalization of the acquisition proceedings. It has already been observed that this is a starkly relevant factor for determining whether the exercise of power is colourable or otherwise. However, in its practical application the question boils down to the fact whether the delay, if any, is either unexplained or is factually or statutorily justifiable. On a closer analysis, delay in this context may be placed in three categories for clarity's sake:—

(i) betwixt the issuance of the notification under Section 4 and that under Section 6;

(ii) betwixt the date of the notification under Section 6 and the issuance of notices under Section 9 to the claimants; and,

(iii) betwixt the date of the notice under Section 9 till the rendering of the Award by the Collector.

18. As would be evident later, in the ultimate analysis, the determination of the issue of the colourable exercise of power calls for an over-all perspective of the issue of delay and not in any finical compartmental divisions thereof. Nevertheless, it seems apt to first view the matter in the context of the aforesaid three individual categories.

19. Category (i) need not detain one for long because it would appear that it is now well covered both by the statutory provisions and by binding precedent. Nevertheless, the matter calls for a brief notice in the context of its legislative history. Prior to 1967, the statute had provided no limit of time betwixt the issuance of the notification under Section 4 (1) and the declaration visualised under Section 6. The vice and the anomalies of inordinate delays in the issuance of the notification under Section 6 had come up for consideration before their Lordships in Vishnu Prasad Sharma's case (AIR 1966 SC 1593) (supra). Though the issue was formulated in the strictly legal terms whether successive notifications under Section 6 could be issued on the basis of the original notification under Section 4, the gross hardship and the inequity of issuing of notification under Section 6 after more than 11 years of the original notification under Section 4 came prominently to the fore. The Court held that successive notifications under S. 6 could not be issued on the basis of the original notification under Section 4. This judgment led to the issuing of an Ordinance by the President on Jan. 20, 1967 which was later enacted as Act No. 13 of 1967 whereby substantial amendments in Section 6 were introduced. The proviso to sub-sec. (1) now,

in terms, lays down that no declaration under Section 6 shall be made after the expiry of three years from the date of the publication of the notification under S. 4 (1). The end result, therefore, is that now by virtue of this statutory mandate itself, any delay beyond three years in issuing the notification under Section 6 would render the proceedings wholly void.

20. However, as regards the delay within the period of three years, the learned counsel for the petitioners was insistent in arguing that even if this is unexplained and unjustifiable, it would taint the proceedings. The submission was that the proviso to Section 6 (1) spells out only an outer limit beyond which the notification under S. 6 cannot be issued but does not provide any blanket protection to the State for acting within the said period. This stand might have some tinge of plausibility of logic alone, which appears to me that herein the matter is concluded against the petitioners by the binding precedent in Gujarat State Transport Corporation v. Valji Mulji Soneji, AIR 1980 SC 64. Therein, it was observed as follows (para 16):—

“The question then is: When a statute confers power and prescribes times within which it can be exercised, could it ever be said that even though the power is exercised within the statutory period, yet the Court can examine the question of delay, and record a finding that there was an unreasonable delay in exercise of the power and, therefore, the exercise of the power is bad? This approach would defeat the very purpose for prescribing a sort of a period of limitation on exercise of power. When a period is prescribed for exercise of power it manifests the legislative intention that the authority exercising the power within the prescribed time could not at least be accused of inaction or dithering and, therefore, such exercise of power could not be said to be bad or invalid on the only ground that there was unreasonable delay in the exercise of the power. The very prescription of time inheres a belief that the nature and quantum of power and the manner in which it is to be exercised would consume at least that much time which the statute prescribes as reasonable and, therefore, exercise of power within the time could not be negated on the only ground of unreasonable delay. Therefore, in this case it is difficult to agree with the High Court that there was an unreasonable delay in exercise of power and hence the exercise was either bad or invalid.”

And again (para 17):

"... .. Therefore, while appreciating the anxiety of the High Court we are of the opinion that once the legislature stepped in and prescribed a sort of period of limitation within which power to issue notification under Section 6 could be exercised it was not necessary to go in search of a further fetter on the power of the Government by raising the implication."

In view of the aforesaid enunciation, it does not seem possible for the Courts now to still examine the justifiability or otherwise of the period of strict three years betwixt the notification under Section 4 and one under Section 6.

21. In view of the above learned counsel for the petitioners' challenge to the Sec. 6 notification on the ground that it was issued after a period of 2 years and 10 months of the initiation of proceedings cannot succeed. Admittedly herein the notification under Section 4 was issued on the 8th of September, 1972. In view of the amendment in Section 6 successive notifications thereunder can be issued within a period of 3 years. In the present case this second notification under Section 6 was issued on the 26th July, 1975, which is within the time which their Lordships of the Supreme Court have described as a sort of a period of limitation for the exercise of this power. The petitioners' stand on this limited ground, is thus unsurmountable.

22. Coming to the category (ii), what was hotly agitated in this context was — whether the terminus for delay herein is the notification under Section 6 or the overall delay from the very initiation of the acquisition proceedings. The learned counsel for the respondents had taken up the hyper-technical stand that the legislature having itself provided the statutory limit for three years in future the added delays in finalizing the acquisition proceedings must be counted from the date of the notification under S. 6 and not earlier. I am unable to accept this somewhat doctrinaire stand which does not seem to have either the sanction of principle, nor any precedent was cited in its support. It is plain that the legislature while adding the proviso to Section 6 (1) had only prescribed the outer limit for the exercise of the power of making the requisite declaration. That the object of the legislature was to minimise the delays in this context, is evident from the fact that the moment the threshold of three years is crossed, the power

to issue a notification under Section 6 would be exhausted. It is true that the time within this period of 3 years does not now taint the proceedings but this would certainly be relevant and would call for consideration in the context of any prolonged subsequent delays as well. It cannot, therefore, be said that the moment Section 6 notification is issued within the prescribed time, the total non-action and unexplained delay for the said period would be totally wiped out of consideration. It must, therefore, be concluded herein that the delays betwixt notification under Section 6 and notices under Section 9 have to be viewed in the overall context from the initiation of the proceedings and not from the narrow terminus merely of the date of Section 6 notification.

23. Applying the above rule, it has to be borne in mind that though the last notification under Section 6 was issued on the 26th of July, 1975, proceedings had been initiated nearly three years earlier by the notification under Section 4 on the 8th of Sept., 1972. The issue of delay in the overall context has, therefore, to be viewed from 1972 itself and not from any artificial terminus of the date of the Section 6 notification later.

24. Coming now to the category (iii), the main stay of the arguments on behalf of the State and the private respondents, was that any delay after the issuance of notices under Section 9 is qualitatively different from the delay prior thereto. In substance, an ingenious analogy was sought to be raised that proceedings after notice under Section 9 were in the nature of execution or procedural proceedings which cannot in any way affect, what was called the decretal or the substantive proceedings of acquisition prior thereto. Counsel submitted that whilst delay in the proceedings subsequent to notice under Section 9 may merit a mandamus or a direction for expeditious disposal the same is not relevant to, nor can be made a basis for nullifying the acquisition proceedings themselves. In sum, the stand of the respondents was that no amount of consequential delay after issuance of notice under S. 9 is either relevant or germane to the validity of the notifications under Sections 4 and 6.

25. The argument aforesaid does credit to the ingenuity of the learned counsel and in fairness one must notice that it was presented with plausibility and ability by Mr. J. K. Sibal. However, a deeper analysis would show that, in essence, the stand is untenable if not wholly fallacious. I am unable to see any basic or qualitative difference

betwixt proceedings under the Act up to the stage of issuing of notices under Section 9 and thereafter. Indeed, a look at Part II of the Act in which Sections 4 to 18 are contained, seems to indicate that all these provisions are only components of one integral whole. No artificial or finical line of distinction can be drawn with regard to proceedings up to Section 6 or to Section 9 and the provisions that follow thereafter. Right up to the proceedings culminating in the rendering of the Award by the Collector, the procedure prescribed by the Act is one integrated whole which cannot, or in any case should not, be artificially compartmentalized. I am, therefore, of the view that inordinate delays even after the issuance of notice under Section 9 are equally relevant and fit for consideration in determining the basic issue of the colourable exercise of power.

26. From the aforesaid discussion of the three categories enumerated in para 17, it inevitably follows that in construing the challenge to the acquisition proceedings on the ground of colourable exercise of power, the Court has to take an over-all perspective of the whole matter and irrespective of any finical divisions based on the various stages of acquisition. As their Lordships have pointed out repeatedly in *Vishnu Prasad Sharma* (AIR 1966 SC 1593); *Ambalal Purshottam* (AIR 1968 SC 1223) and *Gurdial Singh's* (AIR 1980 SC 319) cases (supra), the whole scheme of the Act visualises an expeditious finalization of the acquisition proceedings once they are commenced. Unexplained and inordinate delays which tend to hold the claimants at ransom, whose properties are sought to be acquired and are further denied compensation within a reasonable time would be sharp and pointed pieces of evidence to establish the lack of bona fides for the exercise of power. The Court has, therefore, to take into consideration the whole spectrum for the initiation of the proceedings till the time of the challenge raised thereto by the petitioners in which delay may well be the most important, if not, the conclusive factor. Herein, the statutory period of three years provided for the exercise of the power of declaration under Section 6, does not provide any blanket protection to the respondent-State to rest on its oars. Though it must now be held that on the ground of delay alone, challenge to the notification under Section 6 cannot be raised, if it comes within the three years' period prescribed by the statute. It does not follow therefrom that this is to be entirely excluded from the over-all delay that may follow

the finalization of the proceedings after Section 6 notification as well. If, even after the notification under S. 6, the State procrastinates over a number of years, then the whole period from the corner-stone of the notification under Section 4 (1) has to be viewed in a larger perspective. The intervals between Sections 4 and 6 Notifications are, therefore, not irrelevant as a factor for examining the bona fides of the acquisition proceedings. To use a homely phrase, this period can certainly be tagged to other inordinate delays after the issuance of notification under Section 6 to examine the matter in a total perspective. It deserves recalling that unexplained delay operates only to the hardship and prejudice of the citizen alone and not to the State which has the power at any time to withdraw from the acquisition either by virtue of Section 48, (and as authoritatively held in *Ambalal Purshottam's* case supra) or the broader provisions of the General Clauses Act.

27. As has been repeatedly emphasised by the final Court, the issue of delay has to be visualised in the context of the larger scheme of acquisition under the Act. Section 4 requires the satisfaction of the appropriate Government that the land is likely to be needed for a public purpose and a declaration under Section 6 concretises that intention. To satisfy the test of bona fides herein it is elementary that there must exist a present need for acquisition for the execution of an existing public purpose. To put it in a term of art, both the public purpose and the need for execution must be in praesenti and not wholly in futuro. Any purported acquisition for a vague public purpose which may or may not arise in the future on the pegged down market value is thus assailable as a colourable exercise of power and an abuse by the State to compulsorily take the property of the citizen at a pittance for illusory futuristic needs. This is more so when judicial notice can be, and indeed has been taken by the final Court, of a continued and inexorable up-trend in the prices of real estate. Consequently, if there exists no explanation at all for long delays to finalize the proceedings and concretise the alleged public purpose the inference inevitably arises that no immediate public purpose existed or was in sight which could be put in practical shape. Once that is so, it may well follow that the exercise of power was a colourable attempt to freeze prices forthwith for an acquisition years later when they may well be double or treble of the existing ones. For a welfare State to

do so at the cost of the citizen, would thus be something which would be a fraud on the power conferred by the statute and, therefore, quashable.

28. The immediate effect of the issue of a notification under Section 4 plainly is that the market value of the land is artificially pegged down on that date. The owner virtually loses the beneficial enjoyment of his property because any improvements made on the land thereafter are not to be compensated at all. Apart from this fact, the citizen is left dangling at the mercy of the State to acquire or not to acquire because the power remains with the State to withdraw from the acquisition at any time. If the prices fall, the respondent-State can cancel the notification to the grave prejudice of the land owner. On the other hand the respondent-State who holds the whip hand, is not at all likely to be adversely affected. Consequently, it is the duty of the respondent-State to act with the utmost expedition in acquisition proceedings because acting within a reasonable time even where no limitation is provided, is the unwritten premise of the statute. Equally, it has to be borne in mind that the act is expropriatory and has, therefore, to be narrowly construed. The strictness with which the final Court has viewed the acquisition proceedings is highlighted by the judgments of the Supreme Court holding that even a violation of the procedural provisions like the publication of Section 4 notification in the locality would vitiate the whole acquisition proceedings. Not only this, the publication must be simultaneous with the notification and in case it is not, each day's delay has to be satisfactorily explained in order to save the validity of the notification. Similarly, the proviso to Section 6 (1) now lays down a strict outer limit and even a day's delay beyond three years would bar the State from issuing a notification under Section 6 thus wiping off any earlier intention to acquire the land. It would thus appear that where the very initiation of the proceedings is rested on nothing more than an illusory need in the future rather than immediate need for existing public purpose, the same can hardly be sustainable. Equally, a total unexplained inaction and procrastination in this context would lead to an inflexible presumption that in fact there was no immediate need for an existing public purpose and the exercise of the power of acquisition would thus be a colourable one.

29. Before parting with this aspect of the case it seems necessary to sound a sharp

note of caution in the context of a frontal challenge to the validity of Section 4 notification itself. In the earlier part of the judgment, it has been observed that the proviso to Section 6 (1) now protects a notification under Section 6 issued within three years of the initiation of proceedings. This must not be misunderstood to mean that there is any such limitation or protection in challenging the validity of the original notification under Section 4 itself. If the writ petitioner is in a position to establish conclusively that even at the very time of the issuance of the notification under Section 4, there was neither any public purpose in contemplation nor any need or plan for its expeditious execution then, it would be obviously open to the petitioner to challenge the notification under Section 4 forthwith. A long delay in issuing the notification under Section 6 would equally be a relevant factor in laying siege to the original notification under Section 4 itself. The observations in Gujarat State Transport Corporation's case (AIR 1980 SC 64) (supra) are thus obviously in the context of Section 6 notification and in no way protect the challenge to the original notification under Section 4. It could not possibly have been the intention of the law that where the very initiation of the proceedings can be established to be tainted with mala fides, the citizen must still wait for another three years before assailing the same on the alleged ground that Section 6 notification can be issued within a period of three years. I am inclined to the view that irrespective of the considerations applicable to Section 6, a frontal challenge to Section 4 notification on the basis of a colourable exercise of power is open to the petitioners forthwith.

30. In fairness to Mr. J. K. Sibal, it is necessary to advert to his twin contention that a writ of certiorari does not lie against the acquisition proceedings on the ground of delay and in any case the apt, if not the only remedy is one of mandamus commanding an expeditious culmination of the proceedings. Counsel contended that if at all the petitioners were aggrieved by the delay, they should have sought and can only claim a mandamus from the Court for a quicker finalization of the proceedings.

31. The aforesaid contention does credit to the ingenuity of the learned counsel but an indepth examination would show that the stand is untenable. As has been oft repeated, a writ of mandamus can only issue where there is a clear public duty laid upon an authority and an equally clear right in the petitioner to enforce the same. It had to be

conceded before us that the act does not provide any period of limitation within which acquisition proceedings have to be finalized from the date of the notification under Section 4. There is thus no statutory duty laid on the State to act within a strict prescribed time. Of course, as observed by the final Court, the general duty on the State to exercise the power within a reasonable amount of time exists. But what exactly is a reasonable amount of time herein? Obviously, this must differ from case to case. Therefore, this unwritten premise cannot *stricto sensu* warrant the issuance of a writ of mandamus. Plainly enough, therefore, there is neither a statutory mandate to complete the acquisition proceedings within a time prescribed nor is there a corresponding inflexible right on the power of the claimant to such enforcement with any precision. Of course, Article 226 of the Constitution empowers the writ Court to issue ancillary directions apart from the grant of a particular writ but that by itself is not the true equivalent of writ of mandamus.

32. Again another cogent argument against the theory of a writ of mandamus being issued is that the respondent-State is never under a statutory duty to acquire the land right up to the time till the same gets vested in it. Section 48 in express terms gives the power to the State to withdraw at its discretion from the acquisition of any land of which possession has not been taken. This is apart from the power under the General Clauses Act. Therefore, in this context, a mandamus can hardly lie because it would always be open to the State to take the stand that it is under no legal obligation to acquire and in any case can at any time contemplate a withdrawal from the acquisition. Apart from that, the State can always claim an allegedly reasonable time for the finalization of the proceedings. What is reasonable time in a particular case would not be easy to determine nor apt for a Court to lay down inflexibly as it must when issuing a mandamus.

33. In this context, counsel for the petitioner was equally on firm ground in contending that in a case of colourable exercise of power mandamus cannot possibly provide the appropriate relief. The grievance herein is that the writ petitioners have been denied a statutory right to get the market price of their land and it is actually sought to be taken over by a surreptitious device. The value thereof has been deviously pegged down to their disadvantage. A mandamus in such a situation can only ensure compensation at

those very pegged down prices of which the petitioners make a grievance. Consequently, if the writ petitioners are able to establish their case, a writ of mandamus far from being a remedy can only sanctify and enforce what in essence is challenged as a colourable exercise of power. Indeed, once the conclusion is reached that in fact the exercise of power was a mere abuse and a colourable one, then the only appropriate remedy is by way of writ of certiorari by quashing the impugned action.

34. To conclude on the legal aspect, the answer to the question posed at the outset must be rendered in the affirmative and it is held that unexplained inordinate delay in the finalization of the acquisition proceedings under the Act may well taint it with the vice of a colourable exercise of power and thus vitiate the same.

35. Coming now to the merits, it deserves highlighting that the proceedings herein were initiated a decade ago on Sept. 8, 1972. A Section 6 notification had followed on Nov. 29, 1972 specifying more than 35 acres of land for the specific purpose of the development of the Mandi Township. An Award was rendered in those proceedings and not only plans for the Mandi area were prepared but plots therein were auctioned way back on Mar. 21, 1974. However, another notification under Section 6 was issued on July 26, 1975. Far from taking any follow-up action, the respondent-State for nearly six years relapsed into studied inactivity. It is the admitted position that the respondent-State itself released certain areas covered by the acquisition proceedings belonging to respondent No. 3 on a representation made by them. It is not denied that the public purpose of creating the Mandi Township has long since reached culmination. The petitioners alleged an ulterior motive for the acquisition, namely, the widening of the frontage of the factory of the private respondents on the Delhi-Mathura road, though it has been vaguely denied. It thus seems to be plain that the notice under Section 9 has been issued after a delay of nine years from the original notification under Sec. 4, and not a hint of explanation worth the name for the same is forthcoming on the record. The inevitable inference is that the notices under Section 9, now issued, are a merely colourable exercise of power to take over the land of the petitioners at pegged-down prices of a full decade earlier and long after the original purpose of acquisition stands virtually satisfied. I would accordingly quash the impugned notification as also

the acquisition proceedings qua the petitioners only and allow this writ petition. In view of the somewhat ticklish legal issues involved, the parties are left to bear their own costs.

PREM CHAND JAIN, J.:— I agree.

I. S. TIWANA, J.:— I also agree.

Petition allowed.

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S. S. SANDHAWALIA, C. J. AND

S. S. SODHI, J.

Devinder Pal Singh, Petitioner v. State of Punjab and others, Respondents.

Civil Writ Petn. No. 2962 of 1982, D/- 10-8-1982.

(A) Constitution of India, Arts. 29, 226 — Prospectus for competitive entrance examination for admission to Medical Colleges — Containing provision for reservation of seats for certain categories and a notification providing that seats left vacant in reserved categories may be filled by general category — Subsequent notification reducing minimum qualifying marks in case of reserved categories — Cannot be impeached on ground that right vested in general category by earlier notification was taken away, or on ground of retrospectivity or equitable estoppel. (Evidence Act (1872), S. 115).

A prospectus issued for competitive entrance examination for admissions to the medical colleges provided for reservation of seats for certain categories of students. It also incorporated a notification issued by State Government on May 18, 1982 (No. 7 (3)-5 HB. III-82/7778 of the Department of Health and Family Welfare (Health Branch III), Government of Punjab) which provided that seats left vacant in the reserved categories may be filled from the candidates of general category. The competitive entrance examination was held and its result disclosed that a very few candidates belonging to Scheduled Castes and Scheduled Tribes qualified for admission to the medical colleges. Considering the large number of seats of that category left vacant thereby, a notification was issued by the State Government dated July 19, 1982 by which the minimum qualifying marks in case of candidates belonging to reserved categories was reduced. This notification was challenged by some of the students who had appeared for the entrance examination but did not qualify for any of seats available to candidates of

general category, on the ground that a right vested in them i.e. students of general category by notification contained in prospectus could not be taken away by the impugned notification.

Held that the relevant provisions contained in the prospectus showed that the right of candidates belonging to the general category was only to the seats available for such candidates. There was no right vested in them in respect of the seats left vacant from the reserved categories. They could at best look to such vacancies with the hope of a bounty which may or may not materialise and at any rate the extent thereof would always be an uncertain factor. This could not, however, be the foundation of any right in the petitioners. The impugned notification of July 19, 1982 conferred rights only upon those to whom such rights were due. It concerned only the reserved categories and was thus not open to challenge on the ground of impinging upon any existing or vested rights of the petitioners. Thus notification could not be impeached either on the ground of retrospectivity or on the principle of equitable estoppel. Case law ref.

(Para 19)

(B) Constitution of India, Arts. 14, 15, 29 — Prospectus for competitive entrance examination for admission to medical colleges — Containing provision for reservation of seats to certain categories and notification providing that seats left vacant in reserved categories may be filled by general category — Subsequent notification reducing minimum qualifying marks in case of reserved categories — No violation of Arts. 14 and 15, the relaxation being only in matter of selection of candidates who were otherwise eligible for admission to medical colleges. AIR 1981 SC 2045 Foll.

(Para 23)

Cases Referred: Chronological Paras

AIR 1981 SC 2045	20, 23
(1981) 1 Serv LR 689: 1979 Sim LC 160 (Him Pra)	11
(1981) C. W. P. No. 3128 of 1981, D/- 28-7-1981 (Punj. & Har), Ravdeep Kaur v. State of Punjab	11
ILR (1977) 1 Punj & Har 56: 78 Pun LR 920 (FB)	12
(1971) 2 Serv LR 487 (Punj & Har)	12
AIR 1970 SC 35	17
AIR 1969 Orissa 80	15
AIR 1969 Punj 257: 1969 Lab IC 958	13
AIR 1959 Andh Pra 493	15

A. Viswanathan with V. Ramswaroop, for Petitioner; H. L. Sibal with K. P. Singh Sandhi, Addl. Advocate-General, for Respondents.

S. S. SODHI, J.:— There are three State-owned medical colleges in the State of Punjab namely the Medical College, Amritsar; Medical College, Patiala and Medical College, Faridkot.

2. On the recommendation of the Medical Council of India, the State Government decided that for admissions to the three medical colleges in July, 1982, a common competitive entrance examination be held and that it be conducted, on behalf of the State Government and the medical colleges, by the Punjabi University at Patiala.

3. The total number of seats available for admission to the medical colleges were as under :—

Medical College, Amritsar.	150
Medical College, Patiala.	150
Medical College, Faridkot.	60

Total 360

Besides this, there were 30 seats available in the Government Dental College, Amritsar and 20 in the dental wing of the Government Medical College, Patiala.

4. A prospectus was issued for the competitive entrance examination for admissions to the medical colleges. Amongst other matters provided therein, provision was made for reservation of seats for nine categories of students. These categories and the extent of the reservations in respect thereof being as under :—

(i) Scheduled Castes/Scheduled Tribes	25%
(ii) Backward Classes.	5%
(iii) Backward Area.	2%
(iv) Border Area.	2%
(v) Sportsmen/women.	2%
(vi) Nominees of the Central/State Govt.	7%
(vii) Children/grandchildren of Political sufferers.	2%
(viii) Children/grandchildren of defence personnel.	2%
(ix) Handicapped candidates (for M.B.B.S. course only).	1%

5. The prospectus also incorporated the notification issued by the State Government on May 18, 1982 (No. 7 (3)-5 HB III-82/7778 of the Department of Health and Family Welfare (Health Branch III) Government of Punjab) which provided for the distribution of seats in the medical colleges. The relevant paragraph of this notification is reproduced hereunder :—

“Admission shall be given on the basis of the relative merit of candidates determined

on the result of the competitive entrance examination. In the case of reserved seats relative merit of the candidates shall be determined within each category of reservation. A candidate, however, must secure a minimum of 50% marks in the competitive entrance examination to qualify for admission. Candidates belonging to Scheduled Castes/Scheduled Tribes will have to secure a minimum of 33% marks in the said examination to qualify for admission. Within each reserved category the criterion for determining relative merit shall be the performance in the competitive entrance examination alone. In any main reserved category, there will be no sub-categories for preference. For example, in sports category, merit of candidates having different sports grades, will be determined only on the basis of performance in the entrance examination. Similarly there will be no preferential sub-category in the reserved categories mentioned at (vii), (viii), (ix) in para III (c). Seats left vacant in the reserved categories may be filled from the candidates of general category.”

6. The position, thus, was that 48% of the seats were set apart for the reserved categories, leaving 52% for the general category with the proviso that the unfilled seats, if any, of the reserved categories may go to the general category. In other words, with total seats being 360 those that fell in the general category were 187 while for Scheduled Castes and Scheduled Tribes the number was 90 seats.

7. The competitive entrance examination was held on June 21, 1982 and the result thereof was declared on 3rd July, 1982 and thereafter interviews for selection were held on July 17, 1982.

8. The examination results disclosed that only 39 candidates belonging to the scheduled castes and scheduled tribes qualified for admission to the medical colleges as against the 90 seats reserved for such candidates. Considering the large number of seats of this category left vacant thereby, the State Cabinet at its meeting held on July 7, 1982, decided that the minimum marks to qualify for admission to the medical colleges in the case of candidates belonging to scheduled castes/tribes and sportsmen and sportswomen be reduced. It was in pursuance of this decision that a notification was issued by the Punjab Government on July 19, 1982 whereby the minimum qualifying marks in the case of candidates belonging to the Scheduled castes and scheduled tribes were re-

duced from 33% to 25% and in the case of sportsmen and sportswomen from 50% to 25%. It is this notification which has been challenged by the petitioner Devinder Pal Singh in the writ petition filed by him under Arts. 226 and 227 of the Constitution of India as also by the petitioners in Civil Writ Petitions Nos. 2992, 2963, 2964, 2997, 3150, 3071, 3178, 3011 and 3225 of 1982. The issues raised in all these petitions being common, they were all heard together and it was agreed by counsel that the decision in Devinder Pal Singh's case would govern all the writ petitions.

9. It deserves note at the very outset that all the petitioners here are candidates who sat for the competitive entrance examination and by the results achieved by them therein they were not entitled to admission to any of the 187 seats available to candidates belonging to the general category.

10. The case of the petitioners is founded upon the argument that as only 39 candidates belonging to the Scheduled Castes and Scheduled Tribes qualified for admission to the 90 seats reserved for them, the 51 seats rendered vacant thereby became available for candidates belonging to the general category and the inclusion of these seats in this category opened up prospects for admission to the medical colleges for them. A vested right thereby ensued to them. They could not now be deprived of this right by the impugned notification of July 19, 1982, which, if implemented, would lead to this result, as lowering the minimum qualifying marks for candidates belonging to the Scheduled Castes and Scheduled Tribes would inevitably make more such candidates eligible for the seats reserved for them and correspondingly reduce those available for inclusion in the general category. The contention being that the representations or conditions contained in the prospectus had the force of law which could not be retrospectively altered by Government in the exercise of its executive powers so as to take away the vested rights thereby. The vested rights here being in the 51 seats which became available to the candidates of the general category from those left unfilled from the quota reserved for candidates belonging to the Scheduled Castes and Scheduled Tribes.

11. In order to establish the binding nature of the rules published in the prospectus Mr. Vishwanathan, learned counsel for the petitioners, cited *Anil Nag v. State of Himachal Pradesh*, (1931) 1 Serv LR 689, where in dealing with the rules relating to

admissions to the medical college embodied in the prospectus it was held that such rules possessed the force of law having a binding effect upon the Government and other competent authorities for the purpose of admission to the medical college. A similar view was expressed by a Division Bench of our High Court in *C. W. P. 3128/1981* (*Ravdeep Kaur v. State of Punjab*) decided on 28-7-1981.

12. The next limb of the argument of the counsel for the petitioners was with regard to the attribute of retrospectivity imputed to the impugned notification of July 19, 1982. In dealing with this aspect of the matter, reference was made to the observations of the Full Bench in *Punjab University v. Subhash Chander*, ILR (1977) 1 Punj & Har 56, where it was stated:

"..... legislation is normally deemed to be prospective unless by clear intendment or necessary implication it has to be construed as retrospective also. However, this power of clothing legislation with retrospectivity is an attribute primarily of the plenary powers of the legislature itself. Power to legislate retrospectively is a hydra-headed weapon which must be wielded with care and circumspection and it is therefore that its exercise is normally left to the wisdom of the legislature itself rather than its delegates. To this rule, there is, however, one clear exception that the legislature whilst delegating its power to the subordinate authority may in express terms or by necessary intendment clothe the same with the identical power to make retrospective laws."

In this behalf it was pointed out by the counsel for the petitioners that in the hierarchy of powers, executive powers were at the lowest rung and consequently no retrospectivity could be conferred by the exercise of such powers. Reference was next made to *K. D. Vasudeva v. Union of India*, (1971) 2 Serv LR 487 (Punj & Har), where it was held that unless there is power in any statute or statutory rules entitling the executive Government or any of its agencies to pass orders with retrospective effect it was not open to those authorities to pass such an order.

13. The other authority cited in support was *Suresh Kumar v. Union of India*, AIR 1969 Punj 257, where it was held that the Government had no lawful authority to prejudicially affect the civil rights of a Government servant retrospectively by mere executive fiat. On these principles, according to the counsel for the petitioners, the impugned

notification was without jurisdiction and illegal.

14. Great stress was also laid by Mr. Vishwanathan counsel for the petitioner upon the reduction of the minimum qualifying marks in the competitive entrance examination to below 33% in the case of candidates belonging to the Scheduled Castes and Scheduled Tribes. The contention being that less qualified and less deserving persons would be enabled thereby to fill up seats for admission in the medical colleges posing, on the one hand, a danger to society and, on the other hand, were likely to lead to vacancies in the colleges in the subsequent years by their inability to complete their courses of studies satisfactorily. Violation of Arts. 14 and 15 of the Constitution of India was complained of thereby.

15. Mr. K. P. Bhandari appearing for some of the other petitioners sought to press in aid the principle of equitable or promissory estoppel in seeking to impeach the notification of July 19, 1982, reliance being placed in this behalf upon *Kumari Akhtar v. Principal, Osmania Medical College, Hyderabad*, AIR 1959 Andh Pra 493 and *Abodha Kumar Mohapatra v. State of Orissa*, AIR 1969 Orissa 80. In *Kumari Akhtar's* case (AIR 1959 Andh Pra 493) (supra) the relevant notification provided for the reservation of 10% of the seats for admission to the medical college for candidates belonging to the Marathawada area. After interviews for selection had been held, this reservation was withdrawn by the Government. It was held that having made an implied representation it was not open to the authorities concerned to detract from it and the principles of legal or equitable estoppel would apply. Similar was the position in *Abodha Kumar Mohapatra v. State of Orissa*, AIR 1969 Orissa 80. This was again a case relating to admissions to medical colleges. After the examinations had been held, instructions were issued by Government that no applications for admission would be entertained from students securing less than 50% marks in the pre-professional examination. Fifteen per cent seats were also reserved for lady students. It was held that the principle of legal or equitable estoppel was applicable in the circumstances of the case as the claim of the petitioners was appropriately founded upon the equity which arose in their favour as a result of the representations made on behalf of the Government in the notice relating to the admissions to the medical colleges and the action taken by the petitioners acting upon the said re-

presentations. The Government and the authorities concerned were, therefore, estopped from departing from the representations as contained in the original notice.

16. Mr. H. L. Sibal appearing for the respondent-State, on the other hand, vehemently argued that the impugned notification of July 19, 1982, could not be construed to have any such retrospective effect as could render it invalid or void on any of the grounds urged by the counsel for the petitioners, the argument being that the impugned notification could lay itself open to challenge only if it could be construed as taking away existing or vested right from the petitioners. No such right was in any manner affected by this notification as it concerned only the seats for the reserved categories and not those of the general category.

17. Adverting to the earlier notification of May 18, 1982 which was incorporated in the prospectus and has been reproduced above, counsel contended that it conferred no vested right in the candidates belonging to the general category to any reserved seats which may have been left unfilled. The provision in the prospectus in this behalf was merely that such vacant seats "may" be made available to the general category. There was no warrant for reading "may" here as "shall". It was, thus, his contention that the vested rights of candidates belonging to the general category were only in the 52% seats available to them and no more. Any seats left vacant from the reserved categories which may be made available for candidates of the general category were seats becoming available to them merely as a bounty or on the off chance but not such as could accrue as a matter of right to such candidates. Seen in this light, no right of the candidates belonging to the general category was in any manner affected by the impugned notification of July 19, 1982. In this behalf, it was further the contention of Mr. Sibal that the Government could not be compelled to release the seats left vacant in the reserved category to the general category. In support of this contention, reliance was sought to be placed upon *Kumari Chitra Ghosh v. Union of India*, AIR 1970 SC 35. This was a case concerning admissions to the Maulana Azad Medical College, Delhi. The challenge here was to the nominations made for the reserved seats in this College. This challenge was upheld on the ground that the petitioners had no locus standi in the matter as they did not compete for the reserved seats and

the assumption that if nominations to the reserved seats were not in accordance with rules, all such seats as have not been appropriately filled up would be thrown open to the general pool, was wholly unfounded. It was held that the Government was under no obligation to release those seats to the general pool. The Government may in the larger interests of giving maximum benefit to candidates belonging to the non-reserved category release seats to them but it cannot be compelled to do so at the instance of students who applied for admission from (sic) the categories for whom the seats had not been reserved.

18. Counsel for the respondents went on to argue that there was a constitutional mandate to further and promote the uplift of persons belonging to Scheduled Castes and Scheduled Tribes, and in order to achieve this object it was not only open to the State to reserve seats for them in institution like medical colleges but also to make such provisions as may be necessary to make such reservations effective. In the present case, the number of such candidates who had qualified for admission was so low that reduction in the minimum qualifying marks was rendered imperative thereby as otherwise it would have amounted to a substantial de-reservation of seats of this category. Relaxation of the minimum qualifying marks for candidates belonging to the Scheduled Castes and Scheduled Tribes in the present case was, thus, clearly in furtherance of this constitutional obligation and was, therefore, both equitable and just and legal too and no invalidity attached thereto.

19. There is indeed merit in the contentions put forth by the counsel for the respondents. A plain reading of the relevant provisions contained in the prospectus would show that the right of candidates belonging to the general category was only to the seats available for such candidates. There was no right vested in them in respect of the seats left vacant from the reserved categories. They could at best look to such vacancies with the hope of a bounty which may or may not materialise and at any rate the extent thereof would always be an uncertain factor. This cannot, however, be the foundation of any right in the petitioners. The impugned notification of July 19, 1982 conferred rights only upon those to whom such rights were due. It concerned only the reserved categories and was, thus, not open to challenge on the ground of impinging upon any existing or vested rights of the petitioners. There was, thus, no occasion

for seeking to impeach this notification either on the ground of retrospectivity or on the principle of equitable estoppel.

20. Turning to the attack on the impugned notification on the ground of violation of Arts. 14 and 15 of the Constitution it was argued by the learned counsel for the respondents that it was founded upon the fallacy that relaxation granted thereby was in respect of eligibility whereas it was only in the matter of the selection of candidates for admission. Reliance in this behalf was placed upon State of M. P. v. Nivedita Jain, AIR 1981 SC 2045. This authority does indeed have an important bearing on the issues raised herein. In this case there were 720 seats available for admission to the medical colleges in Madhya Pradesh. The rules for admission to these colleges provided for reservation of 15% of the seats for each of the categories of the Scheduled Castes and Scheduled Tribes candidates. There were, thus, 108 seats reserved for the Scheduled Castes candidates and the same number for those belonging to the category of Scheduled Tribes. Rule 20 of the relevant rules provided that the minimum qualifying marks for admission to the medical colleges shall be 50% in the aggregate and 33% in each subject separately; but for Scheduled Castes and Scheduled Tribes candidates the minimum qualifying marks shall be 40% in the aggregate and 30% in each subject. This rule further empowered the Government, in the case of candidates belonging to Scheduled Castes and Scheduled Tribes, to grant special relaxation in the minimum qualifying marks to the extent considered necessary in the event of the required number of candidates in these two categories not being available. When the results of the examination was declared it was discovered that only 18 candidates belonging to the Scheduled Castes and 2 to the Scheduled Tribes had qualified for admission. Accordingly in exercise of the power under R. 20 referred to above, a relaxation of 5% was made in the minimum qualifying marks in terms thereof and as a result even more candidates in the category of Scheduled Castes and one from amongst those of the Scheduled Tribes qualified. Seeing the large number of seats that still remained unfilled out of the seats reserved for the Scheduled Castes and Scheduled Tribes candidates the State Government passed an order completely relaxing the condition relating to the minimum qualifying marks for these two categories. It was this order which was challenged in this case, the principal ground of challenge being that this

order contravened regulation II of the Medical Council of India and the other that it would have the effect of allowing less qualified and less deserving candidates to fill up the seats and thereby destroy equality and violate Arts. 14 and 15 of the Constitution.

21. The Court observed that the eligibility of a candidate who may seek to get admitted into a medical college for obtaining recognized medical qualifications may be prescribed by the Medical Council. All candidates who are eligible for admission into medical colleges are entitled to seek admission but as to how selection has to be made out of the eligible candidates for admission to the medical colleges is a matter which has necessarily to depend upon the circumstances and conditions prevailing in a particular State. The process of selection of candidates for admission to a medical college out of the candidates eligible for admission for filling up the limited vacancies has no real bearing on the question of eligibility or qualification for admission or on the standard of medical education. The provisions of Regulation II of the Medical Council of India were thus held to be merely directory and not mandatory.

22. Turning to the challenge under Articles 14 and 15 of the Constitution, it was observed:

"It cannot be disputed that the State must do everything possible for the upliftment of the Scheduled Castes and Scheduled Tribes and other backward communities and the State is entitled to make reservations for them in the matter of admission to medical and other technical institutions. In the absence of any law to the contrary, it must also be open to the Government to impose such conditions as would make the reservation effective and would benefit the candidates belonging to these categories for whose benefit and welfare the reservations have been made. In any particular situation, taking into consideration the realities and circumstances prevailing in the State it will be open to the State to vary and modify the conditions regarding selection for admission, if such modification or variation becomes necessary for achieving the purpose for which reservation has been made and if there be no law to the contrary."

It was accordingly held that as the order in question was not liable to be struck down on the ground of contravention of Regulation II of the Medical Council of India, the order could clearly be supported under Article 15 (4) of the Constitution. Further, the

relaxation made by the State Government in the rule regarding selection of candidates belonging to Scheduled Castes and Scheduled Tribes for admission into medical colleges cannot be said to be unreasonable and the said relaxation constitutes no violation of Arts. 15 (1) and 15 (2) of the Constitution nor does it affect Art. 14 thereof, the relaxation being only in the rule regarding selection of candidates belonging to the Scheduled Castes and Scheduled Tribes who were otherwise qualified and eligible to seek admission into medical colleges in relation to seats reserved for them.

23. The observations of the Supreme Court in Nivedita Jain's case (AIR 1981 SC 2045) (supra) are equally applicable to the present case, the relaxation here too being only in the matter of selection of candidates who were otherwise eligible for admission to the medical colleges.

24. It follows, therefore, that no invalidity or illegality attaches to the impugned notification of July 19, 1982, and the relaxation in the minimum qualifying marks extended thereby to candidates belonging to the reserved categories was, thus, validly granted. In the result, these writ petitions are hereby dismissed. There will, however, be no order as to costs.

S. S. SANDHAWALIA, C. J.:— I agree.
Petitions dismissed.

AIR 1982 PUNJAB AND HARYANA 538 M. M. PUNCHHI, J.

Kundan Singh, Petitioner v. Additional Director, Consolidation of Holdings, Punjab, Jullundur and another, Respondents.

Civil Writ Petn. No. 884 of 1980, D/- 8-1-1982.

(A) East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (50 of 1948), Ss. 42, 21 (2), (3) and (4) — Petition under — Claim of right of water course in accordance with consolidation scheme — Plea of limitation bar against such petition — Plea does not lie. (Limitation Act (1963), S. 5).

Where a petitioner under S. 42 claiming a right of water course to his land in accordance with the consolidation scheme has not earlier proceeded under S. 21 (2), (3) or (4), no plea of limitation bar can lie against such petition. Section 42 envisages the scheme, repartition or orders within the correcting ambit of the State Government. The three instances of exercise of power by the func-

tionaries under the Act are distinct. It is only to orders passed under the Act that the clog of limitation for purposes of challenging under S. 42 is attached. AIR 1981 Punj & Har 204, Followed; AIR 1968 Punjab 267 (FB), 1969 Pun LJ 389 and 1976 Pun LJ 317, Referred. (Para 4)

(B) East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (50 of 1948), Section 42 — Petition under — First petition against a party withdrawn — Second petition filed against different party — No objection of non-maintainability of second petition in view of first petition as second petition is against different party and strict principles of Civil P. C. are not applicable to proceedings under Section 42. (Civil P. C. (1908), S. 11). (Para 5)

(C) East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (50 of 1948), Section 42 — Petition under — Right of water-course to land in accordance with consolidation scheme claimed — Site most suited under circumstances allowed by the authority for irrigation facilities according to scheme without noticing the petitioner's claim of different water course in a civil suit — Such approach of authority cannot be termed as appalling or perverse. (Para 6)

Cases Referred: Chronological Paras
AIR 1981 Punj & Har 204 : 83 Pun LR 472 4

1976 Pun LJ 317 : 1976 Rev LR 385 4

1969 Pun LJ 389 4

AIR 1968 Punj 267 (FB) 4

A. S. Cheema, for Petitioner; Vijay Tewari, for Respondents.

ORDER: — This is a petition under Articles 226 and 227 of the Constitution of India, requiring this Court to quash the orders of the Additional Director, Consolidation of Holdings, Punjab, Jullundur, dated December 21, 1979, Annexure P-4 to the petition.

2. Facts giving rise thereto are these:

The petitioner as also respondent No. 2 named Swaran Singh were right-holders in village Bir Pind, Tehsil Nakodar, District Jullundur. Consolidation operations under the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948 (for short, referred to as 'the Act') took place in the village. In due course the scheme of repartition was prepared. Repartition took place on July 20, 1961. Neither the petitioner nor respondent No. 2 objected to the same and it became final. According to the petitioner, none of them even filed ob-

jections thereto so as to attract any order under S. 21 (2) of the Act. There were no appeals either under the said S. 21.

3. On the supposed assertion of the claim by respondent No. 2, that he had a right to have his land irrigated from a well, he fell out with his brother named Sham Singh, who is not a party to the present petition. This Sham Singh, in order to get respondent No. 2 enjoined from claiming such right and from restraining him from interfering with the possession of Sham Singh over a water-channel, filed a suit in the Court of Sub Judge, II Class, Nakodar. The same was decreed on Jan. 25, 1979, vide judgment Annexure P-1, wherein the detail of the alleged water-course finds mention in the heading of the judgment.

While respondent No. 2 was in the process of prosecuting his appeal against the said judgment, he thought it fit to file a petition under Section 42 of the Act before the Additional Director, Consolidation, vide copy of petition Annexure P-2. That was made on April 12, 1979. The appeal of Swaran Singh before the Additional District Judge against the judgment of the learned Subordinate Judge was dismissed on July 23, 1979. Seemingly, the finding of the trial Court was affirmed that Swaran Singh respondent No. 2 had no such claim against Sham Singh. Presumably finding that it would be futile to pursue the litigation before the Additional Director against Sham Singh, respondent No. 2 withdrew his petition under Sec. 42 of the Act on Sept. 21, 1979 vide Order Annexure P-3 to the petition.

A few days later on Oct. 18, 1979, respondent No. 2 filed a petition under S. 42 of the Act and this time directing it against Kundan Singh primarily (the present petitioner) claiming that he had a right of a water-course from the well situated in Khasra No. 35/27 which had not been provided to him as was the mandate of the scheme of consolidation and that the same should be done now. The learned Additional Director having perused the provisions of the scheme, as also the revenue record, came to the conclusion that the holding of the petitioner as reflected in the Khatauni Ishtemal prepared during the consolidation proceedings, revealed that his area was irrigated, and if that was so, then the petitioner was entitled to have, in accordance with para 8 of the scheme, a water-course by way of a direct link on the Killa-line from the source of irrigation for irrigation purposes since the land of the petitioner did not join the Ahata

(the courtyard) of the Persian wheel. He accordingly accepting the petition, allowed a water-course to respondent No. 2 to his holding from the well situated in Khasra No. 35/27, along Killa numbers specified in his order Annexure P-4, which is now impugned.

4. The learned counsel for the petitioner, in the first instance, relying on *S. Gurdial Singh v. State of Punjab*, AIR 1968 Punj 267 (FB); *Thakar Singh v. Dharam Singh*, 1969 Pun LJ 389 and *Swaran Singh v. Addl. Director, Consolidation of Holdings, Punjab, Jullundur*, 1976 Pun LJ 317 contends that the Additional Director condoned the period of limitation illegally and improperly as good merits of the case are no ground for condoning the period of limitation.

It has further been asserted that admittedly the petition under Sec. 42 of the Act was time-barred and no cause had been pleaded by respondent No. 2 for condonation of delay. It seems to me that the argument has been built without any functional premises. It is the petitioner's own case that respondent No. 2 did not file any proceedings under S. 21 (2), 21 (3) or 21 (4) of the Act and rest content with the repartition. Section 42 of the Act mentions the scheme, repartition or orders within the correcting ambit of the State Government, whose delegatee is the Additional Director. Thus, three instances of exercise of power by functionaries under the Act are distinct and do not intermingle. It is only to orders passed under the Act that the clog of limitation for the purposes of challenge under Sec. 42 of the Act is attached. This has been authoritatively settled by this Court in *Haqiqat Singh v. Additional Director, Consolidation of Holdings, Punjab, Chandigarh*, (1981) 83 Pun LR 472: (AIR 1981 Punj & Har 204). Thus, there is no merit on the ground of limitation and the contention raised is thus rejected.

5. It was then contended that respondent No. 2 having withdrawn the earlier petition under Section 42 of the Act could not file a subsequent petition on the same cause of action. In the first place, there is no warrant for such a proposition, but even, otherwise, the same is misfounded. The first petition was directed against Sham Singh and the second petition was directed against Kundan Singh primarily, though Sham Singh was added a party thereto without any purpose as no relief was sought against him. Additionally, it was pointed out that the earlier petition was withdrawn without seeking formal permission from the Additional

Director to move him again in another petition. This objection too is misfounded as the second petition was neither sought to be instituted against Sham Singh primarily, nor are the strict principles of the Civil Procedure Code, in which this rule is well embedded, applicable to proceedings under Section 42 of the Act. Thus, this contention also is devoid of merit and deserves to be rejected.

6. Lastly, it was contended that the site of the water-course, which was being pleaded in the civil litigation, was different than the one which has now been provided for by the Additional Director and on that ground the order is perverse. This objection again appears to me to be misfounded because the Additional Director has not taken into account what did respondent No. 2 litigate about with Sham Singh, though the possibility cannot be ruled out that the judgment might have been made available to him for perusal at the time of hearing.

Oblivious of those facts the Additional Director, it appears to me, has opened the charter and found out that when respondent No. 2 stood allotted irrigated land he was entitled to have facilities of irrigation in accordance with the provisions of the scheme. And what site suited most, in the circumstances, he allowed for the purpose, along side the Killa-line as specified in the impugned order. Such approach cannot be termed as appalling or perverse.

7. No other point is being urged.

8. For the foregoing reasons, this petition fails and is hereby dismissed. No costs.
Petition dismissed.

AIR 1982 PUNJAB AND HARYANA 540 SPECIAL BENCH

S. S. SANDHAWALIA, C. J.,

C. S. TIWANA AND J. V. GUPTA, JJ.

Terence Valentine Rose, Petitioner v. Lynettee Irene and another, Respondents.

Matrimonial Ref. No. 1 of 1981, D/- 23-12-1981.*

Divorce Act (4 of 1869), S. 10 — Dissolution of marriage on ground of adultery of wife — Wife remaining ex parte — Evidence from the side of husband establishing the fact of adultery — Husband entitled to decree for dissolution of marriage. AIR 1933 All 427, Foll. (Paras 7, 9)

*From decree of 1st Addl. Dist. Judge, Ferozepore, D/- 23-4-1981.

IZ/JZ/D923/82/AMG

Cases Referred: Chronological Paras
AIR 1933 All 427 7

Ravinder Chopra, for Petitioner.

S. S. SANDHAWALIA, C. J.:— This is a reference under Sec. 17 of the Divorce Act, for confirmation of the decree nisi for the dissolution of marriage granted by the learned Additional District Judge, Ferozepore.

2. Terence Valentine Rose, petitioner, had preferred the petition against his wife Lynette Irene averring that both of them were married according to Christian rites at Kanpur on April 15, 1968. Later, both of them lived together in the residential quarters attached to the Francis Newton Mission Hospital, Ferozepore, in which the petitioner was employed. Two sons and a daughter were born out of the wedlock.

3. It was alleged in the petition that on May 6, 1980, the petitioner went to Moradabad in order to look after his ailing mother and when he returned a little more than a fortnight thereafter, he found his residential quarter locked and respondent No. 1 missing therefrom. On enquiry, he learnt that she had left the house along with their infant daughter a few days earlier and had not returned to the matrimonial home thereafter. Further enquiry thereafter revealed that respondent No. 1 was living with Parkash Masih, respondent No. 2, in a house near M. E. S. Power House, Ferozepore Cantt. A report was lodged by the petitioner with the police, but respondent No. 1 refused to return to the conjugal home and continued to live in adultery with respondent No. 2 at house No. 2, Street No. 5, Ferozepore Cantt.

4. Notice of the aforesaid petition was issued to both the respondents who put in appearance. The respondent-wife filed a written reply admitting her marriage with the petitioner but denying the rest of the allegations. Respondent No. 2, Parkash Masih, however, did not file any written statement and it was directed that he should do so on or before Jan. 20, 1981. However, on that date, none of the respondents chose to put in appearance and consequently proceedings were ordered ex parte against them.

5. In support of his case, the petitioner himself stepped into the witness box as A. W. 1 and deposed in detail with regard to the averments made in the petition. A. W. 2 K. C. Joseph, Incharge of the Administration of Frances Newton Hospital, Ferozepore, was examined to the effect that the petitioner worked there as Technician in the Radiography Department and was living with respondent No. 1 in the residen-

tial quarters attached to the Hospital. This witness gave evidence to the effect that the petitioner had complained to him against the surreptitious visits of respondent No. 2 Parkash Masih, during the absence of the petitioner. The witness also stated that he had personally observed Parkash Masih, respondent, visiting the house of the petitioner whilst the latter was in Hospital in connection with his duty. He opined that he suspected illicit intimacy between both the respondents and consequently prohibited respondent No. 2 from entering the residential quarters of the Hospital. Nevertheless, thereafter, he had occasion to see both the respondents meeting each other either near the main gate of the Hospital or outside the gate of the residential premises. He further supported the petitioner with regard to latter's going away to Kanpur in May, 1980 and on his return finding that the petitioner had eloped with respondent No. 2 leaving the residential quarter locked.

6. A. W. 3 Patras, deposed about the factum of respondents Nos. 1 and 2 living together in adultery in House No. 2, Gali No. 5, Ferozepore Cantt. for about three months where he had gone to visit them. He stated that respondent No. 2 had represented to him that respondent No. 1 was his wife. He also deposed that on one occasion when he had gone to the house of respondent No. 2, he found both the respondents lying in a compromising position in bed and he was warned by respondent No. 2 that he should not enter the house without knocking at the door.

7. The learned Additional District Judge, Ferozepore, has closely examined the aforesaid testimony and after appraising the same accepted it as more than adequate proof of the fact that both the respondents were living in adultery. Reliance has rightly been placed on Cyril Rowal and Gibbs v. Miss. Ellen Mabel Gibbs, AIR 1933 All 427, in this context. He has concluded that on the evidence led, he was left with no doubt that both the respondents were living an adulterous life together. Consequently, he allowed the petition and passed an ex parte decree for the dissolution of marriage of the petitioner with respondent No. 1, subject to the confirmation by this Court.

8. As in the trial Court, so in the present proceedings also, the two respondents have been duly served but have not chosen to put in any appearance. Hence ex parte proceedings were ordered against them. It is the admitted position that the statutory period of six months has since elapsed.

9. After hearing the learned counsel for the petitioner, we find not the least ground to take a view other than the one arrived at by the learned Additional District Judge. The testimony of as many as three witnesses, including the petitioner himself, stands wholly un rebutted. Therefrom the only irresistible conclusion is that the petitioner is plainly entitled to a decree of dissolution of marriage.

10. In the result, we allow the reference and confirm the decree nisi. The parties, however, shall bear their own costs.

Order accordingly.

AIR 1982 PUNJAB AND HARYANA 542

J. V. GUPTA, J.

Mohinder Singh, Appellant v. Narain and others, Respondents.

Second Appeal No. 1684 of 1980, D/- 25-5-1982.*

Evidence Act (1 of 1872), S. 116 — Estoppel between licensor and licensee — Grant of licence by tenant — Licensee cannot be permitted to plead that licensor, i.e., the tenant, being a statutory tenant was not entitled to grant the licence. (Easements Act (1882), S. 53).

It is not only an owner who can grant a licence, but even a person, who can transfer his interest in the property, is also competent to grant the same u/s. 53, Easements Act. Tenancy rights as such are transferable. It is a different matter that if the said rights are transferred without the consent of the landlord, in writing, the tenant may incur certain liability under the Act, but the person to whom such a licence is granted cannot take the plea that the tenant had no right to grant a licence in his favour. 1969 Cur LJ 589 (Punji), Rel. on. (Para 5)

In the circumstances, held, the licensee who had been inducted by the tenant could not be permitted to plead that the licensor, i.e., the tenant, being a statutory tenant was not entitled to grant the licence. AIR 1965 SC 414, Disting. (Para 6)

Cases Referred :	Chronological	Paras
1969 Cur LJ 589 (Punji)		3, 5
AIR 1965 SC 414		6
1965 Cur LJ 341 (Punji)		3

K. S. Thapar and C. B. Goel, for Appellant; N. C. Jain and V. K. Jain, for Respondent No. 4.

*Against decree of Raj Kumar Gupta, Addl. Dist. J., Karnal, D/- 2-6-1980.

GG/HZ/C922/82/HR/RSK

JUDGMENT:— The defendant-appellant has filed this appeal against the judgment and decree of the Additional District Judge, Karnal, dated June 2, 1980, whereby the decree of the trial Court passed in favour of Ranjeet Singh, plaintiff-respondent, was affirmed.

2. The plaintiff filed this suit for the grant of a mandatory injunction directing the defendants to surrender possession of the shop, in question, to him, on the allegations that Kura Ram, defendant, was his real maternal uncle. The plaintiff was in occupation of the shop, in dispute, on the G. T. Road, Karnal, as a tenant under one Nawab Sajad Ali Khan much before the partition of the country and had been carrying on the oil business therein under the name and style of Ranjit Singh & Co. of which he was the sole proprietor. It was further stated that after the partition of the country, the suit property vested in the Custodian as an evacuee property and his status as a tenant was recognised by the Custodian also. Later on, Kura Ram, defendant, joined him in his oil business as a partner and both of them then carried on the business under the name and style of Ranjit Singh & Co. in partnership till the year 1954, when the partnership was dissolved. The plaintiff further averred that from the year 1954 onwards, he and Kura Ram, defendant, carried on their individual oil business, but continued to occupy the shop, in dispute, jointly inasmuch as Kura Ram, defendant, remained in occupation thereof as a licensee. In the year 1959 the plaintiff joined service and his goods continued lying in a part of the shop. He left service in the year 1962 and started maintaining the accounts of some parties and to attend to this job by sitting in the shop. As such, Kura Ram, defendant, and the plaintiff continued using the shop, in dispute, till the year 1974. In April, 1974, Kura Ram, defendant, began to take steps with a view to oust the plaintiff from the said property and ultimately, he along with defendants Nos. 2 to 4 did not allow him to remain in occupation of the shop. Thereupon, the plaintiff revoked the licence by registered notice dated August 27, 1974, and filed the present suit on Oct. 28, 1974, for the grant of a mandatory injunction against the defendants, as mentioned above. The suit was resisted by them and it was pleaded that Kura Ram, defendant, had been in exclusive possession of the shop for more than 20 years in his own right as a tenant under the owners. The alleged licence in his favour was not admitted. It was also

pleaded that Kura Ram, defendant, had taken the shop, in dispute, from Nawab Sajad Ali Khan for running the business of Ranjit Singh & Co. It was specifically denied that it was the plaintiff who was the tenant of the shop, in question, or that he carried on the business thereon under the name and style of Ranjit Singh & Co. On the pleadings of the parties, the trial Court framed the following issues:—

1. Whether the plaintiff has been occupying the suit property as a tenant under Nawab Sajad Ali Khan?

2. Whether the plaintiff has been occupying his individual business as alleged in paragraph No. 2 of the plaint?

3. Whether the plaintiff was allotted the suit property after the partition of the country? If so, to what effect?

4. Whether defendant No. 1 was inducted in the business being run by the plaintiff by the latter as a licensee? If so, the effect thereof?

5. Whether the plaintiff was not a tenant on the suit property as alleged in para No. 2 of the plaint? If so, the effect thereof?

6. Whether defendant No. 1 was always a tenant on the suit property as alleged in para No. 3 of the plaint? If so, its effect?

7. Whether the plaintiff has no locus standi to file the suit?

8. Whether the suit is not maintainable in the present form?

9. Whether the plaintiff is stopped from filing the suit by his own act and conduct?

10. Whether the suit is not within time?

11. Whether the plaintiff has waived his rights to file the suit by his act and conduct?

12. Whether the suit is bad for mis-joinder of parties and causes of action?

13. Whether the suit is correctly valued for purposes of court-fee and jurisdiction?

14. Whether the defendants are entitled to special costs? If so, the total thereof?

15. Relief.

Issues Nos. 1 to 6 were discussed together and it was held that the plaintiff was the tenant on the shop, in dispute, under Nawab Sajad Ali Khan. The remaining issues were found against the defendants and consequently, the suit was decreed by the trial Court. In appeal, the learned Additional District Judge affirmed the findings of the trial Court on all the issues and, thus, maintained the decree in favour of the plaintiff. Dissatisfied with the same, the defendant has come up in second appeal to this Court.

3. The only argument raised on behalf of the appellant is that the plaintiff being

the statutory tenant himself could not grant a licence as he had no transferable interest in the suit property. In support of this contention, reference was made to the provisions of Section 53 of the Easements Act, 1882, which reads:

“A licence may be granted by any one in the circumstances and to the extent in and to which he may transfer his interests in the property affected by the licence”

Section 13 of the Haryana Urban (Control of Rent and Eviction) Act, 1973, (hereinafter called the Act), was also referred, under which no tenant was authorised to sublet the premises under him. On the other hand, on behalf of the respondent, it was submitted that no plea was taken by the appellant in the written statement that no such licence could be granted by the plaintiff. According to the learned counsel for the respondent, the respondent being the tenant on the premises, in dispute, had a transferable interest and to grant a licence in favour of Kura Ram, defendant. In any case, if the plaintiff violated any provisions of the Act, then he could be liable to ejection under the statute, but that did not mean that no licence could be granted by him. In support of his contention, the learned counsel placed reliance on *Dev Dutt Verma v. Ajit Singh*, 1965 Cur LJ 341 and *Municipal Committee, Ambala City v. Lal Chand*, 1969 Cur LJ 589.

4. After hearing the learned counsel for the parties, I do not find any merit in this appeal.

5. It is not only an owner who can grant a licence, but even a person, who can transfer his interest in the property, is also competent to grant the same. It has been so held in *Lal Chand's case* (1969 Cur LJ 589) (Punj) (supra). Section 53 of the Easements Act, as reproduced above, inter alia provides that a licence may be granted by any person who may transfer his interest in the property affected by the licence. It could not be disputed that the tenancy rights as such are transferable. It is a different matter that if the said rights are transferred without the consent of the landlord, in writing, the tenant may incur certain liability under the Act, but the person to whom such a licence is granted cannot take the plea that the tenant had no right to grant a licence in his favour. Besides, Sec. 116 of the Evidence Act, 1872, reads:

“No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be

permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property, and no person who came upon any immovable property by the licence of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such licence was given."

6. The learned counsel for the appellant, relying upon Anand Nivas Pvt. Ltd. v. Anandji Kalyanji's Pedhi, AIR 1965 SC 414, contended that a person remaining in possession after the determination of his tenancy, becomes a statutory tenant and, therefore, he has no interest in the property which he could transfer. However, the abovesaid case was under the Bombay Rents, Hotel and Lodging House Rates Control Act, wherein the question involved was whether the tenant after the determination of the contractual tenancy could enforce the terms of the original tenancy whereby the right to sublet the premises was given to him. In this context, it was observed by their Lordships that with the determination

of the lease, unless the tenant acquires the right of a tenant holding over, by the acceptance of rent or by assent to his continuing in possession by the landlord, the terms and conditions of the lease are extinguished, and the rights of such a person remaining in possession are governed by the statute alone. Thus, the facts of that case have absolutely no relevancy with the facts of the present case. Here, there is no dispute between the landlord and the statutory tenant, but with the tenant and his licensee who has been found to have been inducted by the tenant as such on the premises, in dispute, by both the Courts below. Once it is so held, then the licensee cannot be permitted to deny that the licensor, i.e., the tenant, being a statutory tenant was not entitled to grant the licence.

7. For the reasons recorded above, there is no merit in this appeal. The same fails and is dismissed with costs.

Appeal dismissed.

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